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FEDERAL REPORTER,  
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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

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# JUDGES

OF THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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<sup>2</sup> Appointed April 8, 1909.

<sup>3</sup> Died March 1, 1909.

<sup>4</sup> Appointed March 16, 1909, to succeed John K. Richards.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.

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THE FULLERTON. †

(Circuit Court of Appeals, Ninth Circuit. December 7, 1908.)

No. 1,557.

1. SEAMEN (§ 29\*)—PERSONAL INJURIES—UNSEAWORTHINESS OF VESSEL.

In view of Rev. St. § 4561, as amended by Act Dec. 21, 1898, c. 28, § 11, 30 Stat. 758 (U. S. Comp. St. 1901, p. 3095), which makes it a penal offense to knowingly send an American vessel to sea in the foreign or coastwise trade "in such an unseaworthy state that the life of any person is likely to be thereby endangered," and the purpose of which is to protect seamen, a seaman will not be held to have assumed the risk from such unseaworthy state so as to preclude a recovery from the vessel or owner for an injury resulting therefrom, but the vessel by going to sea in violation of the statute assumes all risks which may result therefrom.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29;\* Master and Servant, Cent. Dig. § 592.]

2. SEAMEN (§ 29\*)—PERSONAL INJURIES—LIABILITY OF VESSEL.

A sailing vessel which, before starting for a voyage from San Francisco to Hawaii laden with oil and in tow of a steamer, was equipped with a secondhand anchor chain, used as a part of the towing line in accordance with custom, the links of which did not fit the compartments of the wildcat, on which it was wound, designed to prevent it from slipping, and therefore were not securely held thereby, but slipped when the line was subjected to severe strain, was unseaworthy in that respect, and liable to a seaman who, without negligence on his part, was injured as a result of such insecure fastening, it not being shown that a chain which would fit the wildcat could not have been procured.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.\*]

3. SEAMEN (§ 29\*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

The mate of a vessel being towed in the night in a heavy sea, who was injured while directing and assisting in lashing the anchor chain, used as part of the towline, to the towing bitt after the former lashing had parted and the chain had begun to slip on the windlass, *held*, on the evidence, not chargeable with contributory negligence.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. § 29.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. SEAMEN (§ 11\*)—MEDICAL TREATMENT—FAILURE TO PROVIDE PROPER TREATMENT FOR INJURED SEAMAN.

Libelant, who was mate of a sailing vessel on a voyage from Port Harford, Cal., to Kihel, Hawaii, in tow of a steamer, was injured in the course of duty when 582 miles out from Port Harford and from 1,500 to 1,600 miles from Kihel. Libelant's arm was crushed in such manner that surgical skill was necessary to properly treat it and he requested to be taken back at once to Port Harford for treatment, there being no surgeon on board. This the master refused to do, nor did he communicate with the master of the towing steamer on the subject, but proceeded on the voyage to Kihel, which was reached in about 10 days, libelant's arm being then in such condition that amputation was necessary. Both vessels carried cargoes of crude oil. The wind was favorable for a return to Port Harford, which probably could have been reached in 3 or 4 days. *Held*, that it was the duty of the master under the circumstances to return at once with libelant to Port Harford unless the steamer would take him back, and that his failure to do so rendered the vessel liable in damages. Gilbert, Circuit Judge, dissenting.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. § 187; Dec. Dig. § 11.\*]

Rights and liabilities of seamen as to medical treatment, see note to *The Cuzco*, 83 C. C. A. 186.]

5. DAMAGES (§ 132\*)—PERSONAL INJURY—REASONABLENESS OF AWARD.

An award of \$17,500 for a personal injury to the first mate of a vessel earning \$150 per month, which resulted in the loss of his right arm and entailed much pain and suffering, *held* not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 379, 390; Dec. Dig. § 132.\*]

For personal injuries as affected by plaintiff's character and condition, see note to *Metropolitan St. Ry. Co. v. Kennedy*, 27 C. C. A. 138.]

Appeal from the District Court of the United States for the Territory of Hawaii.

In Admiralty. Libel in rem, in the District Court for the Territory of Hawaii, against the American barkentine Fullerton and claimants, to recover damages in the sum of \$50,000 for personal injuries received by libelant on a voyage from the port of San Francisco via Port Harford, to the port of Kihei, territory of Hawaii. Decree in favor of the libelant for \$17,500. Claimants appeal.

W. S. Burnett and A. Lewis, Jr. (Donzel Stoney, Page, McCutchen & Knight, and Smith & Lewis, of counsel), for appellants.

E. C. Peters and S. H. Derby (E. B. McClanahan and E. A. Douthitt, of counsel), for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The libel in this case was filed in the District Court for the Territory of Hawaii by Henry Witthof, the first officer of the American barkentine Fullerton, against the barkentine and claimants, to recover for personal injuries received by him while in the performance of his duties on board the vessel.

It appears from the evidence that the barkentine Fullerton, owned by the Mission Transportation Company of Los Angeles, Cal., departed from the port of San Francisco on December 19, 1906, in tow of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the steam tug Monarch. On December 21, 1906, at a point from five to eight miles off Port Harford, the tow was transferred to the steamer Lansing, and by the latter vessel the barkentine was towed to Kihei, Island of Maui, one of the Hawaiian Islands, arriving at Kihei at 1:30, January 3, 1907. The Fullerton is a four-masted sailing vessel fitted for carrying oil. Her gross tonnage, as appears from the government register, is 1,554 tons, and her net tonnage is 1,494 tons. The steamer Lansing, as appears from the same record, is a vessel of 4,560 gross tons and 3,428 net tons. On the voyage in question both vessels were laden with oil, the Fullerton having on board 15,500 barrels and the Lansing 40,000 barrels. When the Lansing took the Fullerton in tow off Port Harford on December 21st the towing hawser of the Lansing was connected with about 20 fathoms of the port anchor chain of the Fullerton. The chain came on board the Fullerton leading through the hawse pipe on the port side, passed aft near the towing bitt, and then over the wildcat of the windlass on the port side, down through the spurling gate or deck pipe into the chain locker, where the end of the port anchor chain was connected with the starboard anchor chain by means of a large shackle. The wildcat is part of the windlass, and has a mechanism for holding the chain consisting of compartments or divisions on its outer circumference for receiving the links of the chain. To make the holding device effective, it is necessary that the links of the chain shall correspond in length with the length of the compartments or divisions of the holding mechanism, so that each link of the chain fitting into a compartment shall lie securely and each alternate link be caught and firmly held by the shoulders of a compartment. When the size and shape of the link correspond to the size and shape of the compartment, the wildcat becomes an exceedingly effective holding device, whether the windlass is revolving or at rest; but in the present case the lengths of the links of the port anchor chain did not correspond to the lengths of the compartments of the port wildcat. The lengths of the compartments were each 10 inches, while the lengths of the links of the anchor chain varied from  $11\frac{1}{4}$  to  $11\frac{3}{4}$  inches, so that the ends of the links as they were drawn around the wildcat projected over the ends of the compartments, and the holding device was not brought into play, or, at best, only to a limited extent.

When the Fullerton was taken in tow by the Lansing off Port Harford, her port anchor chain, as part of the towing line, was further secured by lashing the chain to the towing bitt a few feet in front of the windlass. This lashing was done by the crew under the direction of the appellee as first officer, and under the supervision of the second officer and master, the latter being on the forecastle head at the time with the megaphone, through which he was communicating with the Lansing. The lashing was done with an inch and a half rope, which had been previously used for a like purpose when the barkentine was in tow of the tug Monarch. The appellee proposed to take a new  $3\frac{1}{4}$  inch rope for the lashing on this occasion, but he was told by the master that it was not necessary to waste good rope; that he could use the old rope for that purpose, and because the mate, who saw the chain

slipping, protested that it might be dangerous and somebody get hurt, he was told by the master that he could go below; that he (the master), and the second mate would attend to it. The Lansing, with the Fullerton in tow as described, on December 21st proceeded on the voyage to Kihei. At about 10 p. m. of the evening of December 21th, at a distance of about 582 miles from Port Harford, and between 1,500 and 1,600 miles from Kihei, the Fullerton pulling heavily on her tow and running into a choppy head sea, the man on the lookout notified the appellee, who was then on the poop, that the chain was slipping over the windlass. The appellee called his watch together and proceeded to the forecastle head, where it was discovered that the lashing which had fastened the chain to the towing bitt had carried away and had been drawn forward into the hawse pipe. The appellee took the new rope which he had proposed to use when the lashing was first made, and with the assistance of the crew proceeded to again lash the chain to the towing bitt. This towing bitt is about  $3\frac{1}{2}$  feet square and about 4 feet high. It is on the forecastle head, about  $3\frac{1}{2}$  feet forward of the windlass, and extends down through the deck to the keelson, into which it is built. The port anchor chain leading straight from the port hawse pipe to the port wildcat passes within about 12 inches of the port side of the bitt. The appellee took the new rope, and with the assistance of the crew made it fast to the chain near the forward end of the bitt, then passed it around the bitt to the chain near the after end of the bitt, where the rope was passed around the chain and returned around the bitt to the forward end. Here the rope was again passed around the chain, and back around the bitt, and so on, the rope being passed backward and forward around the chain at the two points forward and aft and around the bitt, drawing the chain to within about 6 inches of the bitt. While this work of lashing the chain to the bitt was going on, the appellee was standing on the port side of the chain near the after end of the bitt, directing the work and assisting in making the end of the rope fast to the chain at that point. The rope had been passed around the bitt a number of times when the chain, under a heavy towing strain, suddenly jumped and slipped over the wildcat just as the appellee was connecting the end of the rope with the chain at the after end of the bitt. The jumping and slipping of the chain carried appellee's right arm between the chain and the bitt, where it was jammed and crushed. Members of the crew undertook to release appellee's arm by prying the chain away from the bitt with the capstan bar without effect. The lashing was then cut away and appellee's arm released. The appellee was removed to the cabin. It was afterwards discovered that the injuries to appellee's right arm consisted in breaking the two bones of his forearm about the middle of the lower third and dislocating the bones of the wrist.

The appellee requested the master to return to Port Harford for medical assistance, stating that he had a very bad arm. The master said he knew, but he could not return; he could not cut loose from his tow. The steward was called, who washed the injured arm, and under the direction of the master it was placed in splints. On ar-

riying at Kihei nine days later, the appellee was removed from the vessel and taken to Mahululani Hospital at Wailuku, where, on January 6th, his arm was amputated. The surgeon performing the operation designated the point of amputation as at the middle of the upper third of the arm proper. In about a month the appellee was removed to the Queen's Hospital, and on April 9, 1907, he was discharged from that hospital. While the appellee was still in the hospital he brought the present libel against the barkentine Fullerton to recover damages in the sum of \$50,000.

The first cause of complaint alleged in the libel is that the use and employment of the anchor chain by the Fullerton for towing purposes in the manner described was negligent and careless, for the reason that it was unsuited, improper, and unsafe; that the links of the chain could not and did not fit the notches, grooves, or indentures of the wildcat; and that in lashing and making fast the anchor chain to the towing bitt, and while the libelant was in the exercise of due and proper care, the chain slipped over the wildcat and pinioned libelant's right arm against the bitt, thereby bruising, mashing, and breaking his arm and producing the injuries for which he seeks compensation. The second cause of complaint alleged is that after the injury to libelant the master of the Fullerton, in disregard and violation of his duty and obligation to libelant to return to Port Harford for the purpose of providing libelant with proper and sufficient medical attention and care, continued on the voyage to Kihei; that as a result of the injuries to libelant, and because of the want of proper medical attention, and by reason of the failure and neglect of the master to return to Port Harford, where the libelant might have received proper and sufficient medical attention, libelant's arm was in such condition that upon the arrival at Kihei it was necessary, in order to save libelant's life, to amputate his arm at a point about four inches above the elbow.

The answer of the libelees, so far as it is necessary to be noticed, alleges that libelant was not injured by reason of any negligence or carelessness of the vessel or owners or master, but solely through the negligence, carelessness, fault, and lack of due care and caution on the part of the libelant; that prior to the time of the departure of the Fullerton from the harbor of San Francisco, and prior to the departure of the vessel from Port Harford for the voyage to Kihei, the libelant had a full, thorough, and accurate knowledge and acquaintance with the anchor chains and windlass of the Fullerton, and with the mechanism and appliance of the windlass and a part thereof known as the "wildcat," and the functions and purposes thereof, and the purposes and uses and operation of the wildcat in connection with the anchor chain while in the performance and operation of the towing of the Fullerton, and in the proper fitting of the links of the anchor chain into the indentures and grooves or notches in the wildcat, and had full, thorough, and accurate knowledge and acquaintance with the length of the links of the anchor chain and the size of the grooves of the wildcat, and also of any misfitting of the links of the anchor chain into the indentures of the wildcat, if any misfitting there was, and

the consequences and liabilities arising therefrom and thereby in the case of the towing of the Fullerton by means of said anchor chain, wildcat, and windlass; that on December 24, 1906, at about 10 p. m., while the Fullerton was proceeding on her voyage in tow of the steamship Lansing, the night being dark and rainy, and the wind and head sea causing the Fullerton to pull heavily on her towline and to pitch and dive into the seas, the libelant was guilty of great and gross negligence and carelessness in attempting to lash and make fast the anchor chain of the Fullerton to the towing bitt without signaling to or causing the said steamship Lansing to slow down and slacken up and ease the strain on the towline leading from the Lansing to the Fullerton; that at the time of the injury to the libelant the Fullerton was about 582 miles from Port Harford on her voyage to Kihei in tow of the said steamship Lansing, and that had the Fullerton put about and returned to Port Harford she would have been compelled to cast off her towline from the steamship Lansing and proceed back to Port Harford by means of her sails, she having no other means of power of returning, and without any assistance of a tow by the steamship Lansing; that, the winds being uncertain and variable, the master of the Fullerton decided that it was more advisable, judicious, and safe to proceed a longer distance to the port of Kihei with the certain and reliable tow of the steamship Lansing than attempt to sail back a shorter distance to Port Harford with uncertain, variable, and unreliable winds, believing that the Fullerton would in all probability reach the port of Kihei sooner and with greater dispatch with the aid of the tow of the steamship than by attempting to sail back to Port Harford.

Testimony upon these issues was taken by the court below, and a judgment entered in favor of the libelant for \$17,500. The present appeal is from that judgment. When the record reached this court the appellants (libelees) moved this court for leave to take additional testimony in the case. Upon the showing made, an order was entered allowing the taking of such testimony. This additional testimony related mainly to an alleged act of contributory negligence on the part of the libelant in failing to use a chain stopper which it is claimed would have helped to hold the chain. This chain stopper or riding chock was in front of the towing bitt. At the time of the injury to the libelant the pawl of the chain stopper was triced up, and it was contended that before proceeding to lash the chain to the towing bitt the libelant should have dropped the pawl of the chain stopper and thereby eased the strain on the chain, but the evidence taken does not support this contention. The evidence is that this chain stopper or riding chock is in direct line from the windlass to the hawse pipe, and that it is bolted to the deck with only four bolts. It is used to ease up the strain on the windlass when the vessel is riding at anchor, and in mooring and unmooring when both anchors are used. It is also used when the anchor is over the side, but it is never used for easing the strain on the windlass when the vessel is in tow using the anchor chain and the chain lashed to the towing bitt, for the reason that it is not strong enough for that purpose, and, besides, when the chain is lashed to the towing bitt it is not on a straight lead from the

windlass to the hawse pipe over the riding chock, but the chain is drawn aside at the towing bitt so that it passes over the riding chock at an angle, and if the pawl was then let down and the chain caught in the pawl the entire strain would be on the riding chock and none on the towing bitt or windlass. Manifestly the riding chock or chain stopper could not have been so used at the time of the accident with any safety to the vessel or to those employed about the windlass or towing bitt. Moreover, the chain stopper had carried away or was broken in December, 1906. Whether it was properly renewed or repaired prior to the voyage under consideration does not clearly appear. The libellant testified that he had a conversation with the master the day after sailing. He told him that the chain stopper was up. The master said, "Well, we can't use that; it won't hold anyway; it is broke; and don't let it down under any circumstances." The master does not positively deny that he made such a statement, but was of the opinion that the chain stopper was in good condition at the time of the accident. When asked why he did not tell counsel for appellants about the chain stopper prior to the trial in the court below, he made the significant reply, "I didn't think it had anything to do with it at all." After carefully reading all the testimony taken in this court upon that subject, we are of the opinion that the master's statement is correct.

We will now consider the case as it was presented to the court below. With respect to the first cause of complaint, it appears from the evidence that the specifications for the vessel when she was new called for 180 fathoms of chain. This would furnish 90 fathoms of chain for each side of the vessel. The wildcats on both sides of the vessel required the chains to have 10-inch links. When the Fullerton departed from San Francisco on the night of December 19, 1906, in tow of the steam tug Monarch, she had on board only 120 fathoms of chain, with links of various lengths from  $11\frac{1}{4}$  to  $11\frac{3}{4}$  inches. Ninety fathoms of this chain was taken in on the starboard side, and 30 fathoms on the port side. Twenty fathoms of the latter chain was payed out on the towing line, and 10 fathoms of the chain remained in the chain locker. The links of the chain did not fit the wildcat on either side. They were so large on the port side, where the chain was used as a part of the towing line, that, as before stated, the links projected over the ends of the compartments in such manner that the chain would slip over the wildcat under heavy strain. It appears that on the previous voyage from Port Harford to San Francisco the Fullerton lost both of her anchor chains, consisting of 180 fathoms, outside of the harbor of San Francisco. She was at anchor. Her starboard chain had been attached to a towline, but the towline had been cast adrift. When they came to heave in on the anchor chain, the anchor caught on something and carried away the port wildcat, and, as the two chains were shackled together in the chain locker and the outer end of the starboard chain was adrift, the entire chain ran out and was lost. This was between the 5th and 10th of December. It appears that there was some difficulty in finding chains to take the place of the lost chains. The master and one Frank H. Evers,



who was the agent of the company owning the vessel and who provided her equipment, testified that they were four days hunting for chains, and then finally purchased the chains which were placed on the vessel just prior to sailing. These chains were secondhand chains. A new wildcat had to be made, and that also was taken on board just prior to sailing. There is no direct evidence that chains could not have been found to fit the wildcat, nor is there any evidence that a wildcat could not have been made to fit the chains that were taken on board. It is true the master testifies that if they could have got sufficient chain of the proper size they would have put it on board, and he also testifies that he could not get a chain made in San Francisco; and Mr. Evers testifies that on the first day that he knew the anchor chains were required he went to Mr. I. E. Thayer, the agent of the Lebanon Chain Works—

"and asked him how long it would take him to get us the chains here and he said it was impossible to do anything under two months, and in the way freight was coming at that time it would likely be longer. I ordered him to immediately telegraph for the chains, which was done, and we obtained the chains in a little over four months after they were ordered."

The inference sought to be drawn from this testimony by the appellants is that to obtain chains that would fit the wildcats the vessel would have been compelled to wait four months for the chains ordered from the Lebanon Chain Works, but if this was the fact it certainly could have been established by direct testimony. If no chains could be obtained either in San Francisco or at Oakland with links that would fit the wildcats, it was easy to establish that fact by direct and positive testimony, and this was not done. The testimony relative to the difficulty of obtaining suitable chains for the vessel was introduced by the appellants, and the presumption is that it was the most favorable testimony that could be produced in that behalf. In this aspect the evidence was not sufficient to show that all reasonable means had been used to obtain suitable chains for the vessel prior to her departure from San Francisco, and that the failure to secure them was because they could not be obtained under any reasonable conditions.

It is contended by the appellants that the appellee knew before the vessel left San Francisco that the links of the chain were too large for the wildcat, and that he assumed the attending risk. Evers testified that he knew the links were about an inch too large. He knew they did not fit, and he says the mate and he mentioned the fact to one another, and the mate said it would do. Evers fixes the time of this conversation in the evening when they were taking the port chain on board, and this latter act he says was between 5 and 6 o'clock. This was on December 19th, and it was dark at that time. The appellee testifies that he does not remember any such conversation; that the port chain arrived at the wharf about 6 o'clock; that he then took the sailors and engineer and carpenter, and got supper; there was no cooking on board the vessel; they finished supper about a quarter to 7 o'clock, and returned to the vessel and began taking the port chain on board at 15 minutes to 8 o'clock. It was dark. He had no opportunity of observing the condition of the port chain when it ar-

rived at the wharf, and he did not observe it when the chain was taken on board. The vessel left the dock with the tug alongside about 15 minutes past 8 o'clock, and proceeded out to sea. The master testifies that in the evening he went up town to get a portion of the crew, and the chain passed him on the way down. It was about supper time when he came down. He returned to the vessel about 7 or half past 7. He did not know whether they had finished the taking of the chain on board at that time. They pulled out from the dock a little after 8 o'clock. The taking on board of the port anchor chain was the last act in preparing the vessel for sea, and when that was completed she left the dock at a little after 8 o'clock in tow of the tug Monarch, and proceeded to sea, although the appellee understood that the vessel was to anchor in the bay and remain until morning to get the remainder of the chain. It is clear from this testimony that Evers was mistaken when he says he had a conversation with the appellee when they were taking the port chain on board between 5 and 6 o'clock in the evening. That chain was not on the dock until about 6 o'clock, and was not taken on board until 2 hours later, and there is no testimony that Evers was there at that time. The appellee testifies that he did not discover the fact that the port chain did not fit the wildcat until the next morning when the vessel was at sea. He then notified the master, who replied: "Well, mister, tell me something I do not know." The appellee then proceeded to lash the chain to the towing bitt. It had not been lashed before. This testimony is contradicted, and this circumstance, connected with the lashing of the chain to the bitt, taken in connection with the testimony upon the subject, leads to the conclusion that the appellee did not know that the port anchor chain did not fit the wildcat prior to the departure of the vessel from San Francisco, and under the circumstances shown by the evidence the appellee had no opportunity of leaving the vessel after making this discovery.

The defense that the appellee assumed the risk attending the use of a chain that did not fit the wildcat cannot be sustained in any reasonable view of the testimony, but the case has another aspect which should not be overlooked. The usual method of towing is with the hawser fastened to the towing bitt. The testimony in this case is to the effect that it is also common to use one of the anchor chains in towing. In such case the wildcat is used instead of the towing bitt for holding purposes, and the lead of the chain is through the hawse pipe; but when the hawser is fastened to the towing bitt the lead is over the forecandle head, and there is always danger that the vessel will take a sheer and pull the head gear out of the vessel. For a long tow the use of the anchor chain fastened to the wildcat and leading through the hawse pipe is, therefore, a proper appliance, but in such case the links of the anchor chain must fit the wildcat and make the chain secure, or otherwise there is danger that the chain under the strain of a heavy tow will slip and all the chain in the locker run out, including the chain attached to the anchor on the other side of the vessel, and when the strain comes on this chain the bow of the vessel might be pulled out. Appellee testifies that this was what occurred to him when

he saw the chain slipping over the wildcat just prior to the accident, and he hastened to lash the chain to the towing bitt. He thought the running out of the chain would endanger life and the loss of the ship. The master testified that the running out of the chain would be likely to tear up some of the bulkheads down below between the lockers, but he did not think it would come up so far as to have torn out the whole upper deck. The Fullerton was a heavy tow, and the Lansing was a large vessel, heavily laden. These two vessels pitching into a heavy sea would necessarily bring heavy strains on the towline, and if the chain could not be held on the wildcat it seems beyond question that the vessel would be in danger of receiving serious injury, imperiling the lives of those on board. In other words, the Fullerton was deliberately sent out on this long voyage in an unseaworthy condition. Section 4561 of the Revised Statutes, relating to the sending of a vessel to sea "unsuitably provided in any important or essential particular," as amended by "An act to amend the laws relating to American seamen, for protection of such seamen and to promote commerce," approved December 21, 1898 (Act Dec. 21, 1898, c. 28, § 11, 30 Stat. 758 [U. S. Comp. St. 1901, p. 3095]), provides as follows:

"If any person knowingly sends or attempts to send, or is party to sending or attempting to send an American ship to sea, in the foreign or coastwise trade, in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall, in respect of each offense, be guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars, or by imprisonment not to exceed five years, or both, at the discretion of the court, unless he proves that either he used all reasonable means to insure her being sent out to sea in a seaworthy state, or that her going to sea in an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purposes of giving that proof he may give evidence in the same manner as any other witness."

In *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, the plaintiff was in the employ of a railroad company as a yard switchman in its yards in Cincinnati, Ohio. While attempting to couple two freight cars he had his foot caught in an unblocked guard rail, and in his efforts to extricate the foot his right hand was crushed between the drawheads of the cars and injured so badly as to require amputation. The plaintiff had been in the employ of the railroad company for seven months. He had had nine years' experience as a railroad man. A railroad man of experience can see at a glance whether a guard rail or switch is blocked or not. There were a great many guard rails and switches in the yards where plaintiff worked. With the exception of a few where experimental blocks were used, the defendant did not use blocks in either its guard rails or switches. The plaintiff said he did not know that the guard rail in which his foot was caught was not blocked, and that he had not noticed whether the guard rails and switches of defendant generally were blocked or not; but this testimony was given no weight. The railroad company defended on the ground that the plaintiff knowing the danger has assumed the risk of the employment. A statute of Ohio required railroads to adjust, fill, or block the frogs, switches, and guard rails of their tracks, with the exception of guard rails on bridges, so as to prevent the feet of their employes from being caught therein.

Railroad companies violating the act were to be punished by a fine of not less than \$100 nor more than \$1,000. Judge Taft, speaking for the Circuit Court of Appeals in the Sixth Circuit, held that the purpose of the statute was to protect employes of railroad companies from a well-known danger of their service, the result of which, from the nature of their employment, they were compelled to assume, and, although an employe impliedly waives a compliance with the statute and agrees to assume the risk from unblocked switches and guard rails by continuing in the service without complaint, a court will not recognize or enforce such agreement. It was further held that to permit a company to avail itself of such an assumption of risk by its employes is in effect to enable it to nullify the object of the statute; that the only ground for passing such a statute is found in the inequality of terms upon which the railroad company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law because he had not previously shown himself capable of protecting himself by contract, and it would entirely defeat this purpose thus to permit the servant "to contract the master cut" of the statute. In *The Osceola*, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, the Supreme Court of the United States held that the law may be considered as settled upon the proposition that the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807.

The court below placed the assumption of risk where it properly belonged in this case, when it said:

"If the ship could not make proper preparations for sea, and chose to go to sea without them, it was a deliberate assumption by her of all risks and all damages which might result from such want of preparation, which would include all damages that the crew might suffer in the way of injury through such want of preparation."

It is next contended that the appellee was guilty of contributory negligence at the time of the accident in not signaling the *Lansing* to slow down when the lashing of the chain to the bitt had been carried away and the appellee with the assistance of his watch was about to put on another lashing. The appellee was facing an emergency. All the conditions required immediate action to secure the safety of the ship and those on board. It would have required time to secure a light for signaling purposes, and such delay might have resulted in serious consequences, and, besides, the appellee had no authority to signal the *Lansing* to slow down. He did what the situation and his authority seemed to call for, and he cannot now be charged with contributory negligence in acting promptly in the emergency to secure the chain to the bitt.

It is further contended that the appellee was guilty of contributory negligence in placing himself in a dangerous position in the work of lashing the chain to the bitt. Appellee testifies that he was standing on the port side of the chain facing forward toward the bitt, to which the chain was being lashed by the crew under the direction of the

appellee. The appellants contend that he should have faced aft toward the wildcat, so that he could have observed any slipping of the chain over the wildcat, and in case it did slip to step aside out of danger. This contention is without merit. Had the appellee faced toward the wildcat, he could not have watched and directed the work of the crew in lashing the chain to the bitt. It was his duty to supervise and direct that work in every detail and see that it was done right. For that purpose his position was precisely what the situation required. In this connection it is also objected that appellee was negligent in passing his arm around the chain and his hand between the bitt and the lashing in fastening the rope lashing to the chain. It is difficult to see how he could have done otherwise in passing the rope around the chain and making the necessary hitch. We find no evidence of contributory negligence in any of this work.

With respect to the appellee's second cause of complaint, it appears from the evidence that at the time of the accident the Fullerton was 582 miles from Port Harford and between 1,500 and 1,600 miles from Kihei. The appellee, knowing the serious injury he had received, requested the master to return to Port Harford for medical assistance. Surgical skill was required to set the bones of the arm and place the arm in splints so that the broken bones would unite and the injured tissue heal. This skill the master did not have, nor was it on board the vessel, but it could have been had at Port Harford. In *The Iroquois*, 118 Fed. 1003, 55 C. C. A. 497, a seaman in the performance of his duty fell and broke both bones in one of his legs below the knee, and there was no one on board competent to treat the injury. This court held that it was the positive duty of the master to take him at once to some port where proper treatment could be had, and, where such a port could have been reached in time, the failure to do so, by reason of which amputation became necessary, was negligence on the part of the master which rendered the ship liable in damages for the injury. Judge Gilbert, speaking for the court, said:

"We entertain no doubt, in view of the evidence in the case and the law applicable thereto, that it was the duty of the master to bear away to some port of distress as soon as possible after the occurrence of the accident. \* \* \* By the maritime law he (the seaman) was entitled to be healed at the expense of the ship. *Reed v. Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641; *Harden v. Gordon*, 2 Mason, 54, Fed. Cas. No. 6,047. This obligation was imposed upon the ship in consideration of the appellee's services, and his undertaking to engage in possibly perilous voyages and encounter hazards if necessary in the protection of the ship and cargo. The injury to the appellee was a serious one, and the master must be presumed to have known that it required careful and scientific treatment."

The master of the Fullerton refused to turn back for the purpose of securing proper surgical skill for the appellee at Port Harford. His reason for refusing is stated by the appellee in his testimony as follows:

"That night after I got to bed I asked the captain, 'You better return, with this arm; you better return to port. I got a very bad arm, Captain.' He says, 'Well, I know but I can't return; I can't cut loose from this towboat.' I said, 'Well, you can signal to him.' \* \* \* Q. What did he say? A. 'Well, we will see about that in the morning, but we cannot turn around;

your arm will be all right; we will put it in splints and dress it.' I say, 'I am afraid I have a bad arm, afraid I will lose my arm before I get there; blood poisoning might set in.' 'No,' he says, 'that will be all right; you know I can't turn around; it would cost me too much money; see how much it will cost to turn around, and the steamer would not go with me anyway.' I says, 'You don't know; signal to him and find out.' He says, 'We will see what we can do in the morning; we will have a talk.' That was all the conversation. \* \* \* Q. Did you see the captain any more that night? A. No, sir, I did not see him until next morning. Q. What time did you see the captain the next morning? A. It was 20 minutes to 8, sir, a. m. Q. In the morning? A. Yes, sir. Q. What was done then? A. He told me then he had signaled the Lansing, and the Lansing had signaled to them, and I asked him whether—what signals he sent to the Lansing—just asked, 'What was the matter last night?' Then he answered that I got my arm broke. 'Did you ask him to return with me, return with the ship?' I says. He said, 'No; what is the use of asking him? I know he would not return, anyway.' I says, 'You ought to try to do something with it, because my arm is all swollen up.' Then I showed him my arm and my hand, all black and swollen up. 'Then I am suffering fearful pain.' I told him, 'I am afraid of blood poisoning might set in before we get much farther; you have got a fair wind to go back; can't you go back? You got a fair wind; try to sail back.' He says, 'You are all right, in a few days, as soon as the arm is set up.' 'I am afraid, Captain, it is beyond your—it is beyond you; you haven't got medicine to put on it, or anything.' He said, 'All right, it will be all right; I will fix it up.'

This testimony is uncontradicted by the master. His testimony is as follows:

"Q. At the time that the mate was hurt, did you consider at all the proposition of medical attendance upon the mate? A. After I had fixed his arm up, put it splints, and made him as comfortable as I could, I considered and thought the whole matter over in my room, and considered what was the best to do under the circumstances. \* \* \* Q. Well, after the accident happened to the mate, did you continue on your voyage, or did you go back to Port Harford? A. Continued on the voyage. Q. Why did you continue on with your voyage? A. I considered we were under tow, in tow of the Lansing, and the chances were just about the same to get down to Kihel in the same time as we would if we had gone back. Q. Well, you understand, do you not, Captain, that Kihel is between 1,500 and 1,600 miles away, and Port Harford was 582 miles away? A. Yes, sir. Q. Now, you say that you considered the chances were about the same? A. Yes, sir. Q. So that you had not—If you had not gone to Kihel, but had gone to Port Harford, what would have been the motive power of the Fullerton, if you had gone to Port Harford? A. We would have had to sail. Q. Why would you have had to sail? A. The Fullerton would have gone on; at least the Lansing would have let me go; I would have had to let go the Lansing, and he would have gone on and delivered his own cargo. Q. Well, why would the Lansing have gone on? \* \* \* A. I have instructions in case of breaking adrift from the tow, or anything interferes that the two ships cannot proceed together, each one continues on its own course. \* \* \* Q. How is the American barkentine Fullerton rigged, tackled, and furnished with appliances relative to sailing? A. She is well fit out, well found, and always ready for sailing. Q. If you had cast adrift or parted with your tow with the Lansing, in your judgment, taking into consideration the weather conditions as they were on that day and the day following, how long would it have taken you to sail back to Port Harford, if you had so parted your tow and cast adrift from the Lansing at the time of the accident or the next morning? A. Well, that is something you cannot answer definitely. \* \* \* Q. In arriving at your conclusion as to whether to go back to Port Harford or sail on to Kihel, what facts did you take into consideration? A. I took into consideration that if we continued to Kihel we continued under tow. Q. If you turned around to go back? A. We would have to go under our own power; that is, sail. \* \* \* Q. What facts did you take into consideration aside from the fact that you would have to sail

back to Port Harford? A. Well, at the time of the accident, the wind was sou'west, and it would naturally go to the west and nor'west and finish up there, and blowing pretty fresh, and we could not make much headway when it got into nor'west on account of the seas and wind, and I thought that under the circumstances \* \* \* and conditions that we would get to Kihai as soon as we would get back to Port Harford. \* \* \* Q. Now, what, in your opinion, would have been the probable length of time, or what would you consider under the circumstances would have been the variations in time, that you could have sailed from the position in which you were at the time of the accident to Port Harford? A. Under favorable circumstances, we would have been in Port Harford in three or four days, but again we might have been double that time that season of the year, or even longer. Q. How much longer? A. Well, you could not tell, you could form no idea. We might get there in four days, we might get there in fourteen; it is hard to tell; you don't know how the wind is going to act."

The instructions to which the master referred in his testimony as his authority in such an emergency were introduced in evidence. They were issued by the Union Oil Company of California, and addressed "Captain J. C. Kitchin, Bktn. Fullerton." What relation this company had to the Fullerton or the Lansing or the cargoes of either is not disclosed. The Mission Transportation & Refining Company was the registered owner of the Fullerton. The cargoes on both the Fullerton and the Lansing were crude oil, but the owners of these cargoes are not stated, nor is the ownership of the Lansing mentioned in the evidence. The instructions material to this case were as follows:

"When you are towed by one of our own vessels, in case the hawser should break or the weather conditions are such that they are obliged to cut the Fullerton loose, she is in a position to take care of herself, hence you would head your course for the port you started for, and the steamer will, if she can, take you up later. Regarding signals, that is a matter you can arrange with the vessels towing you."

There is no evidence in the record that the Fullerton was being towed by a vessel owned by the company that issued these instructions, but, waiving that objection, the instructions do not relate to the situation on board the Fullerton concerning which the master was called upon to act. The hawser had not parted or broken, and the weather conditions had nothing whatever to do with the injury to the appellee. The instructions were, therefore, not applicable, and it was not to be expected that instructions would have been given for such a situation. The conduct of the master under such circumstances is regulated by the general maritime law, which requires that the master shall use all reasonable exertions to secure skillful and timely attention for a seaman disabled in the service of the vessel. *Brown v. Overton*, 1 Spr. 462, Fed. Cas. No. 2,024; *Whitney v. Olsen*, 108 Fed. 292, 47 C. C. A. 331, and cases there cited; *The Iroquois*, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955. It was therefore plainly the duty of the master of the Fullerton to have communicated with the master of the Lansing and ascertained what assistance he or his vessel was able to render under the circumstances. Neither of the cargoes was perishable, and there was no risk of a loss of market for either. It would seem that the Lansing could have dropped the Fullerton and taken the appellee back to Port Harford. The Fullerton

would then have proceeded under sail and later been overtaken by the Lansing, and the voyage to Kihei resumed and continued with but little loss of time. Another alternative was for the Lansing to drop the Fullerton, the latter vessel return with the appellee to Port Harford under her own sail, and the Lansing proceed on her voyage. The wind was favorable at this time for the Fullerton to make this return to Port Harford under sail, and it was likely to so continue at this season of the year, with some probable variations. The wind was ahead, as they were sailing in the direction of Kihei, which would have been a favorable wind for the Fullerton sailing in the contrary direction towards Port Harford. It is not necessary to determine which, if either, of those two alternatives should have been chosen. Either would have been better than the course adopted; but it is enough that the master of the Fullerton did not communicate with the master of the Lansing concerning either or the assistance he or his vessel might have been able to render in the emergency, but on his own judgment the master of the Fullerton determined to continue on the voyage to Kihei in tow of the Lansing. This was not doing all that a reasonably prudent person was called upon to do under the circumstances, and his failure in this respect was negligence for which the vessel is liable.

It is contended by the appellants that the judgment of the District Court in favor of the appellee for damages in the sum of \$17,500 is grossly excessive. The court below took into consideration appellee's earning capacity at the time of the accident, and how far that capacity had been reduced by the loss of his arm. The evidence showed that appellee had been earning in wages and perquisites \$150 a month, and was earning on the Fullerton in wages and perquisites \$140 a month with the chance of making it up to \$150 a month. The court estimated appellee's earning capacity after the injury to be not over one-third what it was before the injury. The court further considered appellee's expectation of life as shown by the life insurance tables, and discounted that expectation by five years for sea service. The court determined that the libellant was entitled to an amount which, at a reasonable rate of interest compounded annually, would furnish him with \$1,200 per annum the rest of his life, dating from the date of the accident. The court added damages on account of appellee's intense and long-continued suffering of mind and body brought upon him through the negligence of the representatives of the ship, and found the total damages \$17,500. There does not appear to be any error in this method of estimating the damages sustained by the appellee, and, as the findings of fact were fully supported by the evidence, we find no reason for reversing the judgment on that account. In *Western Union Tel. Co. v. Engler*, 75 Fed. 102, 21 C. C. A. 246, the plaintiff was driving along the highway when his horses struck the wire of the telegraph company, which had fallen from its proper place on the poles to within about two feet of the ground. The horses, becoming frightened, suddenly turned and ran, thereby throwing the plaintiff to the ground from the vehicle in which he was riding. By this fall he received a compound comminuted fracture of the



ankle bone of the left leg and his left foot was doubled over, both bones protruding through the flesh; he was disabled for many months, prevented from attending to his business, incurred large expense for medical attendance, and the testimony was that he would probably be permanently lame. The jury had awarded the damages in the sum of \$15,000. It was objected that these damages were excessive. This court, on appeal, refused to set aside the judgment, citing the case of *The City of Panama*, 101 U. S. 453-464, 25 L. Ed. 1061, where that court said:

"Damages in such a case must depend very much upon the facts and circumstances proved at the trial. When a suit is brought by the party for personal injuries, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to the health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."

Considering all the facts of this case, we see no just ground for disturbing the judgment of the court below.

In the view that we have taken of this case, it is not necessary to consider the remaining questions raised on this appeal.

The judgment of the court below is affirmed.

GILBERT, Circuit Judge (concurring). I agree that the decree should be affirmed on the grounds alleged and the facts proven as to the first cause of action. But in view of all the circumstances disclosed in the evidence, and the law applicable thereto as defined in the decision of the Supreme Court in *The Iroquois*, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955, I am of opinion that the master of the *Fullerton* was not negligent in proceeding on the voyage instead of turning back by sail to Port Harford.

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### NORFOLK & W. RY. CO. v. REED.

(Circuit Court of Appeals, Fourth Circuit. December 16, 1908.)

No. 791.

1. MASTER AND SERVANT (§ 125\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—DEFECT IN APPLIANCES—KNOWLEDGE OF MASTER.

While it is the duty of a master to furnish the servant with safe appliances with which to work and to keep the same in good repair, where an appliance furnished is defective, and an injury to a servant results, the existence of such defect must have been known to the master, or it must be shown that a sufficient time had elapsed before the time of the injury to raise the presumption that the master had knowledge of the same, in order to entitle the servant to recover for the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

2. MASTER AND SERVANT (§ 278\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—EVIDENCE OF MASTER'S NEGLIGENCE—DEFECTIVE RAILROAD CAR.

Plaintiff, an experienced brakeman, working in the yard of defendant railroad company, while attempting to operate a brake on a moving flat

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

car, fell or was thrown off and injured. The car belonged to another company, had come into the yards in a train about 3 a. m., and the injury occurred about 11, while plaintiff and others were moving the cars to another part of the yard. The car was equipped with a drop brake, the stem of which when not in use drops to a level with the floor of the car and must be raised when used. Plaintiff testified that the brake stem was standing upright when he mounted the car, and that when he attempted to use it the stem slipped down and threw him off. Such brakes were in common use, although plaintiff testified that he had never used one. The one in question was inspected immediately after the accident and found in perfect working order. The car had also been inspected previously, after its arrival in the yard, by two inspectors working together on opposite sides of the train, both of whom testified that the brake was not defective and was in normal position; that if the stem had been standing upright they would have observed it. *Held* that, assuming the correctness of plaintiff's testimony as to the position of the brake stem, there was no ground for charging defendant with negligence or with liability for the injury, in the absence of any evidence to show how long it had been in such position or who placed it there.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.\*

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

Waddill, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Charleston.

For opinion below, see 162 Fed. 750.

This was an action for damages brought by the defendant in error against the plaintiff in error for injuries received while acting in the discharge of his duties in the capacity of brakeman and in the employ of the plaintiff in error on the 6th day of October, 1905, in the yards at Bluefield, W. Va.

The record discloses that the defendant in error was an experienced brakeman, and that prior to the accident he had been employed as brakeman for a period of two years on the Chesapeake & Ohio Railroad, and on the Norfolk & Western Railway for five additional years, making an aggregate experience of seven years. At the time of his injury, defendant in error was employed in the Bluefield yards. In the yards there were three flat cars, loaded with steel rails, which had been brought in that morning about 3 o'clock, and orders had been given to remove them to the east end of the yard, there to be unloaded. The rails protruded beyond the ends of these cars, so that it was impossible or impracticable to couple the yard engine onto them, and consequently they were taken out of the train, and an effort was made to roll the cars down the track by gravity so that the engine might be brought in behind them. The car in front and the one behind were Norfolk & Western cars, while the one in the middle was a Georgia Southern & Florida car, and was equipped with what is known as a "drop brake," that is, the brake staff, when not held up by the brakeman for the purpose of putting on or taking off the brakes, is intended to drop down under the car, with the handle on a level with the floor thereof. The handle to the brake was an ordinary crossbar, forming with the end of the brake staff something like the letter "T."

The evidence shows that the conductor, a brakeman by the name of Compton (deceased at the time of the trial), and the defendant in error, after the three cars had been cut out from the train, in order to start them down the track, were pushing them, and, when they had succeeded in starting the cars, each of the parties mentioned climbed upon his particular car to manipulate the brake as necessity might require, the defendant in error mounting the middle car, which was equipped with a drop brake, as stated. The plaintiff below alleged that he was unfamiliar with this kind of brake, and, when he went to release the brake, he found the brake stem standing above the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

floor of the car about the same height of a stationary, or ordinary rigid brake, which he supposed the same to be: that, when he grasped the brake stem for the purpose of manipulating the brake, the same fell to its normal position, precipitating him to the ground between the car upon which he was riding and the car following, whereby he lost one leg and was otherwise injured.

The cause came on to be heard in the District Court for the Southern District of West Virginia, and the plaintiff below received a verdict for \$10,000, whereupon a writ of error was sued out to this court.

John H. Holt (Theodore W. Reath, Joseph I. Doran, and Holt & Duncan, on the briefs), for plaintiff in error.

Joseph H. Gaines (Staige Davis, Upshur Higginbotham, and H. D. Rummell, on the briefs), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). There are six assignments of error filed herein, but we deem it necessary to consider only the second assignment, which is as follows:

"The court erred in refusing to sustain the motion of the defendant to direct the jury to return a verdict in favor of the defendant and against the plaintiff, because there was not a scintilla of evidence to establish knowledge on the part of the defendant, either actual or constructive, that the brake complained of was either defective, or out of repair and dangerous."

The jury found, upon a special interrogatory, that the inspection of the brake, shortly after the arrival of the car, was not a proper and sufficient one, as a matter of fact, and upon this finding the case seems to have been determined by the court below.

In order to properly settle the questions presented for our consideration, it becomes necessary to determine as to whether, under the circumstances, the finding of the jury to the effect that there had not been a proper inspection of the brake in question in that the brake was found in an abnormal position would be sufficient to charge the defendant below with negligence. It is well settled that it is the duty of the master to furnish the servant with safe appliances with which to work, and, having furnished such appliances, it still remains the duty of the master to keep the same in good repair. While this duty is imposed upon the master, nevertheless, in a case where it is shown that the appliance furnished was defective, the existence of such defect must have been known to the master, or it must be shown that a sufficient time had elapsed before the time of the injury to raise the presumption that the master had knowledge of the same, in order to entitle the party thus injured to recover. The appliance known as the "drop brake," or disappearing brake, according to the evidence, is in common use on many of the railway systems of the country, in the interchange of traffic incident to interstate business. Cars equipped with such brakes are used on almost every railway system throughout the country, and it appears, in this instance, that cars thus equipped had been in use on the Norfolk & Western Railway system for a number of years. The drop brake is distinguished from the ordinary upright or rigid brake in that it is in the shape of a bar like a T, the ordinary brake being circular in form and in the shape of a

wheel. Therefore, when the brakeman, on this occasion, who had been in the employ of the Norfolk & Western Railway for about five years, and perfectly familiar with a brake shaped like a wheel, saw this brake, he was put upon notice that it was not the ordinary brake in use upon that system, and owing to the pattern of the handle, he must have known that it was a drop brake, inasmuch as he testified that he had seen brakes of that character, and therefore, in the manipulation of the brake, he should have governed himself accordingly.

On page 29 of the record, the defendant in error testified as follows in regard to the condition of the brake at the time he was injured:

"Q. When did you go to work in the railroad service? A. Well, sir, I went to work on the C. & O. in 1892. Q. How long did you remain with the Chesapeake & Ohio? A. A couple of years. Q. In what capacity? A. Brakeman. Q. Freight or passenger trains? A. Freight. Q. With what company did you next take employment? A. The Norfolk & Western Railroad Company, as far as railroad companies are concerned. Mr. Holt: That's what I mean. Q. How long did you remain there? A. I stayed until the latter part of 1900, when this injury happened. Q. You were with them about five years? A. Only about five years. Q. And with the Chesapeake & Ohio two years? A. Yes, sir. Q. In what capacity did you work when you were with the Norfolk & Western? A. As a brakeman. Q. You, then, as I understand, you had, prior to this accident, seven years' experience as a brakeman? A. Yes, sir. Q. Upon freight trains? A. Freight and passenger trains. \* \* \* Q. What kind of handle is used on the Norfolk & Western freight-car brakes? A. There is a wheel used. Q. Do they have upon any of their freight cars— Are there any brakes with a handle that is not a wheel? A. I have never seen them; no, sir. Q. Then they have no handles on their brakes in the shape of a bar like this T that you have described? A. The Norfolk & Western hasn't any. If they have, I have never seen it. Q. When you approached this brake, then, you saw it was not a wheel, and it had to have a handle? A. Why, certainly, I saw it was not a wheel. Q. And that it was a mere crossbar? A. Yes, sir. Q. Did you ever see any of these drop brakes? A. I never handled any of them. Q. That is not my question. Have you ever seen any of these drop brakes? A. Yes, sir; I have seen them, laying down—the drop brakes they have."

It appears from the foregoing that the defendant, although he had never operated one of these brakes, had seen them and knew that they were in use on the Norfolk & Western Railway, and that he was familiar with the peculiar shape of the handle of the same, which was the distinguishing feature of this brake. Do the facts in this case give the defendant in error any better standing than he would have had if he had found the brake in its normal position and had been injured in attempting to operate it? For illustration, suppose, when the brakeman attempted to operate the brake, he had found it in a normal position and had raised it up to the position which it should occupy while being operated, and then, in attempting to manipulate the brake, he had kicked the ratchet loose so as to render it capable of being operated, and it had dropped down to its normal position, precipitating him under the car and resulting in his injury, and upon subsequent examination the brake had been found to be in perfect working order and without defect; can it be reasonably contended that under such circumstances he would have been entitled to recover damages for the injuries thus sustained? We think not—and why? Because the accident in that case would not have been due to the

failure of the master to furnish sufficient and safe appliances with which to work, but would have been due solely to the improper manipulation of the appliance furnished. Therefore the only difference between the case which we suppose and the one now before us is that instead of finding the brake in a normal position, thereby being required to raise it up so as to be able to operate it, the defendant in error testified that he found it in a position where he only had to knock the ratchet loose in order to be able to apply the brake by its proper manipulation, and which, according to the evidence, could have been operated without injury to the brakeman, inasmuch as it was in good condition.

It was shown by the testimony of the two inspectors who inspected the brake immediately after the accident that it was in good condition and without defect. The witness A. J. Albright testified as follows:

"Q. What is your business? A. I am a car inspector at the present time. Q. How long have you been a car inspector? A. I suppose I have been working at that about four or five years—between four and five years. Q. For what railroad? A. For the Norfolk & Western Railway Company. Q. At what point? A. At Bluefield, W. Va. Q. Do you recollect the time Mr. Reed was hurt over in the Bluefield yard? A. Yes, sir. Q. Do you recollect the date? A. Yes, sir. Q. What year was it? A. In 1905. Q. You may tell the jury whether or not, at or near the time of that injury or accident to Reed, you inspected—in company with Mr. Evans—the car from which he is said to have fallen? A. Yes, sir; I helped to inspect the car. Q. Do you recall what time in the day it was? A. It was near 12 o'clock, as well as I recollect. Q. How did you come to go there to inspect that car, Mr. Albright? A. Mr. Evans told me that he wanted me to go with him to inspect that car; we were working together. Q. Tell the jury whether or not you did inspect it. A. Yes, sir. Q. What did you find? A. I did not find anything wrong with the car at all. Q. Did you examine this drop brake? A. Yes, sir. Q. What condition was it in? A. We found it in good condition. Q. Tell the jury whether or not the brake stem was bent. A. It was not bent. Q. Was there anything the matter with it? A. There was not anything the matter with it."

The witness John Evans testified as follows:

"Q. What is your business? A. I am a car inspector. Q. For what road? A. The N. & W. Q. Is that the Norfolk & Western? A. The Norfolk & Western; yes, sir. Q. At what point do you inspect cars? A. At Bluefield, W. Va. Q. How long have you been a car inspector? A. For nine years. Q. With this company all the while? A. Yes, sir. Q. How long have you been in the railroad service? A. For 15 years. Q. In what capacity did you work before you became a car inspector? A. I was a car repairer. Q. At what point? A. At Bluefield, W. Va. Q. What are your duties now as car inspector? A. My duties are to examine cars on their arrival. Q. What kind of an examination do you make? A. We go over the train on its arrival and inspect for defects in the wheels, brakes, and for any defects. Q. Then you examine the brakes, wheels, and every part of the car? A. Yes, sir. Q. If you find a defect, what do you do? A. We shop it. Q. What do you mean by shopping it? A. We chalk it for the shop track. Q. Then what becomes of it when you mark it defective? A. The yard crew then shifts it over to the shop track. Q. It goes over then for repairs? A. Yes, sir. Q. Do you recollect the time of the accident to the plaintiff here, Mr. Reed? Do you recollect when the plaintiff, S. P. Reed, was hurt at Bluefield? A. Yes, sir. Q. Were you a car inspector at that time in that yard? A. Yes, sir. Q. Do you recall the C. S. & F. car 6,048? A. Yes, sir. Q. You may tell the jury whether or not you inspected that car on that day. A. Yes, sir; I did. Q. When did you inspect it? A. We inspected it just a while before 12 o'clock. Q. On the 6th of October? A. Yes, sir; 1905. Q. Was that

before or after Reed was hurt? A. It was afterwards. Q. How long afterwards? A. I do not know how long; I did not see the accident. Q. Who did you take with you to inspect this car? A. Mr. A. J. Albright. Q. Is he one of your inspectors? A. Yes, sir. Q. Is he here? A. Yes, sir. Q. Tell the jury just what inspection of that car you made. A. Well, we went to that car—he on one side and I on the other—and inspected it closely for defects of any kind, and didn't find any defects at all of any kind whatever. Q. Tell the jury whether or not you tested the drop brake on that car. A. Yes, sir; I made three different tests of it; I raised that brake to its proper position three different times. Q. And when you raised it what did it do? A. It would then go to its proper position. Q. Where is that proper position? A. Down just even with the floor of the car. Q. You may state whether or not you found any defect in that brake. A. I didn't find any defect at all. Q. Was it defective? A. It was not defective. Q. How many times did you say you tried it? A. Three times. Q. Tell the jury whether or not it operated properly. A. Well, it did; it operated properly. Q. Tell the jury whether or not, when you let go of it, it would stand up. A. No, it would not. Q. Tell the jury in what condition you found it when you went there to inspect it—whether or not it was standing or down. A. It was down. Q. You may tell us also whether or not that brake stem was bent and out of shape in any way. A. It was not bent at all."

And the witness J. R. Carter testified as follows:

"Q. What is your business? A. I am a car inspector, now. Q. How long have you been a car inspector? A. About four or five years. Q. For what railway? A. For the Norfolk & Western Railway Company. Q. At what point? A. At Bluefield. Q. You may tell the jury whether or not you were on duty as an inspector at Bluefield on the night of the 5th of October and the morning of October 6, 1905. A. I was. Q. Who were engaged as inspectors with you? A. Mr. Tynes. Q. You may state whether or not you inspected all cars coming into that yard that night, coming from Roanoke. A. I did. Q. You may state whether or not you marked all cars that were defective. A. Yes, sir; I did. Q. How did you mark them? A. With white chalk. Q. For what purpose? A. As notice to the repairman what it was chalked for. Q. Where would that send the cars? A. To the repair track—the shop track—or whatever you wish to call it. Q. That is for the purpose of mending them, is it? A. Yes, sir. Q. What kind of mark do you make on them? A. Well, we haven't got any regular mark—any particular mark at all; just a straight mark, and sometimes a cross mark. We most always make a cross mark on a defective car. Q. Are you familiar with what is known as the 'drop brake'? A. I am. Q. If there had been, on that night, any car with a drop brake, the stem of which was standing up, would you have discovered it? A. I would. Q. Why would you have discovered it? A. Because it would have been in an improper position. Q. What would you do with it that would lead you to find it out? Do you try the brakes? A. Yes, sir. Q. Did you find any such on that night? A. I did not."

Among other things, the court submitted the following interrogatory, No. 5, to the jury:

"Q. No. 5. Was the brake on the car in question, to wit, G. S. & F. No. 6,048, when the same was inspected by Inspectors Evans and Albright immediately after the accident, in proper working condition and without defect? A. Yes."

Thus it will be seen that the jury, upon the foregoing evidence, reached the conclusion that the brake was in proper working condition and without defect immediately after the accident occurred.

While none of the witnesses contradict the testimony of the plaintiff as to how the accident occurred, there is no witness whose testimony tends in the slightest to corroborate the evidence of the plaintiff in that respect. There was the uncontradicted evidence of two

witnesses and a finding of fact by the jury that immediately after the accident the brake was found to be in perfect working order and without defect. It also appears from the evidence of the witness McDonald who testified on behalf of the plaintiff in error at the trial, that the brake when raised up would remain in that position only so long as the brake was held in the hands of the operator. Among other things, this witness testified as follows:

"Q. Are you familiar with what is known as the 'drop brake'? A. Yes, sir. Q. Are they not used on the G. S. & F. Railroad? A. Yes, sir. Q. How many cars with brakes of that character has that road now? A. Nearly 2,000, and some in the course of construction at the present time. Q. Is that brake in common use, Mr. McDonald? A. Yes, sir; in our section it is. Q. What roads use it? A. Well, the Southern Road has adopted it as a standard; the Central Georgia Railroad, the C., O. & T. P., the A., G. & S., the Georgia Southern & Florida, and a number of others that I do not remember particularly. Q. Will you please explain now to the jury how that brake works? A. In the manner of applying it, it stands down when it is not in use, on a level with the floor of the car; when you wish to apply the brake you raise it up and apply it, and as soon as you release the handle—your hands from the brake handle—the stem drops down. Q. When not in use, then, it remains under the car? A. Yes, sir; it remains down on a level with the floor of the car—down on a ratchet. Q. Is that true whether the brake be set or not set? A. Yes, sir. Q. Will it stand up at all? A. No, sir; not unless it is wedged. It might be wedged up in some way or other, or bent. Q. Could it be pinned up in any way? A. Not on that particular car. We have some cars in course of construction now that they can pin up—that have a wheel—but this one did not have a wheel; this had a stem with a crossbar and no holes so it could be pinned up. Q. Then that brake would not stand up at all except when in use? A. No, sir. Q. As I understand you, then, Mr. McDonald, that brake would not stand up except when in use unless it was wedged, or had a pin through it, or was so bent as to hold it? A. That is correct, sir."

This testimony tends strongly to contradict the evidence of the plaintiff as to how the accident occurred. If the plaintiff had testified that while in a stooping posture, attempting to raise the brake from its normal position so as to be able to successfully operate it, the cars came suddenly together owing to the manipulation of the brake on the rear car, which resulted in precipitating him between the cars, his testimony would have been in perfect harmony with the physical facts established by the witnesses who testified as to the condition of the brake immediately after the accident occurred.

This case was tried in the court below upon the theory that the condition of the brake was such, at the time of the injury to the defendant in error, that it presented a dangerous trap, and that the master could, by a proper inspection, have prevented the injury complained of by the defendant in error, and that the failure of the master to make such inspection constituted such negligence on its part as to entitle the defendant in error to recover. In order to entitle the defendant in error to recover, it is not only necessary that he should allege that the injury which he sustained was occasioned by the negligence of the master in failing to furnish sufficient and suitable appliances with which to work, but it is also incumbent upon him to show by a preponderance of the evidence that the injury which he sustained was due to the failure on the part of the master to furnish or equip the car with a safe and sufficient appliance—in this instance, to wit, a

drop brake without defect—and to maintain the same in a reasonably safe condition. When we review the testimony, we find that the brake, instead of being defective, was in proper condition, there being no defect of any nature in the construction and mechanism whatsoever discovered by the inspectors just a few moments after the accident happened.

It being shown that the accident was due to the manipulation of the brake, and it appearing that the brake was in proper working order, the question arises as to whether this condition of affairs does not preclude a recovery. But it is insisted, as hereinbefore stated, that the brake was in an abnormal position, and that it presented what might be termed a "death trap." Even if this were admitted to be true, we are still confronted with the proposition as to how or by what means the brake was placed in the position which it occupied at the time the injury was sustained. If the plaintiff below were entitled to recover on account of the brake being in an abnormal position, yet he would still be required to show by a preponderance of the evidence that the master was responsible for or had knowledge of the brake being in such position. The car on which the defendant in error was injured was brought into the yard at Bluefield at 3 o'clock a. m., and was inspected between that hour and 6 a. m. The two inspectors who made the inspection testified that they inspected the car in the usual manner, and that they failed to discover any defect in the brake or that it was in an abnormal position. The witness Tyne, who testified on behalf of the defendant below, testified as follows:

"Q. What are your duties as a car inspector, and what were they on the 6th day of October, 1905? A. Well, sir, the duties of a car inspector is to see that the grab irons, coupling rods, couplings, wheels, and brakes are all in perfect order. Q. When did you examine the freight cars in respect to the time that they came into the yards? A. Immediately after arriving there. Q. And if you found a car defective in any respect, what would you do with it? A. We would shop it to the repair track. Q. Do you recollect of there being an inspection of the Georgia, Southern & Florida freight car 6,048? A. I could not say; we are not required to take the number of each car in a train, and I could not say. Q. Were you on duty in the yard as an inspector on the morning of the 6th of October, 1905? A. I was; yes, sir. Q. Can you tell this jury whether or not you inspected the cars in a train brought there that morning from Roanoke by Conductor Powell? A. I did, but I do not know what conductor brought the train in; we don't get to see them. Q. Did you inspect all cars? A. All trains; yes, sir. Q. What time did you make an inspection that day—that morning? A. Well, I could not tell you exactly what time it was; I did not take the time. Q. When did you come to work? Tell us what you did do. A. We went to work at 6 o'clock p. m. on the evening of the 5th, and left at 6 a. m. on the morning of the 6th. Q. Did you shop any cars on that night? A. Yes, sir. Q. How many? A. I could not tell exactly; 50 or 60, or something like that, we shopped out. Q. State whether or not you shopped all the cars that were defective. A. Yes, sir; I did. Q. State whether or not you omitted or overlooked any. A. I do not think I overlooked any; no, sir. The Court: When did you quit work? A. At 6 o'clock a. m. on the morning of the 6th. Mr. Holt: When you inspected these cars and found them defective, did you mark them in any way? A. Yes, sir, with white chalk. Q. Of what does your inspection consist? What do you do while you are inspecting? A. We are supposed to— (interrupted). Q. Not what you are supposed to do, but what do you do? A. We find the defects in the cars. Q. How do you do that? Do you use a spyglass, or what is the practice? A. No, sir; we use



the naked eye. Q. Tell the jury what you do? A. We pass from one end of the train to the other. There are two of us—one on one side, and one on the other—and we go along and look at the wheels, brakes, grab irons, and lift rods. Q. Are you familiar with what is known as the 'drop brake'? A. Yes, sir; I have seen them. Q. You may tell the jury whether or not, had there been any drop brake standing up, you would have discovered it in your inspection. A. I would; yes, sir. Q. Did you discover any such? A. I did not. Q. Were there any such in that condition when you inspected them? A. None that I seen. Q. Well, did you see them all? A. I saw them all; yes, sir; but there was none that way. Q. You may likewise tell us whether or not you inspected the trains that came in from Roanoke between the hours you were on duty. A. Yes, sir; I did. Q. Who inspected with you? A. Mr. Carter. Q. Is he here? A. Yes, sir."

Here was an inspection made in the usual manner by competent inspectors, and by which it is shown that the brake in question was without defect and that it was in proper condition. It is true that the inspectors state, on cross-examination, that the examination was rapid, and that they examined from 30 to 45 cars in 40 minutes; but that they passed from one end of the train, one on one side and one on the other, and that in doing so they looked at the wheels, the brakes, the grab irons, and the lift rods. They testified that they were familiar with the drop brake, and the witness Tyne testified that if there had been any drop brake standing up he would have observed it while making the inspection, and then, in response to the question as to whether he did discover it, he said, "I did not."

Let us assume that it is not only the duty of the master, in furnishing this particular kind of brake, to furnish a brake which is without defect and in perfect working order, but that it is also his duty to keep it, when not in use, in its normal position; yet, in case of accident on account of such brake being in an abnormal position, the burden would be upon the party injured to show that the master knew, or could by the lapse of time have had knowledge, of the position of the brake. Therefore it becomes necessary to determine as to how or by whom the brake was placed in the position which it is contended by defendant in error that it occupied at the time he was injured. There is nothing in the evidence to justify the inference that the brake, on this occasion, was placed in an abnormal position by an employé of the railroad, because there is no evidence to show that any one acting for or on behalf of the company attempted to move the car until 11 a. m. of that day, and the inspection was made between the hours of 3 a. m. and 6 a. m. The finding of the brake in an abnormal position was one of those unforeseen contingencies which the master could not by any means anticipate, and to hold the master liable under such circumstances would be to ignore all precedents, and to establish a rule which would impose upon the master a duty the performance of which would be a physical impossibility. There is not a scintilla of evidence to show how long the brake had been in an abnormal position. It may have been 30 minutes, or it may have been an hour, or longer, but the evidence of the inspectors renders it quite improbable that it could have been placed in that position before the time of its inspection, to wit, some time between 3 o'clock and 6 o'clock on the morning of the injury. Is it not as reasonable to infer

that some mischievous boy, out of curiosity, or from other motives, raised the brake and left it in the position in which it was found by the defendant in error, as it is to infer that it was left in such position by the defendant below or some of its agents? The learned judge who tried this case below, in a very able opinion, in discussing the law relating to this phase of the question, among other things said:

"It is undoubtedly true that the general rule governing the proof requisite in the case of servants injured by defects in machinery or appliances requires that the plaintiff prove, not only the defect, but that the master either knew of it, or that it had existed for a sufficient length of time to warrant the fair presumption that he should have known of it."

This is undoubtedly a correct statement of the law, and, when we come to apply the evidence in this case, we are at a loss to see upon what theory the jury could have arrived at the conclusion that the injury was due to the negligence of the master. There is nothing in the evidence, so far as we can discover, to justify the inference that the condition of the brake had existed since the last time the same was handled in the regular operation of the train. There are many facts and circumstances which tend strongly to prove that such was not the fact. The court below also stated that if the jury had found that there had been a proper inspection of the brakes, and that they had been found in good condition and without defect at the time of inspection, to wit, between the hours of 3 a. m. and 6 a. m., he would have granted the motion to direct a verdict in favor of the plaintiff in error. If such motion had been granted, it could only have been upon the theory that, notwithstanding the brake was in an abnormal position at the time the servant was injured, a sufficient time had not elapsed from the time of inspection to raise the presumption that the master had knowledge of the fact that it occupied such position. The whole question as to how and by whom the brake was placed in an abnormal position is involved in uncertainty, and, in order to reach any conclusion in regard to the matter, it becomes necessary to base an inference upon an inference, and this would be in violation of the rules of evidence by which we are controlled in determining this controversy.

In view of all the facts surrounding this case, we are of opinion that there was not sufficient legal evidence in this case to sustain a verdict in favor of the defendant in error, and that the court below erred in refusing to grant the motion to direct a verdict in favor of the defendant below.

For the reasons hereinbefore stated, the judgment of the Circuit Court is reversed.

Reversed.

WADDILL, District Judge, dissents.

## CONAWAY et al. v. THIRD NAT. BANK OF CINCINNATI et al.

(Circuit Court of Appeals, Fourth Circuit. December 15, 1908.)

No. 822.

**1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 243\*)—ADMINISTRATION OF PROPERTY—SALE BY TRUSTEE—WEST VIRGINIA STATUTE.**

Code W. Va. 1906, § 3053, which authorizes the trustee "in any such deed" to sell the property covered thereby at public auction, refers to deeds of trust to secure creditors or indemnify sureties executed in pursuance of the preceding section 3052, but does not apply to deeds conveying property for the benefit of creditors which convey an absolute title, and the trustee in such a deed may sell in any manner authorized by the grantor.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 777; Dec. Dig. § 243.\*]

**2. TRUSTS (§ 368\*)—MANAGEMENT AND DISPOSAL OF TRUST PROPERTY—ACTION AGAINST TRUSTEES—INJUNCTION.**

A debtor conveyed all of his property with certain exceptions to trustees. Later, a coal company, of whose stock and bonds he was a large owner, pursuant to a resolution of its stockholders executed a power of attorney to the same trustees authorizing them to sell its lands in such manner and upon such terms as they might deem proper. After diligent attempts during a year and a half to make a sale, they received an offer for the property, of which they notified all creditors, stating that unless objection was made they should accept the same. No objection being made, they entered into a contract, receiving a cash payment, and a further payment to be made on delivery and acceptance of the deed. Complainants, who were creditors of the individual debtor but not of the corporation, brought suit to enjoin the carrying out of such contract. The trustees acted openly throughout, and after full consultation with all creditors. *Held*, that there was no ground for the interference of a court of equity, either because the sale was not made at public auction, because of alleged inadequacy of price, or because the debts to be paid from the proceeds of the land had not been judicially ascertained, especially as it did not appear when complainants became creditors, nor that they had a lien on any of the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 586; Dec. Dig. § 368.\*]

**3. TRUSTS (§ 244\*) — DEATH OF TRUSTEE — SUCCESSION UNDER WEST VIRGINIA STATUTE.**

Where a purchaser of lands who was described in the contract of purchase as trustee, and was shown to have made the contract as agent and trustee for another, died before the transfer was made, the duty to execute the trust devolved on his personal representatives, under Code W. Va. 1906, § 4001, and such representatives have authority to defend a suit pending against him relating to the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 351; Dec. Dig. § 244.\*]

**4. COURTS (§ 356\*) — FEDERAL COURTS — DEATH OF PARTY AFTER JUDGMENT — APPEAL BY PERSONAL REPRESENTATIVES.**

The provision of the judiciary act of March 3, 1875, c. 137, § 9, 18 Stat. 473 (U. S. Comp. St. 1901, p. 513), that, on the death of a party to a judgment or decree of a federal court before the expiration of the time for a writ of error or appeal, his personal representative may file a duly certified copy of his appointment, and thereupon may enter an appeal or bring a writ of error, does not require the filing of such certified copy of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appointment as a prerequisite to an appeal, where a formal order of revivor is entered and an appeal allowed in open court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 356.\*]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

For opinion below, see 156 Fed. 144.

This suit was brought in the Circuit Court of the United States for the Northern District of West Virginia, by the Third National Bank of Cincinnati, and others, against Thomas Moore Jackson and Joseph E. Sands and others, attorneys in fact for the Dola Coal & Coke Company, a corporation, Charles E. Conaway (sometimes called erroneously C. A. Conaway in the record), and others. Such proceedings were had therein that said court, on January 17, 1908, entered a decree, among other things, setting aside a sale of certain property theretofore made by Joseph E. Sands and others, attorneys in fact for said Dola Coal & Coke Company, to said Charles E. Conaway. Shortly after said decree was entered, Mr. Conaway departed this life, and Zella Conaway and W. H. Conaway were duly appointed the personal representatives of the estate of the decedent. The said personal representatives appealed from said decree to this court.

The facts disclosed by the record are, briefly stated, as follows: On the 17th day of December, 1903, the Dola Coal & Coke Company was incorporated under the laws of West Virginia, being capitalized at \$600,000. T. M. Jackson and wife, by deed bearing date December 28, 1903, conveyed to this corporation 3,821 acres of coal and 186 acres of surface land, an aggregate of 4,007 acres, lying in Harrison county, W. Va. On January 1, 1904, said corporation executed a mortgage or deed of trust on its property to the Security Trust Company of Wheeling, to secure a bond issue of \$500,000; that is, 1,000 first mortgage gold bonds of the value of \$500 each.

On January 23, 1905, the affairs of the Dola Coal & Coke Company stood thus: It owned said 4,007 acres of coal and surface land, subject to liens as follows: First, "farmers' liens" on a few parcels of land; second, "parthners' liens"; and, third, lien for the payment of said bonds, of which 500, or \$250,000 worth, had been disposed of and become obligations on the company, making a total indebtedness of the corporation, including interest, of something over \$500,000. It had issued and there were outstanding 6,000 shares of capital stock of the par value of \$100 each, which were held by various persons. T. M. Jackson held 5,000 of them, and 1,000 were held by John F. Hosack, W. H. Koch, H. F. Jones, L. E. Sands, E. T. Hitchman, O. J. Sands, and Wm. P. Schaffer.

At that time, January 23, 1905, a meeting of the stockholders was held in the city of Wheeling, all the stockholders being present, and a resolution was adopted by unanimous vote authorizing and directing the board of directors of the corporation to cause Joseph E. Sands, Ira E. Robinson, and John W. Davis to be duly constituted attorneys in fact of the corporation to make sale of said real estate belonging to the corporation, upon such terms and at such times as they might deem proper, and to this end make and deliver an appropriate contract, deed, etc. On the same day, after said stockholders' meeting, the board of directors held a meeting, and, in pursuance of said resolution of the stockholders, authorized and directed the president of said corporation to execute and acknowledge for record and deliver to said Joseph E. Sands, Ira E. Robinson and John W. Davis a proper power of attorney in accordance with the terms of said resolution, and on the same day the president did make and deliver the proper power of attorney to said Sands, Robinson, and Davis.

Pursuant to the powers invested in them by said resolutions and power of attorney, said Sands, Robinson, and Davis, as such attorneys in fact, on the 27th day of September, 1906, sold said coal and surface land belonging to the corporation to Charles E. Conaway, who was acting for himself and as agent

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for J. V. Thompson, for the price of \$145 per acre. The contract of sale bearing date on the said 27th day of September, 1906, was reduced to writing, and duly signed and sealed by the parties thereto. By the terms of said contract, as appears from the record, the purchaser is to pay \$145 per acre, or \$581,015 in all. Of this sum he paid in cash \$20,000 to said attorneys in fact on the day of sale, \$80,000 to be paid on or before the 20th day of November, 1906, and the residue, with interest, to be made in five additional payments. The contract provides for the payment of the liens on the property out of the purchase money, and, further, that the second party, his heirs or assigns, "shall have until the 20th day of November, 1906, if required, to examine the surveys and abstracts of title, and pay said sum of eighty thousand dollars, but with the distinct understanding and agreement that the payment of said sum of twenty thousand dollars is to conclude the sale and purchase of the property upon the terms and conditions herein. It is further covenanted and agreed, however, in this behalf, that the payment of the said sum of eighty thousand dollars on or before said 20th day of November, 1906, shall be considered the essence of this agreement, but its non-payment on that date shall not suffice to release the party of the second part herein save with the consent of the party of the first part, as hereinafter provided; and if the said sum shall not be paid on or before the date (time being expressly made the essence hereof), the party of the first part, may, at its election, rescind the contract upon returning to the party of the second part the sum of twenty thousand dollars this day paid, less \$10,000.00 to be retained therefrom by the party of the first part as liquidated damages for the nonperformance of this contract by the party of the second part, or may, in lieu of such rescission, elect to enforce the specific performance of this contract by the party of the second part herein by such appropriate methods as it may be advised."

After the execution of said contract of sale, and said Conaway had made the first payment of \$20,000, and before the time of the making of the second payment of \$80,000, to wit, on October 29, 1906, the plaintiffs instituted this suit, and the court below entered an order restraining said attorneys in fact "from taking any further proceedings for the sale of the property of the Dola Coal & Coke Company, and from executing any deed, writing, or conveyance to C. E. Conaway or any other person for the conveyance of the property of the said Dola Coal & Coke Company until the further order of this court."

The said Charles E. Conaway, before the 20th day of November, 1906, the day fixed in the contract for the second payment, to wit, on the 15th day of November, 1906, tendered and offered to pay to said attorneys in fact the sum of \$80,000, and said attorneys in fact refused to accept said \$80,000 for the sole and only reason that said restraining order had been awarded in this suit. After the purchaser, Conaway, made such tender to the attorneys in fact, he deposited said \$80,000 in the First National Bank of Fairmont, W. Va., there to be held, ready to be paid over to the said attorneys in fact at such time and as soon as they are able and can accept the same. Thereupon said attorneys in fact declared their willingness to comply with said contract as soon as the said restraining order shall be dismissed.

The plaintiffs Third National Bank of Cincinnati and Union Savings & Trust Company filed their original and amended bills in this cause for the purpose of setting aside said sale of said coal and surface lands of said Dola Coal & Coke Company upon the alleged grounds: That the price of \$145 per acre for which the property was sold "is a grossly inadequate price and value for the property"; that the sale should have been made at public auction; that, before any sale be made, there should be a judicial determination of the liens against the property; that a conspiracy exists between the Baltimore & Ohio Railroad Company, the Fairmont Coal Company, and others, in which John W. Davis and Joseph E. Sands participated to keep down the value of said property and prevent the sale or operation thereof, and that the purchaser, Conaway, "is acting at the direction and in behalf of the officers of the Fairmont Coal Company in making said pretended purchase, and that the purchase, if consummated, will inure to the benefit of the Fairmont Coal Company," etc., and the design is to acquire the property at their own price, regardless of value; that the proceedings of the corporation did not authorize said attorneys in fact to make said sale to Conaway, and that Conaway had legal notice of the

invalidity of the authority to sell; and the contract of sale made with Conaway is fraudulent and void on its face.

The bill prays, among other things, that further proceedings under said contract of sale be enjoined; that said sale of the property of the Dola Coal & Coke Company to Conaway be set aside; that the liens on said land be ascertained; "that a sale by the trustees at public auction, after due advertisement, be authorized, to be made upon reasonable and fair terms"; "that a special receiver may be appointed with authority and direction to take immediate possession and control of all the unadministered assets and property belonging to the estate of T. Moore Jackson, and the property of the Dola Coal & Coke Company, and administer said estate under the orders of this court," etc.

The cause was heard on the bills, the answers of Charles E. Conaway, John W. Davis and others, Lynn S. Horner, and T. M. Jackson all sworn to, and various affidavits, and the court, on the 17th day of January, 1908, entered a decree setting aside the sale of the property of the Dola Coal & Coke Company to Charles E. Conaway, and referring the case to a commissioner in chancery to ascertain and report the real estate belonging to said corporation, the liens thereon, and other matters concerning said corporation's affairs, also the assets of T. M. Jackson, his debts, &c. From this decree the personal representatives of Charles E. Conaway, deceased, appealed.

John Bassel and W. H. Conaway (W. S. Meredith, on the brief) for appellants.

V. B. Archer and Melvin G. Sperry (Sperry & Sperry, Johnson & Hoffheimer, on the brief) for appellees.

Before PRITCHARD, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). It is insisted by counsel for appellants that the trustees in making this sale were acting as attorneys in fact for and on behalf of the Dola Coal & Coke Company, and that therefore they were not trustees in the usual acceptance of the term, but were simply acting in pursuance of the authority thus granted by the Dola Coal & Coke Company to sell and dispose of the property in question, and that therefore any statute of West Virginia relating to sales of property under deeds of trust could not affect them in the slightest degree.

The learned judge who tried the case below, in disposing of this first question, said:

"First. It is well settled that it is immaterial as to the form and character of the instrument by which a trust may be created. It may also be created by more than one instrument in different forms, each bearing different technical names. The question in equity is always one of substance and not of form. I therefore construe the original agreement between Jackson and these trustees, the deed for his realty, the memorandum of assignment of his personal property, and the power of attorney of the Dola Company to them, as means resorted to to accomplish a single purpose, the creation of a trust in these trustees for the benefit of his creditors. The power of attorney, it is true, goes a step beyond the other writing and gives the right of disposition of the coal property of the Dola Company, in which Jackson was not alone interested. However, it cannot be denied that his interest was almost the whole thereof, that this power was executed solely because of his transfers before made, and with the sole purpose of better obtaining and securing his interests therein and vesting the same in the trustees."

The authority granted the trustees by the Dola Coal & Coke Company reads as follows:

"Now, therefore, be it resolved, that the board of directors of this corporation be and they are hereby authorized and instructed to cause Joseph E. Sands, Ira E. Robinson, and John W. Davis to be duly constituted the attorneys in fact of this corporation to make sale of all and singular its real estate as aforesaid, in such manner, upon such terms, and at such times as they may deem proper. \* \* \*

The court below held that the trustees were required by the provisions of section 3053 (W. Va. Code 1906) to sell the property in question at public auction. This section reads as follows:

"(6) The trustee in any such deed shall, whenever required by any creditor secured or any surety indemnified by the deed, or the personal representative of any such creditor or surety, after the debt due to such creditor or for which such surety may be liable, shall have become payable and default shall have been made in the payment thereof, by the grantor, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction. \* \* \*

Owing to the various instruments executed by the grantor to his trustees, together with the power of attorney given to the trustees by the Dola Coal & Coke Company, the question arises as to whether the sale of the property of the Dola Coal & Coke Company was made in pursuance of the trust created by the execution of the deeds by the grantor, as well as the power of attorney executed by the Dola Coal & Coke Company, or whether the authority to make such sale was derived solely from the authority conferred upon the trustees in the power of attorney executed by the Dola Coal & Coke Company. The court below ruled that the various conveyances made by the trustees, as well as the power of attorney executed by the Dola Coal & Coke Company, constituted one transaction, and should therefore be treated as constituting a trust for the benefit of the creditors of the grantor. If the sale was made solely in pursuance of the power of attorney hereinbefore referred to, then unquestionably the trustees in making such sale were not required to advertise the property at public auction under the provisions of section 3053, or any other section of the Code of West Virginia pertaining to sales of property under deeds of trust. But for the purpose of deciding the questions involved herein, we will treat the ruling of the lower court in this respect as being correct, and that this property was sold in pursuance of an express trust created for the benefit of the creditors of the grantor.

Section 3052, which immediately precedes section 3053, appears to be confined strictly to deeds of trust. We therefore conclude that the provision of section 3053, relative to the manner of making sale of property under deeds of trust, must necessarily be construed as referring to deeds of trust executed in pursuance of section 3052. This section is limited in its scope to deeds of trust executed to secure creditors and to indemnify sureties; whereas the deed under which this property was sold was executed for an entirely different purpose, to wit, for the benefit of creditors of the grantor. The language of this section is so plain and explicit that there can be no doubt as to its true intent and meaning. It is obvious, even from a casual reading of the statute, that it was intended to apply exclusively to deeds of trust, and that it does not apply to a deed of assignment for payment of debts as in this instance. Another distinguishing feature is that there

is nothing in section 3053 which requires the trustee to enter into bond for the faithful discharge of his duties before making sale of the property conveyed or distributing the proceeds, except when required by the grantor or any cestui que trust in said deed. However, when we come to examine section 3054 of the Code of West Virginia of 1906, we find that its provisions require that the trustee under the conveyance therein contemplated shall, before entering upon the discharge of his duties as such, execute a sufficient bond for the faithful discharge of the duties thus imposed upon him. This section reads as follows:

"That a person appointed by an insolvent debtor as trustee in any assignment, conveyance, transfer, or other act of such insolvent debtor, which is intended to operate as an assignment of all such debtor's property for the benefit of all of his creditors, or which does so operate under the laws of this state, shall not have the power of such trustee until he qualifies as such by taking an oath and giving a bond in a penalty double the amount of the ascertained estate, with sufficient surety, before the clerk of the county court of the county in which such assignment, conveyance, transfer or other instrument is or should be recorded, or such act is done, in the manner, and with the effect as a personal representative of the estate of a decedent is qualified. And in case such person so appointed trustee by such insolvent debtor fails or refuses to so qualify the said county court shall appoint such trustee upon the application of any person interested. The oath of such trustee shall be that he will faithfully perform the duties of the office of trustee to the best of his skill and judgment, and will account for and pay over all money that comes to his hands as such trustee. Said bond shall be approved by said court, and conditioned that said trustee shall faithfully perform the duties of trustee to the best of his skill and judgment, and account for and pay over all money that may come to his hands as such trustee. Upon the qualification of such trustee, there shall be appraisers appointed to appraise the estate of the insolvent debtor in the same manner and by the same authority that appraisers are appointed for the estate of a decedent, and such appraisers shall be governed by the same laws, and perform the same duties that appraisers of the estate of a decedent are governed by and are required to perform. And all such trustees as aforesaid shall appear before some one of the commissioners of accounts of the county court before which he qualified as such trustee, and lay before such commissioner a report of his receipts and disbursements, and his vouchers for the same, in all respects and with like effect as is provided for fiduciaries generally by chapter 87 of the Code of West Virginia."

It is true that the trustees in this instance did not enter into bond, as required by the provisions of this section, but their failure to do so was due to the fact that such section was not in existence at the date of their appointment, it being enacted subsequent thereto.

It is also insisted that the provisions of section 3056 are such as to render the action of the trustees in disposing of the property at private sale a nullity and void. We do not think so, for the reason that the opening sentence thereof restricts its operation to property sold under deed of trust, and therefore the reason we have already assigned applies with equal force to this proposition, and we must conclude that deeds of trust as therein designated are such deeds of trust as may be executed for the purpose of securing creditors or indemnifying sureties. We have diligently examined the Code of West Virginia with a view of ascertaining the law of that state in regard to the time and manner of making sales under deeds similar to the one executed in this instance, and section 3054 is the only one we have found



that undertakes to prescribe the duties of trustees under a deed made exclusively for the benefit of creditors, and there is nothing in that section which undertakes to prescribe the manner of making sales under such instruments. The enactment of this section is in recognition of the distinction between deeds of trust to secure creditors, or to indemnify sureties, and an express conveyance for the benefit of creditors. A provision that property conveyed by deed of trust to secure creditors, or indemnify sureties, should be sold at public auction, after giving sufficient notice, is wise, and one that is intended to protect the interests of the grantor and his creditor alike. While a creditor under the terms of the deed of trust may demand a sale under the deed, yet he cannot demand an immediate sale, and thus deprive the grantor of an opportunity to use all the means within his power to save his property; neither can the trustee dispose of such property at private sale, without giving the grantor an opportunity of securing bidders who will pay an adequate price for the same. By this provision, in many instances, the grantor, even though his property has to be sold to satisfy the debts secured, is enabled to secure bidders who are willing to pay a fair price for such property, and thereby release not only a sufficient amount to pay off the indebtedness of the grantor, but an amount sufficient to leave a surplus to which, under the provision of the deed of trust, the grantor would be entitled. Also, under a deed of trust executed for such purpose, the grantor, in the event that he should be able to pay the debt thus secured, would be entitled to have the securities sign a release of the property thus conveyed, or cancel the lien as recorded. In this case, however, it is not the purpose of the grantor to secure payment of a debt, but the sole object was to grant and convey his property to trustees absolutely, for the benefit of his creditors, and the estate thus transferred is dedicated for that purpose, and that purpose only. In other words, this deed of assignment is in effect tantamount to a sale and conveyance of the property by the grantor to his creditors, in that it is provided that the property thus transferred is to be sold, and the entire proceeds arising therefrom applied to the payment of the various creditors in accordance with the terms contained therein. There are none of the distinguishing features contained in a deed of trust executed for the benefit of creditors, or to indemnify sureties, to be found in the conveyance executed by the grantor in this instance. This conveyance to trustees was for the creditors, and the creditors only; but in a deed of trust the rights of the grantor are reserved and protected as hereinbefore stated.

The authority of the trustees to make sale of the property, as contained in the conveyance for the benefit of the grantor's creditors, reads as follows:

"\* \* \* the trustees named take possession of all of the said real and personal property, and shall proceed with all reasonable dispatch to make sale of the same at such time and upon such terms and in such manner as they may deem most expedient, full and absolute discretion being hereby vested in said trustees in relation to the management, control and disposition of said property; \* \* \* it being the intent and purpose of this contract and of the instruments to be executed in furtherance thereof, to vest the said trustees with the full, absolute and indefeasible title to the said property, both

real and personal, without right of redemption on the part of the said Jackson, and to be held by the said trustees for and on behalf of all the creditors of the said Jackson whether parties to this agreement or otherwise, for the sole use, benefit and behoof of the said creditors."

This provision clearly leaves the manner of sale, and time when it shall be made, etc., exclusively within the discretion of the trustees, there being no restriction or direction whatever as to when and how such sale shall be made. There is not a scintilla of evidence to show that the trustees acted improperly at any stage of the proceeding. In referring to the conduct of the trustees, the learned judge below in his opinion filed herein, made the following statement:

"Nor do I regard the charges of misconduct on the part of these trustees as sustained. It seems to me that, under all the circumstances, they are subject to neither condemnation nor just criticism."

Everything seems to have been done in the open, and the efforts of the trustees to secure bidders were such that their action in that respect became a matter of general notoriety in the vicinity where the property is situated, thus giving those who might desire to purchase the property full and ample opportunity to negotiate the same with the trustees, just as though there had been public advertisement of the time and place of sale, and they had been afforded an opportunity to bid at public auction. Likewise, the creditors, the only persons interested under the deed, were fully advised of the action of the trustees at all times, as will appear from the following statements taken from the answer filed herein by the trustees:

"(5) Further answering, respondents say, in relation to the sale made by them of the coal field of the Dola Coal & Coke Company to their codefendant Charles E. Conaway, that, as hereinbefore stated, they were continuously engaged without success from the 23d day of January, 1905, until September 27, 1906, in an endeavor to effect such a sale, or any sale of said property. That at a meeting of the creditors of the said Thomas Moore Jackson held in the city of Clarksburg on the 17th day of January, 1906, a resolution was offered by Lawrence Maxwell, Jr., then counsel for the plaintiffs and representing the plaintiffs at said meeting, instructing these respondents to proceed forthwith to advertise the said coal field and offer the same at public sale, and that the said resolution having been maturely discussed was by a vote of the creditors then present disapproved, and these respondents were instructed to further proceed with their efforts to dispose of said coal field at private sale. That at said meeting certain of the holders of bonds of the Dola Coal & Coke Company then stated that unless a sale of the said coal field should be shortly effected they would proceed to foreclose their mortgage and force the property to sale.

"That thereafter, in the month of May, 1906, no sale having been as yet effected, notwithstanding numerous negotiations entered into by these respondents, certain of the holders of the bonds of the Dola Coal & Coke Company demanded of these respondents that a further meeting of the said creditors should be called for the purpose of further considering the sale of the said property and of instructing these respondents to sell the same at forced or public sale if a private sale should not be sooner made. That such meeting was duly held on the 7th day of June, 1906, and at such meeting the plaintiffs were duly represented by Mr. Dudley V. Sutphin, vice president of the plaintiff Third National Bank of Cincinnati. That at such meeting it was again stated that no further delay in the sale of said property would on the part of the holders of the said mortgage bonds be permitted. Whereupon a general committee of creditors, composed of secured and unsecured creditors, was appointed to consider a plan by which the said coal field might be taken

over by the creditors, or the equity of the common creditors therein might be preserved or protected; which said committee submitted to all the creditors of the said Thomas Moore Jackson a written statement bearing date the 27th day of June, 1906, a copy of which is herewith filed, marked 'Exhibit No. 10,' and in response thereto the plaintiffs, in the person of Mr. Sutphin, their representative, by letter bearing date the 27th day of June, 1906, a copy of which is herewith filed as a part of this answer, marked 'Exhibit No. 11,' signified their unwillingness to participate in the plans therein suggested; that thereafter, to wit, on the 18th day of July, 1906, a meeting of the creditors of the said Thomas Moore Jackson was again held at Clarksburg, at which the plaintiffs were again represented in the person of the said Dudley V. Sutphin, and an adjournment was had without any action looking either to the organization of any syndicate on the part of the said creditors or to any other device whereby the equity of the common creditors in said coal field might be in any manner protected or preserved. And it was then and there again stated on the part of the holders of the bonds of the Dola Coal & Coke Company that no further delay in the sale of the said coal field would or could be permitted.

"Respondents further aver that after the adjournment of the said last-mentioned meeting various holders of the said Dola Coal & Coke Company bonds signified to these respondents their intention of immediately foreclosing their said mortgage unless a sale should be forthwith effected, no interest having ever been paid upon any of the bonds held by them, and the said Dola Coal & Coke Company being therefore in entire default. That various holders of 'farmers' liens' of the class hereinbefore mentioned signified their intention of subjecting to sale portions of the field upon which their liens existed, and the holders of the notes constituting what has been hereinbefore styled, 'partners' liens' notified these respondents, as they had repeatedly done prior thereto, of their intention to enforce their said liens immediately upon their maturity, to wit, on the 1st day of January, 1907. Respondents therefore addressed to the creditors of the said Thomas Moore Jackson a letter under date of the 17th day of September, 1906, a copy of which is filed with the plaintiff's bill as 'Exhibit F,' notifying the creditors of the receipt of a positive offer and of respondents' intention to close the same, in the absence of any better proposition, on the 27th day of September, 1906. Respondents further aver that upon the issuance of said letter the creditors holding bonds of the Dola Coal & Coke Company, as well as those holding 'partners' lien' notes, met in the city of Clarksburg on the 28th day of September, 1906, and a meeting of the common or unsecured creditors was called by the First National Bank of Mannington to be held on the same date. That on that date the said secured creditors in meeting assembled notified these respondents, as well as the unsecured creditors then present, that unless the said unsecured creditors would in some manner assume the payment of the interest upon the said secured debts, and would guaranty the payment of the principal thereof, that they would, and did, instruct these respondents to proceed to make sale of the said coal field at the price then offered, and that they would and did refuse, in the event these respondents should proceed to offer the same at public sale, to make any assurances, guarantee, or promises that they would at such sale enter any bid whatever, or that they would protect the bidding to the amount of the debt due to them; and, the unsecured creditors then present being unable to effect any such arrangement, your respondents treated the instructions so given to them by the specific lienors upon the property as imperative and mandatory.

"Respondents further show that the said circular letter bearing date the 17th day of September, 1906, was duly dispatched to the plaintiffs in this cause, and on the 21st day of September, 1906, respondents received from the plaintiffs Third National Bank of Cincinnati a letter, a copy of which is herewith filed as a part of this answer, marked 'Exhibit No. 12,' wherein among other things, it was said:

"We are not able to suggest any other program than that indicated by yourselves. We have made faithful effort with large coal people all over the country to get them to consider the property without the least result."

"And thereafter, and prior to the said 28th day of September, 1906, respond-

ents received a further letter from the said Third National Bank of Cincinnati, a copy of which is herewith filed as a part of this answer, marked 'Exhibit No. 13,' in which it was further declared:

"We have declined to join in a creditors' meeting Wednesday, and feel that the trustees have done all they could and have served all interests faithfully and well."

We do not think that the instruments under which this sale was made can be treated as constituting a deed of trust, as contended by counsel for appellee. Preliminary to the execution of the instrument in the first instance, it was agreed by more than 85 per cent. of the grantor's creditors that, as a means of finally settling and discharging his indebtedness, his real estate, with certain exceptions, should be conveyed and transferred to the trustees named therein, exclusively for the use of his creditors; the prime object being to secure a sale of the property thus conveyed, and distributing the proceeds thereof among his creditors in accordance with the stipulations therein contained. The right of redemption in this instance was expressly waived and denied, and the power of sale is unconditional. It cannot be contended that the grantor could not have sold and transferred this property outright to his creditors, in satisfaction of his indebtedness, nor that they in turn could not have taken from him a perfect and valid conveyance of the same; and this is precisely what was done in so far as practical results are concerned.

The court also based its action in entertaining the bill in this instance upon another ground, and, in discussing this phase of the question, said:

"Second. I am led to believe that this bill must be sustained and this property be required to be sold under the supervision of this court upon demand of these creditors, because it is the well-established policy of the law in this state to sell real estate only after the liens and their priorities have been ascertained and settled. Section 4147 of our Code (W. Va. 1906) expressly requires such liens to be ascertained, notice to lienholders to be published, and that all rights to parties to except and contest shall be preserved. It is needless to cite the multitude of cases construing this statute.

"I have not the slightest doubt of the sincerity of these trustees in their statement that they have accurately, as they believe, ascertained the creditors, their debts and priorities, secured by this deed of trust. We must admit, however, that this is private judgment, and not judicial determination. It was expressly provided in the trust agreement that creditors should have the right to sue to establish their debts and liens, and, if it had not been so provided, I think this right clear and undisputable if exercised within proper time.

"And finally, while no man can tell whether this large and valuable property, if sold at public auction, will or will not realize a larger sum than the one offered at this private sale, it is nevertheless true that many think it will, that a considerable larger sum has been offered for it, whether by one who could fulfill his offer or not we cannot tell, and that these trustees themselves expressly state in their circular letter to creditors that the sale price of \$145 per acre is much below the true value of the property. Under such conditions it seems to me I must set aside this private sale, entertain this bill, ascertain the liens and charges against this real estate, and direct the sale thereof to be made by these trustees under the direction and orders of this court."

We have carefully considered this point, and we do not think the facts and circumstances surrounding this transaction are such as to justify the intervention of a court of equity. The plaintiffs are not

creditors of the Dola Coal & Coke Company, and there is nothing to indicate that they have ever acquired any lien on its property. The plaintiff the Third National Bank of Cincinnati, on the 14th day of March, 1905, recovered judgment in the Circuit Court of the United States for the Northern District of West Virginia against T. Moore Jackson, Lynn S. Horner, and Fleming Howell for the sum of \$21,-568.28. Said judgment was docketed in the office of the clerk of the county court of Harrison county on the 17th day of January, 1906. The plaintiff the Union Savings Bank & Trust Company, on the same day and in the same court, recovered judgment against all of the parties for \$9,766.47, and docketed the judgment in the office of the clerk of said court on the 17th of January, 1906. At the time, to wit, 19th of December, 1904, that the grantor entered into an agreement with his creditors to the effect that he would convey to Joseph E. Sands, Ira E. Robinson, and John W. Davis, trustees, all of his real estate and personal property, with certain exceptions, he was indebted to several creditors in various amounts, for the payment of which he desired to make provision. The plaintiffs do not allege that they were then creditors of Jackson, and it nowhere appears in the record that Jackson was at that time indebted to them, and the judgments upon which they rely as evidence of indebtedness were not recovered until three months after the conveyance to the trustees as hereinbefore stated. In the first instance, the judgments upon which they rely are against the grantor and others, and not against the Dola Coal & Coke Company, and we know of no principle upon which they would be entitled to proceed against the Dola Coal & Coke Company for the purpose of recovering debts due by the grantor; and it appears that, prior to the execution of the power of attorney by virtue of which this property was sold, all of the right, title, and interest of the grantor in the property of the Dola Coal & Coke Company had been conveyed to that company by proper deed of conveyance.

Among other things, the trustees in their answer say that under their administration ample opportunity was afforded all parties in interest for an inspection of the books and papers and examination of each and every transaction in respect thereto, and that an accounting had been had of all transactions in connection therewith, and that they are still "ready and willing to render to plaintiffs, or any other party in interest, any further accounting which may be by the plaintiffs lawfully demanded." That portion of the answer reads as follows:

"Further answering, respondents say that, as shown by the exhibits heretofore filed, they have from time to time accounted in full detail to all persons interested in the execution of the trust assumed by these respondents; that they have at all times afforded to the plaintiffs and all other creditors of the said Thomas Moore Jackson full access to any and all books of account kept by these respondents, and have answered in full detail any and all inquiries submitted by the plaintiffs or by any other of the said creditors, and that they have at no time refused to account or neglected to render to any person entitled thereto a full account of all and singular the transactions, collections, or disbursements entered into or made by them; that they have, as they believe, ascertained and properly listed all the assets of the said Thomas Moore Jackson, subject to the said trust, and that they have likewise ascertained all the creditors entitled to said assets or any part thereof; that as to certain of said debts there are matters still undetermined which render it im-

possible to state the true amount thereof, but which respondents believe will in due time be adjusted without resort to litigation for that purpose, and respondents here file as a part of this answer, marked 'Exhibit No. 17,' a detailed statement of the amount of the bonds of the Dola Coal & Coke Company now outstanding, and the holders thereof, and of the liens against the property of the said Dola Coal & Coke Company, and the holders thereof, and, as hereinbefore averred, respondents are ready and willing to render to plaintiffs or to any other party in interest any further accounting which may be by the plaintiffs lawfully demanded."

The instrument under which these trustees acted being plain and explicit as to the distribution of the proceeds arising from the sale of the property thereunder, and it appearing that the conduct of the trustees was eminently proper, we do not think that a court of equity at this stage of the proceeding should interfere with the trustees in the discharge of their duties as such.

We will now consider the motion to dismiss the appeal. In support of this motion, counsel contend that "the appeal must be dismissed because the heirs of Charles E. Conaway, to whom descended his interest in said coal field, have not joined in, nor are they in any manner parties to, this appeal." This contention would be good if the property involved descended to the heirs of the said Charles E. Conaway, but such is not the case. At the time of the death of said Conaway, there was no estate in the coal fields to descend to his heirs. Therefore, whatever estate he may have had therein, passed to his personal representative under the law of West Virginia. Code W. Va. 1906, § 4001, provides that:

"The personal representative of a sole or surviving trustee shall execute the trust, or so much thereof as remained unexecuted at the death of such trustee (whether the trust subject be real or personal estate), unless the instrument creating the trust otherwise direct, or some other trustee be appointed for the purpose by a court of chancery having jurisdiction of the case."

Conaway, in making the purchase of this property, acted as agent and trustee, and the contract with the trustees by which he acquired this property vested in him an estate in the coal field held in trust for Mr. Thompson. The contract describes him as a trustee, and, among other things, provides that the property shall be granted and conveyed with covenants of general warranty unto said party of the second part, or his assigns, or such person or corporation as he may designate in writing, free from incumbrances, etc. Also there was an agreement entered into between Mr. Conaway and Mr. Thompson to the effect that the property was being purchased for Mr. Thompson, and the affidavit of Mr. Thompson clearly shows that Mr. Conaway was only acting as trustee. Under these circumstances, it was the duty of Conaway, as Thompson's trustee, to have the complete title to the property thus purchased, in so far as it was in his power to do so, by a conveyance, vested in Thompson; and even, under the circumstances, if he had taken a deed in fee simple for the premises in question, he would have taken the same as trustee for the use and benefit of Thompson, and would have been bound, upon proper demand, to have conveyed the same to Thompson in accordance with the contract between them as to such transaction. "An agent, authorized to purchase lands for his principals, purchases in his own

name, and directs the conveyance to himself. He is bound to convey the land to his principals, upon their complying with his contract of purchase, in the same plight and condition in which the same was conveyed to him." *Wellford v. Chancellor*, 5 Grat. (Va.) 39; *Franks v. Morris*, 9 W. Va. 669.

It is also insisted that:

"Assuming that the personal representative of Charles E. Conaway had any right to appeal, they have not filed in the office of the clerk of the Circuit Court a certified copy of their appointment as required by the act of Congress (Act March 3, 1875, c. 137, § 9, 18 Stat. 473 [U. S. Comp. St. 1901, p. 513]), but merely an unauthoritative certificate of the clerk of the county court of Marion county, W. Va."

It appears from an inspection of the record that the death of Charles E. Conaway was suggested, and that it was proved to the satisfaction of the court that Zella Conaway and W. H. Conaway were on the 29th day of January, 1908, duly appointed administratrix and administrator of the personal estate of the decedent by the county court of Marion county, W. Va., and were duly qualified, and gave bond as such, and on their motion made in open court the suit was revived in their names as personal representatives of said decedent. It also appears that upon the petition of said personal representatives presented to the court and filed therein, accompanied by assignments of error in writing, and a bond in the penalty of \$300 with surety, the court allowed the appeal, and approved as sufficient the bond, and ordered the same to be filed and recorded.

In view of these facts, it cannot reasonably be insisted that this appeal was wholly governed by the provisions of the act of 3d March, 1875, as hereinbefore contended. That statute is evidently intended to provide for an appeal in cases where there is no formal revivor of the suit against the personal representative of the deceased party. The suit being revived, the court undoubtedly had jurisdiction to allow the appeal in open court, which was done. Therefore we do not think that this point upon which counsel rely for dismissal is well taken.

It also appears from the record that the trustees hold \$20,000 of money paid to them by said Conaway, as trustee for Thompson, and it also appears that there is \$80,000 now held on deposit to meet the second payment of purchase money for the coal land, which \$80,000 was furnished by said Thompson to the trustee, Conaway, and by him deposited in said bank. In any event, the interest of said Conaway was such at the time of his death as to entitle his personal representative to be made a party to this suit for the purpose of asserting his right to the \$20,000, to which decedent was entitled for services rendered in the purchase of the land held by the trustees for his benefit, the payment of which is contingent upon the ratification of the sale of such property.

The motion of counsel for appellees to dismiss this appeal is without merit, and therefore refused.

For the reasons hereinbefore stated, the decree of the Circuit Court is reversed, and the case is remanded, with instructions to dissolve the injunction granted herein and to dismiss the bill.

Reversed.

TEXAS & P. RY. CO. v. DIEFENBACH et al.<sup>†</sup>

(Circuit Court of Appeals, Fifth Circuit. February 2, 1909.)

No. 1,797.

**1. CARRIERS (§ 365\*)—PASSENGERS—REFUSAL TO PAY FARE—EJECTION.**

A carrier of passengers may eject with as much force as is necessary all persons liable to pay fare who have not paid and who refuse to pay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1450-1452; Dec. Dig. § 365.\*]

Liability of railroads for ejection of trespassers, see note to Great Northern Ry. Co. v. Bruyere, 51 C. C. A. 578.]

**2. CARRIERS (§ 364\*)—TRESPASSERS—EJECTION—ASSISTANCE OF OFFICERS.**

Where the ordinary agents of a carrier at one station had failed to eject certain trespassers from a stock car in which certain horses were being transported, and there was reason to expect the same and as effective opposition at the succeeding station, resulting either in delaying the train or compelling the car to be set out for daylight, the carrier was entitled to call the local police to eject the trespassers from the car.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 364.\*]

**3. CARRIERS (§ 352\*)—EJECTION OF TRESPASSERS—ACTS OF LOCAL POLICE—RESPONSIBILITY OF CARRIER.**

Where a carrier's train dispatcher having authority to eject trespassers called the local police of a city to assist in so doing, the police acted as agents of the carrier, which was liable for any excesses.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1414; Dec. Dig. § 352.\*]

**4. CARRIERS (§ 359\*)—TRANSPORTATION OF PASSENGERS—RIGHTS OF PASSENGER—FORFEITURE.**

Where three persons entitled to ride in a stock car to care for horses being transported therein permitted three others who had no right in the car to ride therein, and any one of the three entitled to transportation for any purpose closed and fastened the doors of the car and knowingly refused to open it at the request of the conductor or employes of the carrier when they sought to ascertain who were inside the car, to identify the passes, and inspect the transportation contracts of those holding them, the passenger so doing thereby forfeited his rights as a passenger so far as was necessary to carry out the regulations of the company, though there was no conspiracy between the three passengers and the trespassers to procure free transportation for the latter.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1439-1442; Dec. Dig. § 359.\*]

**5. CARRIERS (§ 384\*)—TRESPASSERS—EJECTION—ACTIONS—INSTRUCTIONS.**

Where D., traveling in a stock car with certain horses, was permitted to take two of his assistants in the car to the first division point on promising to purchase tickets for them, which he failed to do, and for this reason the assistants were ejected and arrested, the carrier was entitled to an instruction in an action therefor, in which it was claimed that the carrier was guilty of wanton misconduct in calling on the police to assist in the ejection, that if D. promised to get tickets for his assistants at the division point it was his duty to do so, and they would be on the car without right after passing such point, though they were asleep at that time.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.\*]

**6. CARRIERS (§ 361\*)—EJECTION OF TRESPASSERS—REFUSAL TO SHOW TICKETS OR PAY FARE.**

Where certain persons attempted to procure passage in a stock car, some of whom had transportation and others did not, those holding trans-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 22, 1909.



portation and refusing to show the same when demanded by the conductor, and those refusing to pay fare when demanded, became trespassers and subjected themselves to ejection.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 361.\*]

7. CARRIERS (§ 361\*)—LIVE STOCK—PERSONS IN CHARGE—EJECTION.

Where B. was permitted to ride in a stock car of a fast freight line to the first division point on his promise he would there buy a ticket, and he failed to do so, but attempted to continue his transportation in the car without right, he was a trespasser, though he was the owner of some of the horses being shipped in the car under contract between the carrier and another, and was therefore subject to ejection.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 361.\*]

Shelby, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas.

T. B. McCormick and F. H. Prendergast, for plaintiff in error.

F. M. Etheridge, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a suit brought by A. J. Diefenbach against the Texas & Pacific Railway Company for damage resulting from an alleged illegal arrest and assault committed on Diefenbach by the defendant and its agents while Diefenbach was a passenger traveling on a freight train, in care of stock. John Doran, A. E. Buck, and D. N. Martin each brought suit in his own behalf against the same defendant for damages growing out of the same transaction. By agreement of all the parties, the four suits were tried together before the same jury, and one record presents the four cases in this court.

On November 26, 1906, these parties, together with Charles Mulner and William Corrigan, were at Shreveport, La., in charge of a lot of 14 horses which were to be shipped from Shreveport to Dallas. Eight of these horses belonged to W. O. Foote, and were in charge of A. J. Diefenbach, Charles Mulner, and William Corrigan. Four of the horses were owned by George R. King, and were in charge of John Doran and D. N. Martin. Two of the horses belonged to A. E. Buck, and he had charge of them. The 14 horses were loaded in one car at Shreveport, and the six men boarded the car to travel with the horses. Diefenbach, Doran, and Martin had transportation; Buck, Mulner, and Corrigan did not. The railroad agent at Shreveport objected to any person going in the car who did not have transportation. After considerable discussion, more or less intemperate and heated, it was finally arranged that Buck, Mulner, and Corrigan should be allowed to go in the car with the others to Reisor, a station eight miles out from Shreveport, without tickets, on the promise that they would procure tickets at Reisor. Reisor is a station on the main line of the Texas & Pacific Railway, about 8 or 10 miles out from Shreveport, and trains traveling from New Orleans to Dallas pass through Reisor, but do not go to Shreveport. Cars are brought from Shreveport out to Reisor, and return by a switch engine stationed in Shreve-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

port. On the above understanding that the three parties should obtain tickets at Reisor, they were carried to that station by the switch engine from Shreveport, and the car was left there, to be carried on to Marshall and Dallas by the through freight on the main line, which was due to leave there that same night, the car having left Shreveport for Reisor at about 7 o'clock, and the train arrived at Reisor some time between 10 and 11 o'clock the same evening.

The three parties did not obtain tickets at Reisor. Diefenbach and Buck swore that they were asleep and were not awakened up at that place. Martin says that every one was asleep when they reached Reisor. He says:

"I didn't know when we got to Reisor until we were about to pull out from there. At Reisor, in coupling the cars, there seemed to be some difficulty in making the coupling; they bumped the cars several times pretty hard, and that woke me up. I opened the door and asked the man what was the trouble, and he said, 'Nothing, only we are picking you up to take you to Marshall.' That is the first I knew where we were. The next time I woke up, some one was hammering on the door at Marshall."

Doran testifies:

"I don't know whether we ever got to Reisor. I wasn't awakened by any one; never saw a conductor or anybody."

On the other hand, Kimbrough, the engineer who pulled the car over from Shreveport to Reisor, says:

"I saw the parties after we got to Reisor; I can't tell how many I saw; when I got to Reisor I notified them we were at Reisor. At Reisor we pulled up on the main line and backed down into the yard to set our train out, and when I shoved down there, after I put my train away there, I went to the door and notified them we were at Reisor, and they could get off and provide themselves with tickets. I think, when I shoved down, the side door was open or partially open. When I walked up that way, as well as I remember, they were at the door already; I can't tell you how many were at the door. I saw more than one; I don't recognize any of them I saw there, except the large man over by the wall there (Mr. Martin); I saw him at Reisor. I just remarked to him that that was Reisor, and they could get out and buy tickets."

Mr. Jenkins, conductor on defendant's railway at the time and place, says that he was advised from Marshall that there were a lot of men on the car from Shreveport that were not provided with tickets, and was directed to see that they had first-class transportation before moving the car. He says:

"When I got these orders I went back to the car while the engine was taking coal and rapped a few times. I rapped on the south side of the car—the east end of the south side. \* \* \* I rapped on the door several times before I could get any answer whatever. Finally the door was opened about that far (indicating), but, before the door was opened, he asked who it was—the man inside asked who it was—and I told him I was the conductor, and we were picking up cars and wanted to see his transportation; then he opened the door a very small space—I couldn't tell the man to save my life—and handed out two contracts. I looked at the contracts and saw they were all right, and I told him I understood there were a lot of men in there that had no transportation, and one of them remarked, 'By God, if there is anybody else in here, I don't know anything about it,' and slammed the door. \* \* \* I then tried all around to get in, and no one would let me in at all. I tried both ends of the car. I tried on the south side at both

ends; I was about that car some five or eight minutes trying to get in—something like that. I went and told the dispatcher I was unable to get in, and he told me to bring the car on to Marshall. I had received instructions to see that they had transportation. I didn't receive instructions to break in the car door or anything like that. I never got admittance to the west end of the car. I knocked on the door and tried to get admittance. I made a considerable alarm on the door. I knocked on the door with my knucks. I asked them to open the doors, and received no response at all."

J. C. Meade testifies that he, with the conductor, Jenkins—

"went down with a Shreveport car. As soon as we arrived at Reisor the conductor went to the office to get his waybills to see what cars went, and came on back, and rapped on the door quite a little while before any one came to the door. He asked for transportation, I believe, for the parties in charge of this car. He rapped on the door quite a little while before anybody came and opened the door. Finally he got the door partly opened, and was handed out some papers—I suppose contracts; looked something like that—and he looked over them and gave them back to them. He shut the door, and he went on and got the numbers. I generally have to go with him to get the numbers. \* \* \* He went to the office and got his bills, and during that time he was instructed that there were some other parties in the car, or something like that, and we went on back and he rapped on the door again, and the party inside wanted to know what he wanted, and he says he wanted their transportation—of the other parties in the car—and they made some sort of remark I didn't understand, like 'if there was anybody in there it was their business,' or something similar, and they wouldn't open the car any more. I didn't hear them say they wouldn't open it; they said, if there was anybody in there, it was their business. They didn't open the car. I guess he was engaged 10 minutes, all told, trying to get in this car."

Information as to the contention at Shreveport and the failure of the parties not provided with transportation to get tickets at Reisor, and of the inability of the railroad agents to get into the car at Reisor, was received by the train dispatcher at Marshall, and he issued instructions to the conductor to bring the car on to Marshall, and then called on the city police to meet the train and investigate. The train dispatcher testified:

"I sent the call boy over to call the city police to tell them that No. 67 would be there about 12:30, and that these parties inside defied the conductor at Reisor and wouldn't allow him to see their transportation, and I wished they would come down and see into it."

Further, on cross-examination, he testified:

"My duties are various; among them it is my duty to cause the ejection of people riding on the trains when I consider them trespassers. These men I considered trespassers, and summoned the officers for that purpose."

When the car arrived at Marshall some hours later, two city policemen, accompanied by a deputy sheriff whom they had called in, and the yardmaster, went to the car, and after some delay succeeded in gaining an entrance. Diefenbach, Buck, Martin, and Doran all testified that they were asleep when the car arrived at Marshall, and opened up the car as soon as they were aroused. The two policemen and the deputy sheriff testified that they knocked and called and shook the car door for some time, demanding entrance, and that it was only after the yardmaster called out that the car should be set out that it was opened.

The officers entered the car and arrested Buck, Diefenbach, Martin, and Doran, and, refusing to look at the transportation offered for the last three, handcuffed the four and carried them before the train dispatcher. The officers did not find Corrigan and Muller, although the two men were in the car and were unprovided with transportation. In arresting Diefenbach, the deputy sheriff struck him with a billy. Diefenbach says, without provocation. The deputy sheriff says that, when he entered the car, Diefenbach said, "Who in hell are you?" "I told him who I was, and he says 'To hell with you,' and drew back and hit me. I had a billy and I hit him."

When the parties arrested were carried before the train dispatcher, he examined their papers and held that Diefenbach had a contract and had a right to go in the car; that Martin and Doran had return contracts which entitled them to return transportation, and that they ought not to be held, and that as Buck had no transportation he had no right to be in the car; and thereupon Diefenbach, Martin, and Doran were allowed to proceed with the car, and Buck was held under arrest and subsequently carried before the city court, where, after some talk, he pleaded guilty to riding on a railroad train without a ticket, and, on payment of a fine, was released.

The record showed that Buck testified that he had money enough with him to pay for his transportation, and that Diefenbach testified that he had the money to pay for the transportation of Mulner and Corrigan, and that after leaving Marshall and at Mineola he did, through Martin, buy tickets for Mulner and Corrigan from Marshall to Mineola, and from Mineola to Dallas. If Diefenbach at any time bought any tickets for Mulner and Corrigan from Shreveport to Marshall, the transcript does not show.

On the trial in the court below, Diefenbach recovered a verdict and judgment of \$1,400; John Doran recovered a verdict and judgment of \$800; Lee N. Martin recovered a verdict and judgment of \$800; and A. E. Buck recovered a verdict and judgment of \$1,400. Hereinafter the plaintiff in error will be designated as the company, and the defendants in error, plaintiffs below, as the plaintiffs.

The errors assigned cover nearly all the matters contained in the judge's charge and in the requests refused, but we need not deal with them seriatim. The undisputed facts in the case up to the time the car containing the plaintiffs reached Marshall furnish the standpoint from which to determine the rights and duties of the parties and the effects of the subsequent proceedings. The car in which plaintiffs went from Shreveport to Marshall and from which they were forcibly removed was not one intended or used for the carriage of persons, except in connection with live stock therein, and no person had the right to ride in such car except under previous contract with the company or by permission previously obtained on fare paid in advance. The car itself, while in transit, was not accessible to the company's agents for the collection of fare or the taking up of tickets. This car left Shreveport with six men therein, three of whom had transportation over the road and three without transportation, but under the promise or understanding that the latter should get tickets at Reisor. It is

also undisputed that although there was plenty of time no tickets were obtained at Reisor, nor was any effort made to obtain tickets, but, on the contrary, on the practically undisputed evidence of the company's agents, the car was kept closed, information refused, and access denied. From Reisor the car with the men therein was carried on to Marshall, and at Marshall, by the practically undisputed evidence, it was kept closed until after much rapping and a threat was made to set the car out. The only dispute to this fact is the evidence of plaintiffs that they did not hear the rapping or the threat to set the car out.

Under generally recognized law, the carrier of passengers has a right to eject with as much force as necessary all persons liable to pay fare who have not paid and who refuse to pay. By the law of Texas it is a misdemeanor to board a train without lawful business, without proper consent, and with intent to obtain a free ride. White's Ann. Pen. Code, art. 1010h. Now, under the law and the facts, as hereinbefore recited, was a case made wherein the company was authorized to call in the local police to open the car and ascertain who among the occupants were without proper transportation and eject them as trespassers? Of this we have little doubt. The time was in the middle of the night. The ordinary agents of the company had failed to accomplish anything at Reisor, and without extra assistance there was much reason to expect the same and as effective opposition in Marshall as at Reisor, at best resulting in either delaying the train or compelling the car to be set out for daylight. If the company had a right to call on the local police to eject the trespassers from the car, how far is it liable for any excesses resulting? In regard to this, the trial judge practically charged the jury that in dealing with the plaintiffs the police were the company's agents, and that the company was responsible for all their acts.

The case shows that the train dispatcher, McMahon, who called in the police, had the authority of the company, and particularly to eject trespassers; therefore all question as to the scope of the agency is eliminated, and with this question out, the authorities are practically unanimous as to the correctness of the rule in regard to the liability of the company for the acts of its agents. Citations of textbooks and adjudged cases are unnecessary.

The liability of the company for the acts of the police being established, we find the charge of the court in reference thereto in the cases of Diefenbach, Doran, and Martin correct, and the exceptions in that behalf not well taken.

The charge of the court as to the forfeiture of passenger rights on the part of Diefenbach, Doran, and Martin, as follows:

"If you believe from the evidence that the plaintiffs Diefenbach, Doran, and Martin, all and each of them, conspired and confederated among themselves and with the plaintiff, A. E. Buck, and with one Charles Mulner and William Corrigan, to have the latter three persons carried on said car from Shreveport to Dallas without the payment of fare, and that, in carrying out such conspiracy and confederation, they and each of them, together and in common with the said three named persons, closed and fastened the doors of said car in which they were riding, and knowingly refused to open the same at the request of the conductors and employes of the defendant when the

latter sought to ascertain who were in said car or to identify the passes and inspect the contracts of carriage of those holding same or to collect fares from or to eject those who were occupying said car without right, if such there were, then you are charged that the said Diefenbach, Doran, and Martin were no longer entitled to the rights and protection of passengers, and became trespassers, and the defendant, through its agents or servants, or through peace officers, had the right to eject and expel said parties from said car upon the opening by them of the doors thereof while same was at Marshall"—

while correct as a general proposition, it, under the evidence in this case, is too restricted and limited, and therein prejudicial to the company and calculated to mislead the jury.

There were three cases under consideration, and, under the charge, it was necessary, in order to find a forfeiture of passenger rights, for the three plaintiffs to conspire with the three trespassers in the car to do the acts suggested with the intent to have the three trespassers carried without paying fare. As we understand the law, if either one of the three plaintiffs who possessed the rights of a passenger, for any improper purpose closed and fastened the doors, and knowingly refused to open the same at the request of conductors and employes of the company when the latter sought to ascertain who were inside the car or to identify the passes and inspect the contracts of carriage of those holding the same, then the jury would be authorized to find that such plaintiff had forfeited his right as a passenger so far as was necessary to carry out the rules and regulations of the company.

It may well be that Diefenbach, who admitted he had the money to buy tickets for Mulner and Corrigan, and whose duty it was to buy such tickets before entering on the trip, should keep the doors closed and the agents of the company out while Martin and Doran, who had no apparent interest in the matter, should take no steps therein.

In regard to the refusal of the charges requested, we find the tenth and twelfth requests worthy of consideration as propositions of law applicable to cases before the jury, and their substance not included in the general charge. The tenth request was as follows:

"It appears that Diefenbach promised at Shreveport to get tickets for Corrigan and Mulner at Reisor, and that by reason of that promise Mulner and Corrigan were allowed to enter the car and be carried to Reisor; then it was his duty to have procured tickets at Reisor, and Corrigan and Mulner would be on the car without right after they passed Reisor, even if they were asleep when the car passed Reisor."

In view of the character of the case and its bearing on the wantonness of the company in calling on the police, the company had a right to have the jury instructed as to whether Diefenbach's assistants, Mulner and Corrigan, admitted to have been in the car, were trespassers, and, if they were, bearing on the right of recovery, Diefenbach's responsibility therefor. The twelfth charge, which is as follows:

"If you believe from the evidence that the persons on the train holding transportation refused to show same, when demanded by the conductor, and that the other persons on the train did not, as promised, buy tickets at Reisor, and refused to show their tickets or to pay fare when demanded by the conductor, then you are instructed that from that time they became trespassers, and the defendant had the right to remove them from the train"—

seems to be correct in law, and to bear directly upon the issues in the case.

In Buck's Case the trial judge charged the jury as follows:

"As to the plaintiff A. E. Buck, you are charged that the undisputed evidence showed he took passage in the stock car at Shreveport with the knowledge and consent of the defendant's agent at Shreveport and of the defendant's conductor in charge of the train from Shreveport to Reisor; that the plaintiff Buck promised the said agent and the conductor he would purchase and pay for tickets at Reisor entitling him to be carried from Shreveport to Dallas, and the undisputed evidence establishes the fact that the plaintiff Buck did not purchase and pay for such tickets at Reisor. You are therefore instructed in any event that the plaintiff Buck became and was a lawful passenger in said car from Shreveport to Reisor. As to whether he continued to be a lawful passenger after the car left the station of Reisor depends upon the existence of the facts as you may find them to be from the evidence. If the plaintiff, Buck, when he took passage in the car at Shreveport, was possessed of sufficient money with which to purchase and pay for a ticket at said Reisor entitling him to ride in said car to Dallas, and if when he took passage at Shreveport he intended in good faith to purchase and pay for such ticket, and if when the station of Reisor was reached he, by reason of being asleep was unaware of that fact and was not awakened at said station, and was not thereat demanded to pay his fare or buy a ticket, and if the plaintiff would have paid his fare or purchased and paid for a ticket at some other station intervening the station of Reisor and the city of Dallas, the payment of which fare or the purchase of which ticket would have entitled him to transportation from Shreveport to Dallas, then you are instructed that the plaintiff herein continued to be a lawful passenger when said car arrived at Marshall, Tex."

and refused requests of the defendant as follows:

"The fact that the plaintiff A. E. Buck was the owner of some of the horses shipped under the contract entered into by and between W. O. Foote and the defendant would not entitle the said Buck, under the contract with the said Foote, to transportation, and the sole ground on which said Buck was admitted to take passage in said car being that he would at Reisor procure transportation for himself, it was the duty of said Buck to see that said condition was performed as promised, and if he failed to purchase said ticket, as he had agreed to do, then he could no longer claim the rights of a passenger upon defendant's train; but upon failure to procure said ticket at Reisor, and still continuing to remain upon defendant's train, he became a trespasser therein, and defendant had the right to remove him from said train, using such force only as was necessary to accomplish that purpose."

We think that, in the charge as given and in the requests refused, the trial judge erred to the decided prejudice of the company.

As before stated, the car in which Buck entered and remained to pursue his journey was not used for the general transportation of passengers. It was a stock car on a fast freight line, with no facilities or opportunities for the company's agents to pass through and inspect while the train was moving, to take up tickets or collect money fares, even if, as is not shown, the company's train men were authorized to collect and receive money fares. No person was invited by the company to travel in this car, nor under the rules was any person permitted to be carried therein, unless in connection with a contract of the company to carry live stock or on permission with transportation previously paid. Buck understood this fully from the conversations at Shreveport, and he was only allowed to go to Reisor under the promise then and there to buy a ticket. As he failed at Reisor

to buy a ticket, no matter for what reason satisfactory to himself, yet continued on in the car from Reisor, he was not a passenger, and he was unlawfully in the car, and the company had the right to treat him accordingly. *Atchison, etc., R. v. Headland*, 18 Colo. 477, 483, 33 Pac. 185, 20 L. R. A. 822; *Cleveland, etc., R. R. v. Bartram*, 11 Ohio St. 463 et seq.; *Gardner v. New Haven R. R.*, 51 Conn. 143, 50 Am. Rep. 12. See *Sevier v. Vicksburg*, 61 Miss. 8, 48 Am. Rep. 74; *Texas & Pacific R. R. v. James*, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

For the errors herein pointed out, all the judgments are reversed, and the cases remanded to the Circuit Court with instructions to award new trials.

SHELBY, Circuit Judge, dissents.

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SHUBERT et al. v. WOODWARD et al.†

(Circuit Court of Appeals, Eighth Circuit. February 4, 1909.)

No. 2,954.

1. APPEAL AND ERROR (§ 100\*)—ORDER FOR PRELIMINARY INJUNCTION WHERE OPPOSING AFFIDAVITS DISREGARDED A "HEARING IN EQUITY" APPEALABLE.

Where, in response to an order to show cause why an injunction should not issue, the defendants present admissible opposing affidavits and letters, the court refuses to read or hear them, and orders an injunction until the further order of the court, there is a hearing in equity within the meaning of Act April 14, 1906, c. 1627, 34 Stat. 116 (U. S. Comp. St. Supp. 1907, p. 208), and the order is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 673; Dec. Dig. § 100.\*]

2. APPEAL AND ERROR (§ 837\*)—SUCH AFFIDAVITS AND PROOFS CONSIDERED IN APPELLATE COURT.

Pertinent affidavits and admissions constitute competent evidence in opposition to an application for an injunction, and, although disregarded by the trial court, they must be considered by the appellate court, for the only question in that court is whether or not the order below is sustained by the admissible evidence in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3263, 3276; Dec. Dig. § 837.\*]

Additional proofs in appellate court without trial de novo, see note to *Ridge v. Manker*, 67 C. C. A. 600.]

3. APPEAL AND ERROR (§ 863\*)—ON APPEAL FROM TEMPORARY INJUNCTION OR RECEIVERSHIP APPELLATE COURT MAY DETERMINE EQUITY OF BILL.

Where, on an appeal from an order for a preliminary injunction or from an order appointing a receiver, the equity of the bill is challenged upon substantial grounds, the appellate court may, and it should, consider the question, whether the court below has done so or not, and if it is of the opinion that the relief sought cannot be ultimately granted it should so decide, to the end that all parties may be saved further expense over the endeavor to secure impossible relief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3450; Dec. Dig. § 863.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 18, 1909.



4. INJUNCTION (§ 59\*)—AGAINST BREACHES OF A CONTRACT IS SPECIFIC PERFORMANCE OF IT.

An injunction against all breaches of a contract is in effect a decree for its specific performance, and the general rule is that the power and the duty of a court of equity to grant one is measured by the same principles, rules, and practice as its power and duty to grant the other.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 114; Dec. Dig. § 59.\*]

5. SPECIFIC PERFORMANCE (§ 8\*)—INJUNCTION (§ 135\*)—DISCRETION OF COURT.

The specific performance of contracts and the issue of injunctions are not matters of right. They rest, not in the arbitrary or whimsical will, but in the judicial discretion, of the court, informed and guided by the established principles, rules, and practice in equity, which are advisory rather than mandatory.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 8;\* Injunction, Cent. Dig. § 304; Dec. Dig. § 135.\*]

6. SPECIFIC PERFORMANCE (§ 32\*)—MUTUALITY OF OBLIGATION AND REMEDY ORDINARILY ESSENTIAL TO SPECIFIC PERFORMANCE.

The general rule is that specific performance of a contract will not be enforced by a court in favor of a party to it against whom the court has no power to effectually compel its performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 89; Dec. Dig. § 32.\*]

7. SPECIFIC PERFORMANCE (§ 73\*)—CONTRACTS FOR PERSONAL SERVICES NOT GENERALLY SPECIFICALLY ENFORCEABLE.

The general rule is that courts of equity will not by order, decree, or injunction attempt to compel one to perform a contract to employ, or to continue the employment of, a servant or officer to render personal services which require the exercise of cultivated judgment, special knowledge, experience, skill, or taste, because they are without adequate power to compel such a servant or officer to perform such services effectually.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 206; Dec. Dig. § 73.\*]

8. SPECIFIC PERFORMANCE (§ 75\*)—CONTRACTS FOR SERIES OF ACTS THROUGH MANY YEARS NOT GENERALLY ENFORCEABLE.

The general rule is that courts of equity will not enforce the specific performance of a contract, in the absence of a public interest or other controlling equities, where such performance cannot be compelled by a speedy final decree, but will entail upon the courts through many years the supervision and direction of a continuous series of acts involving many details, and will require the frequent exercise of judgment and special knowledge or experience.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. § 75.\*]

Of contracts requiring performance of continuous acts, see note to *Berliner Gramophone Co. v. Seaman*, 49 C. C. A. 103.]

9. SPECIFIC PERFORMANCE (§ 99\*)—INJUNCTION—PARTY IN DEFAULT.

Courts of equity will not ordinarily compel the specific performance of a contract by decree or by injunction against its violation at the suit of a party who is guilty of substantial breaches of it.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 300; Dec. Dig. § 99.\*]

10. SPECIFIC PERFORMANCE (§ 16\*)—INJUNCTION (§ 136\*)—DENIED WHERE GREATER INJURY PROBABLE FROM GRANT THAN FROM REFUSAL—GRANTED WHERE INJURY FROM REFUSAL GREAT AND CERTAIN, AND FROM GRANT SLIGHT AND REMEDIABLE.

Where the record shows that greater wrong and injury is likely to be inflicted upon the opposing party by granting a decree of specific per-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

formance or an application for an injunction than the moving party will suffer from its refusal, a court of equity should generally deny it.

But where the injury to the moving party from a denial will be immediate, certain, and great, while the loss or inconvenience to the opposing party from its grant will be comparatively small and susceptible to indemnification by a bond, and the questions involved are grave and difficult, a temporary injunction will generally be granted and sustained to maintain the status quo.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 35; Dec. Dig. § 16;\* Injunction, Cent. Dig. § 306; Dec. Dig. § 136.\*]

**11. INJUNCTION (§ 137\*) — RECEIVERSHIP — SPECIFIC PERFORMANCE — FACTS — CONCLUSIONS.**

A corporation, the owner of a theater, and the defendants, the owners of another theater, agreed that for five years the theaters should be separately operated under the control and supervision of the corporation; that W., its president, was appointed the representative of the corporation at a salary of \$50 per week, and that he was appointed the representative of the defendants at a like salary to be the general manager of the enterprises subject to the direction and orders of the defendants; that the defendants should appoint a treasurer of their theater, who should act under the supervision of the corporation; that the funds derived from their theaters should be deposited to their account; that they should pay the rent of their theater, and should cause it to be booked and played 30 weeks each season under a penalty of \$1,000 per week to be paid into the general fund; and that at the end of each year the profits derived from the two theaters should be put into a general fund, and that fund and the losses, if any, should be equally divided between the corporation and the defendants. W. was not a party to the contract. The defendants put the corporation and W. in possession of their theater, but W. disobeyed their orders relative to the scale of prices for admission to their theater, the day of the midweek matinee, the hiring and discharge of employés and the handling of the fund derived from their theater, and they discharged him and went into possession. The corporation and W. exhibited a bill for an injunction against the violation by the defendants of the contract and their interference with the possession, control, and management of their theater by the complainants, wherein they alleged that unless an injunction was issued they would sustain irreparable injury, in that they had incurred expenses in preparing to operate the theater, and in that they would lose profits to the amount of perhaps \$250,000. The defendants presented opposing affidavits and letters. Complainants obtained a temporary injunction as prayed, and an order appointing W. manager of their theater, and the defendants appealed.

*Held:* There was no such equity in the bill as would sustain the injunction sought, because the contract lacked mutuality of obligation and of remedy, because a grant of the relief would entail upon the courts for many years the supervision of a continuous series of acts, and would require the frequent exercise of judgment and special knowledge or experience, and there was no public interest and no controlling equities demanding it, and because greater wrong and injury would probably be inflicted upon the defendants by its grant than the complainants would suffer from its refusal.

(2) For the same reasons, and because the record, including the opposing affidavits and letters, convinces that the complainants had committed substantial breaches of the contract before they filed their bill, the injunctive orders and the order appointing W. general manager cannot be sustained, and the complainants should surrender the possession of the theater to the defendants.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 307; Dec. Dig. § 137.\*]

(Syllabus by the Court.)

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
167 F.—4

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This is an appeal from an order granting a temporary injunction against the breach by the appellants of an agreement made on May 4, 1908, between the Woodward & Burgess Amusement Company, the complainant below, and the defendants and appellants, Lee Shubert and Jacob J. Shubert, relative to the operation of two theaters at Kansas City owned by them respectively. By that contract the amusement company agreed that it had a lease of its theater for 10 years, that it would pay the rent under that lease, and that its theater should be operated as a place of amusement at prices of admission which should not be higher than \$2 nor lower than 25¢. The Shuberts agreed that they had a lease for 10 years of their theater, that they would pay the rent under that lease, that they would cause their theater to be carried on as a place of amusement at prices of admission not higher than \$1 nor lower than 25¢, that they would fill at least 30 weeks each season at their theater, and would pay into the general fund \$1,000 for each week less than 30 booked and played therein. The amusement company drew the contract, and submitted it to the Shuberts for signature. The Shuberts wrote into the fourth and eighteenth paragraphs of it the words underlined below, and then the contract was signed. The fourth, seventh, eighth, and eighteenth paragraphs read in this way:

"Fourth. The party of the first part hereby appoints and designates O. D. Woodward as its representative at the salary of \$50 per week and the second parties hereby appoint and designate O. D. Woodward as their representative at a salary of \$50 per week to be the General Manager of the enterprises herein referred to. *But said representative to be subject to direction and orders from the 2nd party hereto.*"

"Seventh. The party of the first part agrees to take general supervision and control of both of said theaters and the business in connection therewith and to make no charges for its services in so doing.

"Eighth. It is further agreed that the parties of the second part shall name and appoint a treasurer for the Sam S. Shubert Theater in Kansas City, Missouri, said treasurer to be under the supervision of the party of the first part *but who shall have no power to discharge said treasurer.*"

"Eighteenth. The Shubert Theater is to be booked in the offices of Lee & J. J. Shubert in New York City, all contracts to go to O. D. Woodward for approval and signature; the house program to carry the announcement 'Under the Management of the Woodward & Burgess Amusement Company and Lee and J. J. Shubert.' *All funds of the Shubert Theater shall be deposited by the treasurer thereof to the credit of the Shubert account and surplus distributed at end of season as herein provided.*"

The parties further agreed by this contract that there should be charged into the general expenses of each of the theaters \$20,000 per year as rental therefor; that each of the theaters should keep true books of account of all moneys received and paid out, should send daily statements of its receipts and weekly statements, which should show its profits and losses to each of the parties; that each of the theaters should be operated as an independent enterprise; that on June 30th of each year the profits or losses of each theater should be ascertained; that the net profits of both theaters should be paid into a general fund, and should be divided equally between the parties to the contract, and that the losses of both theaters should be divided in the same way; and that the term of the agreement should be five years, and the amusement company should have the option to continue the term for five years longer.

O. D. Woodward was and is the president of the amusement company, and in May, 1908, the Shuberts placed the amusement company and Woodward in possession of their theater, and they proceeded to prepare it for the season commencing in September, 1908. Before the 3d day of September, 1908, numerous controversies arose between the parties respecting the authority of the Shuberts to order and direct the course of management of their theater under the contract. Woodward and the amusement company disobeyed Shuberts' orders in relation to the price of admission, the matinee days, the

employés, and the expenditure of the fund deposited to the credit of the Shubert account. Thereupon the Shuberts discharged Woodward, and on September 3, 1908, the amusement company, and Woodward exhibited their bill in one of the courts of the state of Missouri, in which they set forth the contract, alleged that the Shuberts were about to break it and to take possession of their theater, that this action would result in irreparable injury to the complainants, and prayed that the Shuberts and C. A. Bird, their agent, might be enjoined from violating the contract and from interfering with the possession, control, and management of the Shubert Theater. The court restrained the defendants from taking possession of their theater, and ordered them to show cause why an injunction should not issue as prayed. The suit was then transferred to the United States Circuit Court below, where on September 10, 1908, the order to show cause came on for hearing pursuant to due notice. On that hearing the defendants, in answer to the order to show cause and in opposition to the order for the injunction, filed and presented to the court below 10 affidavits and more than 20 letters between the parties, but the court declined to read them or to hear them. The complainants, probably for that reason, presented no affidavits in response, and the court on September 14 and September 23, 1908, granted and continued an injunction against the violation of the contract by the defendants. On October 2, 1908, the fact that the parties were unable to agree what the contract meant and what acts were in violation of it was made to appear to the court, and it thereupon appointed Woodward general manager of the defendants' theater, and authorized and directed him to manage it according to the terms of the contract, and authorized the defendants to appoint a treasurer for this theater, and it appointed a master to determine what disputed expenses incurred by Woodward should be paid by the treasurer. The defendants appealed from the orders of September 14th and 23d and October 2d.

The order granting the injunction was made on September 14, 1908, and was amended on September 23, 1908. At the time these orders were made, the rights of the parties relative to the order for injunction were measured by the proofs presented by the complainants' bill filed on September 14, 1908, under an order of repleader and the letters and affidavits presented by the defendants in answer to the order to show cause. In that bill the complainants set forth the contract, alleged that under it they were entitled to the possession and management of the Shubert Theater for five years, with an option of an extension of the term for five years more; that they entered into the possession and control of the theater in June, 1908; that they hired the employés, advertised the theater, and expended a great deal of time and labor about the details necessary to perform the contract; that they were about to open the theater on September 6, 1908; that the defendants were seeking to disregard the contract with the amusement company, and to deprive Woodward of his rights under the contract, and were threatening and attempting to take exclusive possession of the theater, to discharge the employés hired by the complainants, and to prevent them from proceeding under the contract. They alleged that they had spent a great deal of time and money in carrying out the contract, and that if the defendants were permitted to disregard it the complainants would suffer great financial loss, permanent damage, and irreparable injury; that the profits by the operation of the contract during the time named therein would probably be very large, exceeding perhaps \$250,000, but that from the fact that they were all prospective there was no way by which the damage to the complainants could be ascertained if the acts of the defendants were permitted to continue. And they prayed for an injunction against the defendants enjoining them from disregarding the contract and from interfering with the possession, control, and management of the Shubert Theater under the contract, and from interfering with the rights of the complainants thereunder.

The opposing affidavits proved that before the original bill was filed the complainants had disobeyed the order of the Shuberts, which prescribed the scale of prices for admission to the Shubert Theater within the limits fixed by the contract, and that they had prescribed other prices which would in many instances cause a difference in the gross receipts of the theater of as much as \$1,000 for a week's engagement, and might easily convert what ought

to have been a profit into a loss; that the complainants had shifted the midweek matinee of the Shubert Theater from Wednesday to Thursday in violation of the direction of the Shuberts, and that this change would greatly diminish the earnings of the theater; and that Woodward had refused to recognize the right of Miller, the treasurer of the Shubert Theater, appointed by the Shuberts pursuant to the contract, to determine the validity of claims against the funds deposited to the credit of the Shuberts' account under the nineteenth paragraph of the contract, and his right to sign the checks thereon, and had insisted that Woodward had the right to sign checks and handle the house along the same lines as he handled every other house with which he was connected; that thereupon the Shuberts had discharged Woodward and had taken possession of the Shubert Theater.

James C. Jones and J. C. Rosenberger (Jones, Jones, Hocker & Davis and Kersey Coates Reed, on the brief), for appellants.

John H. Lucas (Thompson, Stanley & Price and Johnson & Lucas, on the brief), for appellees.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). The complainants pray in their bill, and the orders challenged grant, a temporary injunction against the violation by the defendants of the contract of May 4, 1908. The act of Congress which confers jurisdiction of appeals from orders granting or continuing injunctions provides that an appeal may be taken where "upon a hearing in equity" such an order is made (Act April 14, 1906, c. 1627, 34 Stat. 116 [U. S. Comp. St. Supp. 1907, p. 208]), and counsel insist that these orders are not appealable, (1) because they grant an injunction until the further order of the court, but an injunction until the further order of the court is equally appealable with one until a time certain, and (2) because when the defendants presented their affidavits and letters in answer to the order to show cause why the injunction should not issue against them, the court declined to hear these affidavits and letters or to hear counter affidavits which were not prepared and hence do not appear in the record, and granted the injunction without regard to these proofs for the purpose of maintaining the existing state of affairs until the validity and construction of the contract could be judicially determined at the final hearing of the suit. But the affidavits and letters presented by the defendants constituted admissible evidence in their behalf in opposition to the order for the injunction. Either party may read pertinent affidavits and admissions at such a hearing. Equity Rule 55; Bates on Federal Equity Procedure, § 534; 3 Daniel, 275, 297. These affidavits and letters were introduced in response to the order to show cause at the proper time in the presence of the court and counsel, and at the hearing upon which the court decided to grant the injunction. A hearing by a federal court in equity at which the admissible evidence of a litigant is disregarded and an order or decree is rendered against him is no less a hearing in equity than one in which his evidence is considered, and the orders granting the injunction were appealable.

Moreover, whether the court below considered the affidavits and letters or not, the appellate court may not lawfully disregard them,

because upon an appeal in equity the question always is in a national appellate court whether or not the order or decree challenged is sustained by the competent and relevant evidence presented by the record before it. *Blease v. Garlington*, 92 U. S. 1, 8, 23 L. Ed. 521; *First National Bank v. Abbott* (C. C. A., filed November 24, 1908) 165 Fed. 852; *Missouri American Electric Co. v. Hamilton Brown Shoe Co.* (C. C. A., filed November 16, 1908) 165 Fed. 283; *Dreutzer v. Frankfort Land Company*, 65 Fed. 642, 644, 13 C. C. A. 73.

The injunctive orders in this case are unique. They enjoin the defendants from interfering with such management and control of the Shubert Theater by the complainants "as is granted unto complainants in and by the written instrument set out in plaintiffs' petition," and they enjoin the complainants from interfering with the management of the theater, "except under the exact terms specified in the contract made between the parties," declare that it is the express object of the orders "to compel a strict observance of the rights granted by and the obligations incurred by the terms employed in the contract until its validity or invalidity may be determined on full proofs by final decree," and that in case dispute should arise between the parties, application may be made to the court for temporary construction of the contract and for further orders. When these orders were made on September 14th and September 23d respectively, the record was replete with proof that an irreconcilable conflict had arisen between the parties over the construction of the contract before the suit was commenced; and on October 2, 1908, upon further application, the court ordered that Woodward should exercise the powers of general manager of the theater and of its business, "subject, however, to the provisions of the contract in all respects"; that the defendants' treasurer should exercise the powers of a treasurer; that disputes about claims for expenses should be determined by a special master who was appointed by the order; and that the purpose of the order was "to preserve the status of the property and require the operation and conduct of the business of the Shubert Theater in strict accordance with the contract between the parties." It is clear from a review of these orders that their legal effect was to enjoin the defendants from committing any breach of the terms of the agreement of May 4, 1908.

An injunction against the breach of a contract is a negative decree of specific performance of the agreement, and the general rule is that the power and the duty of a court of equity to grant the former is measured by the same rules, principles, and practice as its power and duty to grant the latter relief. 4 *Pomeroy's Equity Jurisprudence* (3d Ed.) § 1341; *General Electric Co. v. Westinghouse Elec. & Mfg. Co.* (C. C.) 144 Fed. 458, 463; *Welty v. Jacobs*, 171 Ill. 624, 631, 49 N. E. 723, 40 L. R. A. 98; *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, 60, 22 N. E. 616. This, like most general rules, is not without its exceptions, under which injunctions may be lawfully issued to restrain the performance of specific acts in violation of agreements whose specific performance the courts would not completely enforce, as where certain acts violative of an agreement con-

stituted an infringement of complainant's patents (General Electric Co. v. Westinghouse Electric Co. [C. C.] 151 Fed. 664, 675), or a breach of a partnership agreement (Leavitt v. Windsor Land & Investment Co., 54 Fed. 439, 443, 4 C. C. A. 425), although a court of equity will not enjoin all breaches of a partnership agreement and in that way enforce specific performance of it (Marble Co. v. Ripley, 10 Wall. 339, 350, 19 L. Ed. 955), or the violation of a negative covenant, express or implied, where the prohibition will have the effect or tendency, as in the case of a singer's or of a ball-player's contract, to compel performance of the agreement (Lumley v. Wagner, 1 De Gex, M. & G. 604; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 974, 58 L. R. A. 227, 90 Am. St. Rep. 627; Singer Sewing-Machine Co. v. Union Button Hole & Embroidery Co., 1 Holmes, 253, 22 Fed. Cas. No. 12,904; Chicago & A. R. R. Co. v. N. Y., L. E. & W. R. R. Co. [C. C.] 24 Fed. 516, 520; McCaull v. Braham [C. C.] 16 Fed. 37; Goddard v. Wilde [C. C.] 17 Fed. 845); but a prohibition of the complainants from managing other theaters would have no tendency to compel them to manage the Shubert Theater according to the agreement, and in the absence of such a tendency this contract lacks mutuality, or where the validity of the contract conditions the right to the possession and a court forbids a forcible taking until the soundness of the agreement can be determined (Western Union Co. v. St. J. & W. Ry. Co. [C. C.] 3 Fed. 430), but the validity of this contract is not determinative of the right of possession of the Shubert Theater. The case at bar does not fall under any of these exceptions, and it is governed by the general rule. The bill is not leveled at any specific violation or any specified series of breaches of the agreement. It charges that the defendants are seeking to disregard their contract, and it prays for a single relief, and nothing more, that the defendants may be enjoined "from disregarding said contract, and from interfering, or attempting to interfere, with the possession, control, and management of said Shubert Theater under said contract, or in any way interfering with the rights of these complainants thereunder." It is a bill for the complete specific performance of the contract by injunction, and the orders for the temporary injunction are as broad as the bill. Neither the bill nor the orders for the injunction can be successfully maintained unless it was the duty of the court below upon the record before it to compel temporarily the specific performance of the contract.

The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practice of equity jurisprudence. Hennessey v. Woolworth, 128 U. S. 438, 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast, or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience,

and by them the judicial discretion of the court must be guided. *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 676, 57 C. C. A. 428.

Specific performance will not ordinarily be decreed in favor of a party to a contract against whom the court cannot efficiently compel its performance. The obligation and the remedy under the contract must be mutual. 2 *Beach on Contracts*, 885, and note 1; *Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L. Ed. 955; *Fry on Specific Performance of Contracts* (3d Ed.) §§ 440, 441; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Lancaster v. Roberts*, 144 Ill. 213, 223, 33 N. E. 27; *Chicago Municipal Gas Light & Fuel Co. v. Town of Lake*, 130 Ill. 42, 60, 22 N. E. 616; *Ogden v. Fossick*, 32 L. J. Eq. (N. S.) 73; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Richmond v. R. R. Co.*, 33 Iowa, 422. There are exceptions to this rule, as where the specific performance of the complainant's covenants which are not susceptible to enforcement by the court has been completed before he institutes his suit. *Burnell v. Bradbury*, 67 Kan. 762, 764, 74 Pac. 279; *Bigler v. Baker*, 40 Neb. 325, 333, 334, 58 N. W. 1026, 24 L. R. A. 255; *Green v. Richards*, 23 N. J. Eq. 32, 35; *Boyd v. Brown*, 47 W. Va. 238, 249, 34 S. E. 907. But in the case at bar the complainants have not substantially performed their part of the contract, nor can they do so for more than four years to come. There are authorities in which courts have sought and found some reason or excuse in the particular facts of cases to take them out of the rule, as in *Jones v. Williams*, 139 Mo. 1, 92, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436, and *Joy v. St. Louis*, 138 U. S. 1, 50, 11 Sup. Ct. 243, 34 L. Ed. 843. But it is both unreasonable and unjust for a court of equity to constrain one party to an agreement to specifically perform it when it is without power to compel the other party to do so and he may escape its performance at will, and the general practice as well as the weight of authority sustains the rule.

The amusement company agreed by the fourth, seventh, eighteenth, and nineteenth paragraphs of the contract that it would supervise and control without charge, and that Woodward should manage for \$50 per week, the Shubert Theater, subject to the orders and directions of the Shuberts, that Woodward would approve the bookings of the theater, and that its funds should be deposited to the credit of the Shuberts' account by a treasurer appointed by them. Neither the amusement company nor the court, however, has the power to efficiently compel Woodward to do any of the things here required to be done by his personal services, because he is not a party to the contract, he has not agreed to do as the contract recites, and because, if he had signed and agreed, the examination and approval of the bookings and the suitable management of the theater are personal acts whose rightful performance requires special knowledge and experience in the business of operating theaters, and the exercise of skill, discretion, and cultivated judgment, and in the end rests wholly in the will of Woodward. Courts of equity have no efficient means, and therefore will not ordinarily attempt, to constrain an individual to perform personal acts which require special knowledge and experience and the exercise of



skill, discretion, and cultivated judgment. *Pomeroy on Contracts*, §§ 307, 310; *Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L. Ed. 955; 26 *American & English Encycl. of Law* (2d Ed.) p. 95.

It is true that where the performance of negative covenants, express or implied, will tend to constrain the performance of positive covenants for personal services, an injunction may sometimes lawfully issue for that purpose, but neither the amusement company nor Woodward is subject to any negative covenant in this case, whose performance would tend to cause Woodward to approve suitable bookings and to disapprove those which are unsuitable, or to manage the theater wisely and well, and there are no efficient means by which a court of equity could compel him to do so.

Counsel argue that the contract of the amusement company was not that Woodward, the individual, but that Woodward, as its president, should manage the theater and approve the bookings; that these acts were not to be his personal acts, but those of the corporation, and that it may perform them by its agents. But the clear terms of the contract, the provision that the amusement company shall receive no compensation for its supervision, and that the Shuberts shall pay the individual Woodward \$50 per week, conclusively negative this contention. There is no logical way of escape from the conclusion that there is a lack of mutuality of remedy upon this contract between the amusement company and the Shuberts, and that there is neither mutuality of obligation nor of remedy between Woodward and the Shuberts; and as it is impossible for a court of equity to so constrain the will of Woodward as to make him rightly exercise his will, his cultivated judgment, his skill, and his discretion in the specific performance of this contract, the court ought not to compel the defendants to perform it.

Again, the enforcement of the specific performance of the contract in hand will necessarily entail upon the courts through many years the supervision and direction of a continuous series of acts, many of which will present the question whether or not they accord with the contract, such as, what bookings should be approved or disapproved, how many and what persons should be employed to operate the theater, how the intricate details of the business of the theater should be conducted, how its operation should be advertised, and many other unforeseen issues which the complicated performance contemplated cannot fail to raise. It is conceded that a court of equity has ample power to determine all these questions and to conduct this business by its receiver, or master, and that it will sometimes enforce the performance of contracts where the performance involves more intricate details, or longer periods of time, where the other equities of the complainant in the case, or the public interest, are controlling. But in the absence of such public interest, or such controlling equities, or of clear evidence that irreparable injury will probably result to the complainant if it withholds the relief sought, a court of equity does not constrain, and it ought not to compel, the enforcement of the specific performance of a contract which cannot be consummated by a speedy, final decree, but which involves the supervision of a continuous series of acts which must extend through a long period of time and which will require the exercise of special knowledge, judgment, and experience. The brevity

of time and the duty of the court to other litigants praying the determination of their suits ordinarily forbid a court to assume unnecessarily so burdensome a task. *Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L. Ed. 955; *Pomeroy on Contracts*, § 312; *Pullman Palace Car Co. v. Texas & Pacific Ry. Co.* (C. C.) 11 Fed. 625; *Texas & Pacific Ry. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; *Port Clinton R. R. Co. v. Cleveland & Toledo R. R. Co.*, 13 Ohio St. 544.

The issue of an injunction, like the specific performance of a contract, rests in the judicial discretion of a court of equity. It is not a matter of right, and the application for it is addressed to the conscience of the chancellor. It is an indispensable condition of a decree for the specific performance of a contract and of the issue of an injunction against its breach that the moving party has not been guilty of a substantial violation of it himself. He who seeks equity must come into court with clean hands. *Marble Company v. Ripley*, 10 Wall. 339, 358, 19 L. Ed. 955; *Taussig v. Corbin*, 142 Fed. 660, 667, 73 C. C. A. 656, 663. Did the record in this case at the time the injunction was issued show that the complainants had complied with their stipulations contained in the contract? The seventh paragraph of the agreement is that the amusement company will take general supervision and control of both theaters and of the business in connection therewith, and that it will make no charges for its services in so doing. The fourth paragraph stipulates that Woodward is designated its representative at a salary of \$50 per week, and that he is designated by the Shuberts as their representative at a like salary to be the general manager of the enterprises, "but said representative to be subject to direction and orders from the second party [the Shuberts] hereto." These two paragraphs must be read and construed together, because they are in the same contract and relate to the same subject. All their provisions must be harmonized and given effect if possible, but if there is any conflict between the sentence in quotation, which was written into the contract by the Shuberts after the writing was prepared by the amusement company, and the other provisions of the contract, the former must prevail, as that to which the especial attention of the parties was directed and as the expression of their final intent. *Pike's Peak Hydro-Electric Co. v. Power & Mining Machinery Co.* (C. C. A.) 165 Fed. 184. Thus read, the legal effect of these paragraphs is that the amusement company will supervise, control, and manage the Shubert Theater by means of the personal services of Woodward, subject to and in accordance with the directions and orders of the Shuberts. And this is the rational interpretation of the entire contract, for it is incredible that the Shuberts intended and agreed to part with all direction and control of their theater and of its business while they bound themselves to pay about \$20,000 a year rent for it, guaranteed to book and play 30 weeks in each season therein under a penalty of \$1,000 per week, and agreed that the surplus funds derived from its operation should be paid into a general fund with the surplus from the Wood Theater, and that the profits and losses of both should be divided between the parties.

By the second paragraph of the contracts the Shuberts covenanted to cause their theater "to be carried on and conducted as a place of amusement where the highest price of admission should be \$1 and the

lowest 25¢, according to the location of the seats," and the necessary legal effect of this provision was that they retained the right to fix the prices of admission within the limits there specified. They specified the prices within the contract limits after the contract had been signed, and notified Woodward that these prices must stand, but the latter disobeyed his direction and prescribed other prices.

Woodward asked permission of the Shuberts to change the midweek matinee at their theater from Wednesday to Thursday. They refused the permission and directed him to hold the matinees on Wednesdays, but he disobeyed their direction and made the matinee days Thursdays. In defiance of the direction of the Shuberts, he discharged the watchman and musical director whom they had employed for their theater, and hired other employes.

The eighth and the eighteenth paragraphs of the contract contain stipulations that the Shuberts should appoint a treasurer of their theater, to be under the supervision of the amusement company, which should not have the power to discharge him, and that all the funds of the theater should be deposited by this treasurer to the credit of the Shuberts' account, and that the surplus should be distributed at the end of the season. The effect of these provisions was that the treasurer appointed by the Shuberts was authorized to receive and to deposit the funds of the Shubert Theater to the credit of the Shuberts' account; that the Shuberts, the owners of this account, should themselves, by their treasurer or otherwise, pay the necessary expenses of the theater out of this fund, and at the end of the year pay the surplus into the general fund that was to be divided. The Shuberts appointed Mr. Miller the treasurer of their theater, and directed that he should receive and deposit all the funds of that theater, and should draw the checks and pay therewith the necessary expenses thereof after the bills therefor were approved by Mr. Woodward. But Mr. Woodward and the amusement company insisted that Woodward alone should determine and pay the expenses of the Shubert Theater, and that they would not permit him to divide this responsibility with Mr. Miller; and Mr. Woodward wrote to the Shuberts that "as long as I am manager of your theater in Kansas City, under the signed contracts, I shall at all times insist upon my right to sign all checks and handle the house along the same lines as I handle every other house with which I am connected." Thus it may be seen that the complainants had violated the contract between the parties before they commenced this suit. They did not come into the court with clean hands. After these violations of the orders of the Shuberts had been committed, they took possession of their theater, discharged some of the employes whom Woodward had hired, and, when Woodward personally appeared and claimed possession of and remained in the theater with the Shuberts, they discharged him as the manager of the theater for disobedience of their orders and insubordination. The complainants then applied to the state court in this suit for an injunction, and that court issued a temporary restraining order whereby the Shuberts were forbidden to interfere with the management, possession, or control of their theater by the complainants, and, under this order and the orders from which this

appeal was taken, the complainants have held the possession of the theater.

One of the principal purposes, and perhaps the main effect, of the orders granting and continuing the injunction, and of the order appointing Woodward manager of the Shubert Theater, is the prevention of the discharge of Woodward by the Shuberts and his maintenance in charge of the defendants' theater as their manager. Before this suit was commenced he had disobeyed the rightful orders of the defendants relative to the scale of prices for admission to the theater, to the hiring of employ  s, and to the midweek matinees, and relative to the control and disbursement of the fund derived from the theater, and the defendants had good cause to discharge him, and, even if they had no cause, injunction is not the proper remedy for his wrongful discharge. A court of equity is without power to compel Woodward to perform the duties of manager of this theater, because he has never made any agreement to perform them, and because the discharge of those duties requires the rendition of personal services which involve the exercise of cultivated judgment, taste, and experience, and, where a court is without power to compel an employ   to serve, the general rule is that it may not enjoin his employers from discharging him. *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. Cas. 410, 415; *Bainbridge v. Smith*, 41 Chan. Div. 462, 474, 475; *Davis v. Foreman*, 3 Chancery, L. R. 1894, 654, 656; *Pickering v. Bishop of Ely*, 2 Younge & Collyer's Chancery, 249, 266; *Coburn v. Cedar Valley Land & Cattle Co.* (C. C.) 25 Fed. 791, 793.

In *Stocker v. Brockelbank*, 20 L. J. Eq. (N. S.) Cas. 401, 408, the complainant, a patentee, had granted to Brockelbank & Co. an exclusive license under his patent, and had covenanted to serve them as general manager of their business for 12 years; and they had agreed that he should have the general management of their business during that time, that they would pay him 40 per cent. of the net profits during the time, and a gross sum at its end. They discharged him during the time, and he applied for an injunction. The chancellor denied the application, and said:

"Is there any instance (I am not aware of any—none has been cited; though my attention has been called at other times to questions of this nature, I do not recollect any) where it has been supposed that a contract of hiring and service could be made the subject of an application to this court, if the employer claimed the right to discharge his agent, or to dismiss his servant or his manager, or by whatever name the party to perform the service is to be denominated? I do not recollect any instance of any attempt on the part of a court of equity to compel the employer to retain the servant, agent, or manager, and not to forbear to leave him to his remedy at law for the breach of it. I know of no such case, and I should be surprised if that principle could be recognized by the court; for consider what the effect would be: How is it possible for an employer or an agent to go on in the intimate connection which such a contract is calculated to create? They are to be on the same premises, acting in the management of the same business in this case; and if there is mutual dissatisfaction, well or ill founded, it is perfectly clear that a management, conducted under such circumstances, must tend very much to the prejudice of the concern—in this case, I think, particularly."

Finally, it is a good defense to an application for an injunction that the wrong and injury likely to be inflicted upon the defendants by its issue is greater than that which the complainants are likely to suffer from refusing it. *Blount v. Société Anonyme Du Filtre, etc.*, 53 Fed. 98, 101, 3 C. C. A. 455, 458. The same rule governs the application for specific performance of contracts. *Adam's Equity*, by Ralston (8th Ed.) 84.

The complainants allege that their damages will be irreparable if an injunction does not issue, but the only damages they plead are those, the amount of which is not stated, resulting from changes in their business, the nature and extent of which they do not set forth, made for the purpose of performing the contract, and the prospective profits from its performance, which they aver "will probably be very large, exceeding perhaps \$250,000." But the defendants will lose as much by the loss of profits as will the complainants. The complainants are not the owners of and they have no interest in the Shubert Theater, except their interest in these profits, nor are they primarily liable to pay the rent or the other expenses of its operation. On the other hand, the defendants own the theater; any depreciation of its value, of its reputation, of its income, falls primarily upon them. They are bound to pay \$20,000 a year rent for its operation; they have agreed to book and play it 30 weeks in each season, or to pay a penalty of \$1,000 for each week less than the 30 which it is booked and played. The change of the midweek matinee, the disobedience of the defendants' orders fixing the scale of prices and directing the employment and discharge of servants, the general insubordination of their manager, and the pregnant fact that the management of the complainants is that of parties with comparatively little interest in the theater, while that of the defendants is the management of the owners of it, of those who have the largest interest in its income and its prosperity and the greatest responsibility for its rent and expenses, have forced the mind to the conclusion that a greater wrong and injury is likely to be inflicted upon the defendants by the issue and maintenance of the injunction and the order appointing Woodward the manager of this theater than is likely to fall upon the complainants by refusing to issue or to maintain the injunction or the order.

Counsel for the complainants invoke the familiar rule that a preliminary injunction maintaining the status quo may properly issue, and that an appellate court will not disturb it, when the questions of law or fact to be ultimately determined in the suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and susceptible to full indemnification by a bond if it is granted. *City of Newton v. Levis*, 25 C. C. A. 161, 163, 79 Fed. 715, 717; *Lehman v. Graham*, 135 Fed. 39, 43, 67 C. C. A. 513, 517; *Massie v. Buck*, 128 Fed. 27, 31, 62 C. C. A. 535, 539. But this rule is not applicable to the case in hand, because the record at the time the injunction issued proved that greater wrong and injury was likely to be inflicted upon the defendants by issuing than the complainants would probably suffer from withholding it. And the

same remark is applicable to the order appointing Woodward manager of this theater, an order which practically gives him the powers and authority of a receiver for the time being. There is another rule of practice more pertinent to the issues involved in this suit. It is that where, on an appeal from an order granting or continuing a temporary injunction, or from an order appointing a receiver, the equity of the bill is challenged and the attack upon it appears to be well founded, the power is conferred and the duty is imposed upon the appellate court to consider it, whether the court below has done so or not, and, if it is of the opinion that the relief sought by the bill cannot be granted, to so decide and thus to save the parties to the suit further expense resulting from the endeavor to secure impossible relief. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 524, 17 Sup. Ct. 407, 41 L. Ed. 810; *Highland Avenue R. R. Co. v. Equipment Co.*, 168 U. S. 627, 630, 18 Sup. Ct. 240, 42 L. Ed. 605; *Cabaniss v. Reco Mining Co.*, 116 Fed. 318, 320, 54 C. C. A. 190, 192; *Chicago Wooden Ware Co. v. Miller Ladder Co.*, 133 Fed. 541, 545, 66 C. C. A. 517, 521; *Arkansas Southeastern R. Co. v. Union Sawmill Co.*, 154 Fed. 304, 311, 83 C. C. A. 224, 231; *Mann v. Gaddie* (C. C. A.) 158 Fed. 42, 48.

This bill is for an injunction to prohibit the breach of a contract, and by that means to enforce its specific performance. Its equity is strenuously assailed, and it seems to be wanting. The question thus presented has accordingly been considered with care, and the conclusion is that there is no equity in the bill which entitles the complainants to the injunction for which they pray, because there is no mutuality of obligation between Woodward and the defendants; because there is no mutuality of remedy between the amusement company and the defendants, for the reason that the court is without power to compel the beneficial exercise by Woodward of his trained judgment, taste, and experience in the management of the theater and the approval of its bookings for which these parties contracted; because it would be an unwise and unusual exercise of the authority of the court, if it has such power, to prohibit the defendants from discharging Woodward as manager; and because the relief sought cannot be granted by a speedy final decree, but the attempt to give it must entail upon the courts through many years the supervision and direction of a continuous series of acts involving intricate details which will require the exercise of judgment and special knowledge or experience, and there are no public interests or controlling equities which require the court to assume so burdensome a task.

For the same reasons, and because the complainants first broke the contract, because the issue and maintenance of the injunction and of the order appointing Woodward manager of the theater of the defendants are likely to inflict greater wrong and injury upon the defendants than the complainants would suffer from the withholding of these orders, or their reversal, they may not be sustained.

The court below will not be directed to dismiss the bill, because this suit was not at issue when some of the orders here challenged were made, and the bill may have been amended, or it may be susceptible

of amendment, so that other relief than an injunction may be secured. The question has been discussed by counsel in their briefs whether or not the contract created a partnership between the amusement company and the Shuberts. It has been unnecessary to decide that issue in order to determine the questions now to be decided, and no opinion upon it is intimated. If either party should seek a receiver and dissolution of the partnership, or an accounting upon that ground, and such a partnership should be found to exist, it would seem that both theaters would be equally liable to a receivership and to the orders necessary to wind up such a partnership. The record at the time the order for an injunction was issued shows that when the original restraining order was made Woodward had been discharged as manager by the Shuberts, and they were in practical possession of their theater. They have been deprived of this possession and of the control of their property by the restraining order, the injunction, and the general management orders, and the court below should restore these to them. The orders from which this appeal was taken must be reversed, and the case must be remanded to the court below with directions to cause the complainants to deliver to the defendants the possession, control, and management of the Shubert Theater with all convenient speed, without prejudice to the rights of the complainants to damages for all alleged breaches of the contract by the defendants, to an accounting and to all other remedies except the injunction, the maintenance of Woodward in the management of the Shubert Theater, and the specific performance of the contract, and with instructions to take further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

And it is further ordered that the mandate in this case be remitted to the court below ten (10) days after the filing of this opinion.

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CHICAGO & N. W. RY. CO. v. KENDALL

(Circuit Court of Appeals, Eighth Circuit. February 9, 1909.)

No. 2,750.

1. COURTS (§ 376\*) — FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—QUESTIONS OF PROCEDURE.

The question whether a court has at common law the power to compel a plaintiff in an action for a personal injury to submit to a surgical examination is a matter of practice and not of evidence, and, as a matter of practice relating to the power of courts, neither state statutes nor the decisions of state courts on the subject are binding on federal courts under Rev. St. § 721 (U. S. Comp. St. 1901, p. 581), providing that, with certain exceptions, the laws of the several states shall be regarded as rules of decision in trials at common law in such courts, which as to such matters are governed by the decisions of the Supreme Court of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 984; Dec. Dig. § 376.\*

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COURTS (§ 376\*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—CONFORMITY STATUTE.

Under the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), decisions of state courts, unless made in construing local statutes, have never been regarded as controlling in the national courts, and neither under said section nor section 721 (U. S. Comp. St. 1901, p. 581), providing that with certain exceptions the laws of the several states shall be regarded as rules of decision in the courts of the United States, are state decisions construing the common-law rules of evidence obligatory on such courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 984; Dec. Dig. § 376.\*]

3. DAMAGES (§ 206\*)—EVIDENCE—PHYSICAL EXAMINATION OF PERSON INJURED—POWER AND DUTY OF COURT TO REQUIRE EXAMINATION.

Where the plaintiff, in an action for an injury to his knee, while on the witness stand voluntarily exhibited the injured knee for inspection by the jury, the defendant is entitled to require him to submit the same to a surgical examination, and the court has power independently of any statute to compel such submission.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 531; Dec. Dig. § 206;\* Discovery, Cent. Dig. §§ 92, 93.]

In Error to the Circuit Court of the United States for the Northern District of Iowa.

James C. Davis (Grimm, Trewin & Robbins and A. A. McLaughlin, on the brief), for plaintiff in error.

William Smyth (J. W. Jamison and C. J. Lynch, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This is an action to recover damages for personal injury. In his complaint plaintiff alleges that while he was stepping from a passenger train of the defendant, after it had stopped at the station for which he held passage, and the brakeman had called out the name of the station, the train was suddenly and violently backed, and he was thereby thrown down and his knee seriously and permanently injured. On the trial he took the witness stand in his own behalf, and while undergoing cross-examination was asked to expose his knee to the jury for inspection. Objection was at first made, but after some colloquy his counsel directed him to comply with the request. A question was then raised as to whether the injured knee was different from the other knee, and a jurymen suggested that that matter could be better determined by an examination of the other knee, and thereupon plaintiff exposed that knee also. Counsel for defendant then addressed to plaintiff, while on the witness stand, the following question:

"Q. I have in the courthouse two reputable physicians Dr. D. S. Fairchild, of Clinton, and Dr. J. S. Ristine, of Cedar Rapids. I ask you now, with your knees exposed, whether you will permit these two physicians, in the presence of the jury, to examine you?"

This question was objected to by counsel for plaintiff, but the court overruled the objection, and required an answer. Thereupon the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



plaintiff answered, "Not at this place," and immediately afterwards refused to permit any examination by the physicians. Counsel for defendant then presented a motion in writing that plaintiff be required to submit his knee to the examination of physicians selected by the defendant, either in open court, or at some other place, before the conclusion of the trial. On the following morning, counsel for plaintiff filed written objections to the granting of the motion, and the court announced its ruling as follows:

"As I understand, in this matter the court has no power to require a party to submit to a physical examination, except in those states where the local statute authorizes it, and there is no such statute in Iowa. The application will be denied."

To this ruling an exception was duly reserved, and the same now presents the only error urged in this court for the reversal of a judgment in favor of plaintiff.

The Supreme Court of Iowa, in *Schroeder v. Chicago, Rock Island & Pac. R. R. Co.*, 47 Iowa, 378, decided that at common law, and independent of statute, the court had power, in an action for personal injuries, to compel the plaintiff to submit his body to the examination of physicians selected by the court or by the defendant, for the purpose of ascertaining the nature and permanency of the injuries. In *Union Pac. R. R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, the Supreme Court decided that federal courts do not possess such power. Defendant now contends (1) that the *Botsford* Case is overruled by *Camden Railway Co. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721; (2) that the question involved relates to a matter of evidence, and that as to such matters the decisions of the highest court of the state in which the action is tried constitute "laws" within the meaning of section 721 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581), and are therefore binding upon the federal courts. Considering now the first contention, the opinion in the *Botsford* Case is based upon three grounds: (1) That at common law a court has no power to compel plaintiff in an action for personal injuries to submit his body to examination. (2) That such a practice would be a violation of the seventh amendment of the Constitution, which declares that in all suits at common law, where the value in controversy shall exceed \$20, trial by jury shall be preserved. (3) That such a practice would be a violation of Section 861 of the Revised Statutes (U. S. Comp. St. 1901, p. 661) and other sections defining the manner of taking depositions. Since the case of *Camden Railway Co. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721, the last two of these grounds can no longer be regarded as tenable. In that case a statute of New Jersey authorizing such a practice was held to be binding upon the federal courts sitting in that state, and it was expressly ruled that such a statute did not violate either the federal Constitution or any federal statute. The other ground of decision, viz., the want of power, is not overruled, but, on the contrary, is expressly reaffirmed. The court says on that subject:

"It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it"—citing the Botsford Case.

As to defendant's second contention, that the decision of the Supreme Court of Iowa upon a question of evidence is a "law" within the meaning of section 721 of the Revised Statutes, we observe first that the question here raised is not of that character. It could not be contended that the testimony of a skilled physician based upon an inspection of the injured member would not be relevant evidence as to the nature and permanency of the injury. The question is not whether such testimony would be admissible in evidence, but whether the court has, at common law, the power to compel the plaintiff to submit to a surgical examination. We are therefore presented with a matter of practice rather than a rule of evidence. Neither court purports to deal with the question as a subject of local law. The Botsford decision is not based upon any statute or decision of the state in which the action arose. Nor does the Supreme Court of Iowa rely upon any consideration peculiar to that state. Both courts appeal to the general common law as the source of their decision. They are in direct conflict. Which authority should a federal court sitting in Iowa obey? When the point is thus presented, the answer is plain. One of the important functions of the Supreme Court is to declare the powers of inferior federal courts, and, when it has spoken on such a subject, its decision for those courts is final, anything in the decisions of state courts to the contrary notwithstanding.

Being a matter of practice relating to the power of courts, neither state statutes nor the decisions of state courts on the subject are binding on federal courts under section 721 of the Revised Statutes. This was early decided by the Supreme Court in *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253. It was there held that section 34 of the judiciary act, being the same as section 721 of the Revised Statutes—

"does not apply to the process and practice of the federal courts; it is a mere legislative recognition of the principles of universal jurisprudence as to the operation of the *lex loci*."

Previous to the conformity act of 1872, c. 255, 17 Stat. 196, the practice of federal courts in actions at law was wholly independent of current state statutes and state decisions. Combining the provisions of the temporary judiciary act of September, 1789, c. 20, 1 Stat. 92, and the process act of 1792, c. 36, 1 Stat. 275, it was provided that the practice at common law in the federal courts for the 13 original states should be that which obtained in the Supreme Courts of those states respectively in the month of September, 1789. As new states were admitted to the Union, other statutes were passed fixing the practice in the highest courts of those states at an arbitrary time as the practice in the federal courts when sitting in those states. *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *Conkling's Treatise* (1870) page 323 et seq. So long as the common-law system was in vogue in all the states of the Union, little embarrassment was experienced in applying the practice thus established for the federal

courts. But in 1848 the reform procedure was introduced in New York by the Code of that year, and by 1860 similar codes had been adopted in most of the states of the Union. When a generation of lawyers had grown up under these codes knowing nothing of the common-law practice, the burden of acquiring that practice for the few cases which they had in the federal courts became intolerable. To meet that difficulty, section 914 of the Revised Statutes was passed in 1872 (U. S. Comp. St. 1901, p. 684), requiring federal courts to observe the state practice in actions at common law, "as near as may be." *Lamaster v. Keeler*, 123 U. S. 376-387, 8 Sup. Ct. 197, 31 L. Ed. 238; *Indianapolis & St. Louis Railroad Company v. Horst*, 93 U. S. 291-299, 23 L. Ed. 898; *Nudd v. Burrows*, 91 U. S. 426-441, 23 L. Ed. 286. It is manifest, therefore, that, as to a matter of practice such as we are considering, the federal courts can derive no power under section 721 of the Revised Statutes from either the decisions or the statutes of the states. Such a rule, if obligatory on the federal courts, must come in under section 914, commonly known as the "Conformity Act." But under that section decisions of state courts, unless made in construing local statutes, have never been regarded as controlling in the national courts. Even local statutes on the subject of procedure have been rejected by those courts whenever in their judgment such statutes would unwisely incur the administration of justice. *Collin County National Bank v. Hughes*, 155 Fed. 389, 83 C. C. A. 661. Treating the question before us, therefore, as relating to practice, we are clearly of the opinion that the Iowa case cited was not binding upon the trial court.

If, however, we should view the present case as involving a rule of evidence, as defendant insists we should, our conclusion would not be different. In several decisions of the Supreme Court there are found expressions to the effect that decisions of the highest courts of the states on questions of evidence are rules binding upon the federal courts sitting in those states. All of these statements, however, were made either by way of illustration, or in the construction of state statutes. The point has never been directly involved, and passed into judgment as to state decisions touching a general common-law rule of evidence. *Vance v. Campbell*, 1 Black, 427, 17 L. Ed. 168, *Wright v. Bales*, 2 Black, 535, 17 L. Ed. 264, and *Ryan v. Bindley*, 1 Wall. 66, 17 L. Ed. 559, are based on section 310 of the Code of Civil Procedure of Ohio (Rev. St. 1880), permitting a party to be a witness. *McNiel v. Holbrook*, 12 Pet. 84, 9 L. Ed. 1009, is based on a statute of Georgia. *Conn. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708, involved the construction of the statute of New York, defining the privilege of physicians from testifying. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117, involved the federal statute and the statute of New York on the subject of examining parties before trial. *Bucher v. Cheshire Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795, turned upon the statute of Massachusetts forbidding travel on the Lord's Day except for necessity or charity. *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909, presented a question arising under the statute of Illinois, prescribing a method of establishing titles whose records were

destroyed by the Chicago fire. *Claiborne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470, and *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260, involved the powers of municipal corporations, and the settled rule is applied that the decisions of the highest courts of the states on that subject are binding upon the federal courts, "for it is a question that relates to the internal constitution of the body politic of the state."

In *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782, the question is more nearly passed upon. It is there said:

"The laws of the several states with respect to evidence within the meaning of this section apply not only to the statutes, but to the decisions of their highest courts."

The question is not otherwise considered in the case, and the decisions cited to support the statement all involved statutes of the states in which the actions arose. The language just quoted was not necessary to the determination of the question before the court. The matter there under consideration was whether the testimony of an English lawyer could be received as to numerous English statutes relating to private corporations and the liabilities created thereby. While the weight of authority is that the contents of a single foreign statute can only be proven by a properly authenticated copy thereof, the better authority is that, where the question before the court relates to the result of numerous statutes, expert testimony is receivable, the same as in the case of the common law of a foreign state. In this circuit it was held upon full consideration in *Union Pacific Railway Company v. Yates*, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553, that "the decisions of the courts of a state construing common-law rules of evidence are not obligatory on the federal courts." A contrary doctrine was declared in the Seventh Circuit, in *Stewart v. Morris*, 89 Fed. 290, 32 C. C. A. 203.

We do not consider the question as settled by any decision of the Supreme Court of the United States. In the case of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, decided in 1842, that court declared that the decisions of state courts relating to general commercial law were not "laws" within the meaning of section 721 of the Revised Statutes. That term as applied to local decisions was there confined either to the construction of statutes, or to the enforcement of strictly local customs or rules governing the title, possession, descent, or sale of property. The subject was re-examined with great learning in a prevailing and dissenting opinion in the case of *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, and it was there declared that the decisions of the highest court of a state on the subject of negligence are not laws within the meaning of section 721. The basis of decision in these cases was this: That the general rules of commercial law and of the law of negligence had been the creation of the courts, and that the federal judiciary could not accept the law on such a subject from state courts without being placed in a position of direct subserviency to those courts. To maintain their own dignity and independence, it was therefore de-

clared to be their duty to exercise an independent judgment on such subjects. The common-law rules of evidence come clearly within the principle which was controlling in those decisions. In fact, no branch of the law has been so completely rationalized as the common-law rules of evidence. Though Sir Fitzjames Stephen generalized too broadly when he said that the rules of evidence are simply John Stuart Mill's Logic applied in the field of law, still there is a substantial basis of truth for his statement. Those rules have not been derived from local usage, but have at all times been purely the creation of courts. In declaring them, judges have not appealed to the "customs of the realm" as the source of the rule; on the contrary, they have laid down the rules as the result of their own judgment touching what proof is fit for the consideration of a jury, and what scope of inquiry is compatible with the reasonable dispatch of justice. It might well be urged, as it was by the dissenting judges in the *Tyson and Baugh Cases*, that the rules there involved were the result of the local custom of merchants, or the local conditions of commerce and manufacture. No such considerations can be put forth as to the common-law rules of evidence. They emanate from the mind of judges, and not from the practices of the business world. Every reason, therefore, which led the Supreme Court to declare the duty of federal courts to exercise an independent judgment as to matters of general commercial law, and the general common law of negligence, is present with added force as to the common-law rules of evidence. When a state court construes the Constitution or statutes of the state, or enforces a local right of property, the rule emanates not from the decision of the court, but from the Constitution, statute, or local custom. Such, as we have already indicated, is not the fact in regard to rules of evidence. They emanate wholly from the courts. To compel the federal judiciary to accept rules on such a subject from the decisions of local courts is to place them in a position of direct tutelage to such courts, and to rob them of the dignity and independence of judgment which has heretofore been regarded as an indispensable part of their jurisdiction.

But perhaps the best way to ascertain whether state decisions on the subject of evidence are binding upon federal courts is to consider how the Supreme Court and federal Courts of Appeal have dealt with questions of evidence when directly presented for decision. Have they, as in the case of statutes and rules of property, looked to the decisions of the state in which the action arose as laws of controlling authority? The case of *Vicksburg & Meridian R. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299, turned wholly upon questions of evidence. Numerous authorities are cited from England and the states of the Union in the prevailing and dissenting opinions, but no decision is cited from the state in which the action arose, nor is any attempt made to deduce the rule of decision from local decisions. The same question arose again in *Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049. That case came from New York. The question had been repeatedly passed upon by the court of appeals of that state. *Luby v. Hudson River R. R. Co.*, 17 N. Y. 131; *Anderson v. Rome, W. & O. R. R. Co.*, 54 N. Y. 334. No

decision, however, from New York is cited, though decisions from Illinois and Indiana are referred to. The same question arose in this circuit in a case from Missouri, *Fidelity & Casualty Co. v. Haines*, 111 Fed. 337, 49 C. C. A. 379. Numerous authorities are cited, both state and federal, but none from Missouri. The question is treated wholly as one of general law. In the Sixth Circuit Court of Appeals, the same method of dealing with the subject is pursued in *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705, in an opinion written by Mr. Justice Harlan.

*Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. Ed. 106, involved the use of memoranda as independent evidence. The case arose in Massachusetts, and the Supreme Court says that the highest court of that state had ruled the question against the admissibility of such evidence, and numerous cases are cited from that state in support of such a holding. They are not treated, however, as binding authorities upon the federal courts in deciding a case from that state. On the contrary, the decisions of other states are referred to, and the question is clearly stated as a question of general law. In fact, after reviewing authorities, state and national, the court announces this conclusion:

"We do not regard any of these cases as committing this court to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness."

If the decisions of the highest court of the state in which an action arose are "laws" upon questions of evidence, this opinion is quite inexplicable. The law would have been easily found in the decisions of Massachusetts referred to by the court, and the case would have been disposed of solely upon those decisions. The same question is brought under examination in *Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314, 12 C. C. A. 129, a case arising in Michigan, and the cases carefully reviewed by the Sixth Circuit Court of Appeals. No attempt, however, is made to ascertain the holding of the Supreme Court of Michigan on the subject, although that court had repeatedly passed upon the question. *Raynor v. Norton*, 31 Mich. 210; *Misner v. Darling*, 44 Mich. 439, 7 N. W. 77; *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 837.

*Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, involved the admissibility in evidence against a defendant in a criminal case of his papers seized upon a search warrant. The case arose in New York. The highest court of that state had passed on the very question (*People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741; *People v. Van Wormer*, 175 N. Y. 188, 67 N. E. 299), but the Supreme Court treats it as a question of general law, makes no reference to the New York cases, but bases its opinion upon decisions from Massachusetts and New Hampshire.

*Seitz v. Brewers' Refrigerating Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, involved the admissibility of parol evidence in an action on a written contract to prove an independent oral agreement upon the same subject. This case also arose in New York, where the rule on the question involved had been greatly relaxed. *Batterman v. Pierce*, 3 Hill, 171; *Johnson v. Oppenheim*, 55 N. Y.

280; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512. These cases were cited as declaring the law of the state. The last case was directly in point in favor of the admissibility of the evidence. The Supreme Court, however, treated the question as one of general law, and refused to follow the local decisions. It based its ruling not only on previous decisions of its own, but on the decisions of other states in which the strict rule on the subject had been enforced, citing *Naumberg v. Young*, 44 N. J. Law, 331, 43 Am. Rep. 380; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1.

The burden of proof on the issue of contributory negligence is clearly defined in the federal courts. On that subject, however, there is a clear conflict among the different states. In *Chicago Great Western Ry. Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239, state decisions are held not to be controlling upon the federal courts. This court there said:

"The rule of the federal courts is settled and uniform that contributory negligence is an affirmative defense which must be established by a preponderance of evidence, and this requirement is not changed by the fact that a different rule prevails in the courts of the state where the cause of action arose."

In that case the accident occurred in Illinois, and the action was brought in Iowa. In both of those jurisdictions the rule prevails that the plaintiff in a personal injury case is bound to prove his freedom from contributory negligence. *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Burns v. Chicago, etc., R. R. Co.*, 69 Iowa, 450, 30 N. W. 25, 58 Am. Rep. 227. This court, however, refused to follow those decisions. The federal rule has been applied in Indiana, in contravention to the decisions of that state. *Wabash, St. L. & P. R. Co. v. Central Trust Co. (C. C.)* 23 Fed. 738; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898. The same is true of Massachusetts. *Fitchburg R. Co. v. Nichols*, 85 Fed. 945, 29 C. C. A. 500.

These illustrations might easily be multiplied. Sufficient, however, has been adduced to show the settled practice of the federal courts. A somewhat careful examination has failed to discover any instance in which a federal court has treated a local decision on a question of evidence as a rule of law of controlling force in opposition to a decision of the Supreme Court of the United States. Such a practice would, in our judgment, result in unnecessary labor and perplexity for federal judges in the trial of causes. It is the duty of such judges to be familiar with the decisions of the national courts. The rules of evidence are a part of the law that must in the main be carried in the mind of the trial judge. Such questions constantly recur, and must be promptly decided. To take time for argument and investigation would tediously prolong the trial. If those judges were compelled to keep track of local decisions and decide, perhaps, how far they vary from the decisions of appellate federal courts, their labors would be doubled, and the progress of the trial greatly impeded. These considerations receive added force at the present time from the fact that federal judges are so frequently called upon to sit in states other than their own. Again, local statutes and

local rules of property, when involved in suit, are presented once and for all, and thus permit of argument and full consideration. Such is not the case with questions of evidence. They are multiform, and generally not dependent upon the issues involved. For these reasons, we are satisfied that the practice which has heretofore obtained in federal courts is a sound practice, and that local decisions on questions of evidence ought not to constitute authoritative rules binding upon those courts. If, therefore, the question involved in the present case be regarded as a question of evidence, we are of the opinion that the decision of the Supreme Court in *Union Pacific v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, is binding upon federal courts, and, if applicable, should be the rule of decision in the present case, notwithstanding the decision of the Supreme Court of Iowa in *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 378.

Is the *Botsford* decision controlling of the present case? The defendant there, in advance of the trial, applied to the court for an order requiring the plaintiff to submit to a surgical examination. The application was denied, and that ruling constituted the question which was before the Supreme Court for review. That court has already limited the *Botsford* decision in *Camden Railway Co. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721. The decision is at variance with a large majority of the state courts. The rule which it declares has been abrogated by statute in many jurisdictions where it once prevailed. This is the case in New York, New Jersey, Great Britain, Canada, and Australia. We do not feel, therefore, disposed to extend the decision beyond the facts there involved.

In the present case we are not dealing with an application for a surgical examination in advance of the trial. Here the plaintiff at the trial voluntarily exhibited his knee in open court for inspection. Having done this, it was beyond his power to arrest the investigation. The defendant and the court were entitled to employ any agency in its examination which would aid in the determination of the issue on trial. It is universally held that, where an inanimate object is produced upon the trial of a case, it is subject to any legitimate examination and test which will elucidate the matter in dispute. It may be submitted, for example, to chemical treatment, or to examination by the microscope. Simply looking at the plaintiff's knee with the eye of a layman furnished little aid in determining its condition. He himself maintained that there were no external evidences of injury. Whether there were hidden ailments could only be discerned by the skill of a surgeon, and the defendant and the court were as much entitled to turn the eye of a surgeon upon the plaintiff's knee as they would have been to look at a blood stain through a glass. Having exhibited his knee to the jury, it became a part of the evidence in the case, and the mere accident that the thing exhibited was part of a human body could only qualify, and not defeat, the right of complete investigation. *Chicago, Rock Island & Pac. Ry. Co. v. Langston*, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 611; *Haynes v. Trenton*, 123 Mo. 326, 27 S. W. 622.

Whether the defendant in a personal injury case, when the plaintiff takes the stand and testifies in his own behalf, to his injuries, is en-



titled to an exposure and examination of the injured member as a part of the cross-examination, and whether upon the trial of such an issue the defendant may call the plaintiff as a witness, and while he is under examination compel such a disclosure and inspection of the injured member, are questions not presented by the present case, and are not, therefore, necessary for decision. See *Larson v. Salt Lake City* (Utah) 97 Pac. 483.

We think the court erred in its ruling refusing to compel the plaintiff to submit his knee to surgical examination, and for this error the cause is reversed, with directions to grant a new trial.

SANBORN, Circuit Judge (concurring). I concur in the result in this case, for the reasons stated in the foregoing opinion, and for the further reason that in my opinion the United States Circuit Court, sitting in a state where such is the practice and mode of proceeding in the state courts, is invested with the power by the conformity act (section 914, Rev. St.) to require one who brings an action at law for his personal injuries to submit his person to a physical examination by suitable physicians or surgeons, to qualify them to testify to the extent of his injuries. An instructive and rational change of opinion in regard to this subject is portrayed by the decisions of the Supreme Court pertinent to the question.

In 1884, in *Ex parte Fisk*, 113 U. S. 713, 724, 5 Sup. Ct. 724, 28 L. Ed. 1117, that court held in a unanimous opinion that although the state of New York authorized a litigant to take the testimony of his adversary before the trial, and although such was the practice in the courts of that state, the federal Circuit Court had no power to take such testimony, because sections 861, 863-870, Rev. St. (U. S. Comp. St. 1901, pp. 661-665), prescribed the only method of procuring evidence in actions at law in the courts of the United States, and excluded all other modes provided by the statutes of the states or the practice of their courts.

In 1890, in *Union Pacific Railway Company v. Botsford*, 141 U. S. 250, 256, 11 Sup. Ct. 1000, 1003, 35 L. Ed. 734, an opinion was rendered by a divided court, two judges dissenting, that a federal Circuit Court sitting in a state wherein there was no statute and no practice or mode of proceeding in the state courts permitting it had no authority to require a plaintiff in an action for his personal injury to submit to a physical examination by physicians before the trial, because (1) "this is not a question which is governed by the law or practice of the state in which the trial is held," (2) because, as held in *Ex parte Fisk*, the provisions of sections 861, 863, et seq., Rev. St., were exclusive, (3) because any such law or practice would be unconstitutional, and (4) because the person of such a plaintiff was too sacred.

In the year 1900, in *Camden Railway Company v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721, by a decision in which the minority in the last case were of the majority, and in which one of the majority in the last case was the minority, the Supreme Court held that a federal Circuit Court, sitting in a state in which the courts of the state were empowered by a state statute to compel the person in-

jured to submit, at or before the trial of an action for his injury, to a physical examination by physicians or surgeons, had like power by virtue of the state statute and section 721 of the Revised Statutes. That court thereby necessarily held, contrary to the decisions in *Ex parte Fisk* and in the *Botsford Case*, (1) that this is a question which under sections 721 and 914, Rev. St., is governed by the law or practice of the state in which the trial is held; (2) that the provisions of sections 861, 863, et seq., Rev. St., are not exclusive, but other practices and modes of procedure to obtain evidence may be pursued by the federal courts under state law or practice; (3) that a law or practice which empowers a federal court to compel such an examination is not unconstitutional; and (4) that the person of one injured which is not too sacred to be made the subject of an action for the recovery of damages for the injury is not too sacred to be made the subject of an examination by suitable professional gentlemen to ascertain and prove the truth regarding the injury.

In that case the Supreme Court, speaking of the order that the plaintiff should submit to an examination of his person by physicians or surgeons before the trial, said:

"It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it. *Union Pacific Railway Company v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734."

That is to say, as I understand it, that in the absence of a state law adopted by section 721, or of a state practice or mode of procedure which the federal court is empowered and directed by section 914 to follow, such a court has no inherent power to order the physical examination of the injured person in an action before it for the injury. And this, it seems to me, is all there is left of the *Fisk* and *Botsford Cases* since the decision in the *Camden Case*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721.

That decision certainly is that where there is a state statute which authorizes the courts of the state to compel such an examination, section 721, Rev. St., which makes the laws of the state rules of decisions in trials at common law in the national courts, empowers those courts to compel such examinations. By the same mark, where the practice and mode of proceeding in the state courts to qualify witnesses to give truthful testimony regarding an injury to the person, which is the subject of an action, are to require such persons to submit to such an examination, section 914, Rev. St., which requires that the practice and modes of proceeding in a national court in such cases shall conform as near as may be to the practice and modes of proceeding in like causes in the courts of the state in which such federal court is held, grants plenary power to the national court to direct the injured person to submit to an examination by proper physicians or surgeons.

It is true that section 914 does not compel the federal courts to adopt methods of practice or modes of proceeding existing in the state courts "which in their judgment would unwisely incur the administration of the law, or tend to defeat the ends of justice in

their tribunals." *Indianapolis & St. Louis R. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898. But it empowers them to do even that, and, with that exception, it requires them to conform their practice and modes of proceeding "to the practice \* \* \* and modes of proceeding existing at the time in like causes in the courts of record in the state within which such Circuit or District Courts are held." This case does not fall within the exception, because it would not unwisely incumber, but would facilitate, the administration of the law, and it would not tend to defeat, but it would tend to accomplish, the ends of justice, to require one who submits his person to the examination of physicians, to qualify them to testify in his behalf, to submit it also to the examination of like witnesses to qualify them to testify to the truth on behalf of the defendant. This case falls under the general rule, and section 914 gave the court below ample authority to compel the examination.

Nor does there seem to me to be any material question in this case relative to the power at common law of any court, state or federal, to compel a person injured to submit to such an examination of his person in an action for his injury. Let the fact be conceded that the Supreme Court was right, and the Supreme Court of Iowa was wrong, in the decision of that question (*Union Pacific Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734; *Schroeder v. Chicago, Rock Island & Pacific Ry. Co.*, 47 Iowa, 378); nevertheless the decision of the Supreme Court of Iowa, though erroneous, was within its jurisdiction, and it conclusively established the practice and the mode of proceeding to qualify witnesses to give testimony, and to procure evidence in the courts of that state in cases of this character. Congress had the same power to authorize and require the federal courts to conform their practice and modes of proceeding in such cases to the practice and modes erroneously, as to those correctly, existing in the state courts, and it exercised that power. It might have enacted that the national courts should conform their practice and modes of proceeding to the practice and modes of proceeding rightly adopted by the state courts, but it did not do so. It empowered and required the United States Circuit Courts to conform their practice and modes of proceeding in actions at law to the practice and modes of proceeding existing at the time (whether rightly or wrongly adopted) in the courts of the state in which they were sitting. There is no doubt that the practice and mode of proceeding existing at the time in like causes in the courts of the state of Iowa were to require the injured party to submit his person to the examination of suitable physicians and surgeons to the end that the truth might be discovered and proved (*Schroeder v. Chicago, Rock Island & Pacific Ry. Co.*, 47 Iowa, 378), and in my opinion section 914 empowered and required the federal Circuit Court sitting in that state to follow that practice and mode of proceeding.

This conclusion conforms the practice in such cases to the general rule that:

"A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its

determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality." *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624; *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447.

### DENVER & R. G. R. CO. v. WAGNER.

(Circuit Court of Appeals, Eighth Circuit. December 21, 1908. On Rehearing, February 26, 1909.)

No. 2,845.

**1. RAILROADS (§ 33\*)—OPERATION—COMPLIANCE WITH TERRITORIAL LAWS—PRESUMPTION.**

Where a petition alleged that defendant railroad company was operating a railroad in New Mexico Territory, in which the injury occurred, and it could not lawfully do so without complying with Laws N. M. 1903, p. 51, c. 33, commanding every railroad corporation operating in the territory to file a copy of its charter with the Territorial Secretary, give its principal place of business therein, and designate some person on whom process might be served, it would be presumed that defendant had complied therewith.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 33.\*]

**2. PLEADING (§ 59\*)—PRECEDENT CONDITIONS—COMPLIANCE—EXCUSE.**

A petition must show compliance with precedent conditions, or must aver an excuse.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 124-127; Dec. Dig. § 59.\*]

**3. APPEAL AND ERROR (§ 256\*)—RULINGS ON PLEADINGS—EXCEPTIONS.**

The striking of a portion of defendant's answer cannot be assigned for error, where no exception was taken thereto at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1489; Dec. Dig. § 256.\*]

**4. EVIDENCE (§ 29\*)—JUDICIAL NOTICE—STATUTES.**

The federal courts take judicial notice of the public statute laws of the states and territories of the United States without their being pleaded or proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 48; Dec. Dig. § 29.\*]

Judicial notice of public laws and regulations, see note to *Smith v. City of Shakopee*, 44 C. C. A. 4.]

**5. EVIDENCE (§ 29\*)—JUDICIAL NOTICE—AMENDATORY ACTS.**

Where a petition disclosed on its face a cause of action predicated on a special statute of a territory, the Circuit Court of Appeals would take notice of an amendatory act as inseparable from the statute declared on.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 48; Dec. Dig. § 29.\*]

**6. TRIAL (§ 169\*)—OBJECTIONS TO PLEADING—FAILURE TO RAISE—OBJECTIONS TO EVIDENCE.**

Mills' Ann. Code Colo. § 55, provides that if objection to a petition is not taken by demurrer or answer, defendant shall be deemed to have waived it, except that the objection that the petition does not state facts to constitute a cause of action may be raised at any time. *Held*, that an objection to a petition for want of facts in failing to allege compliance with conditions precedent was effectually raised by defendant's motion for a directed verdict at the close of all the evidence and an exception saved to the denial thereof.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 169.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**7. ACTION (§ 10\*)—CONDITION PRECEDENT—COMPLIANCE.**

A party given a right of action by local statute cannot escape performance of precedent acts which condition the right by resort to the forum of another jurisdiction.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 10.\*]

**8. DEATH (§ 51\*)—DEATH OF PASSENGER—PETITION—CONDITION PRECEDENT—COMPLIANCE WITH STATE STATUTES.**

A petition for death of a passenger under the statutes of New Mexico, giving a right of action to the surviving widow of a person killed by wrongful act, which failed to allege notice to the carrier served within the territory, as required by Laws N. M. 1903, p. 51, c. 33, amending the statute under which the action was brought, was fatally defective.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 51.\*]

**9. ACTION (§ 11\*)—PERSONAL INJURIES—NOTICE—STATUTES—POLICE POWER.**

Laws N. M. 1903, p. 51, c. 33, in so far as it requires notice to the defendant of injuries to persons claiming damages within 90 days and the commencement of suit within a year after the injuries occurred, constituted a valid exercise of police power.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 11.\*]

**10. STATUTES (§ 64\*)—PARTIAL INVALIDITY—SEVERANCE.**

The provisions of Laws N. M. 1903, p. 51, c. 33, requiring notice of personal injuries within 90 days and the commencement of suit within a year, being valid and severable from the provision requiring such suits to be brought in the District Court of the territory, were unaffected by any objection that might be made to the latter provision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

**On Rehearing.**

**11. RAILROADS (§ 33\*)—TERRITORIAL LAWS—DISAPPROVAL BY CONGRESS.**

Laws N. M. 1903, p. 51, c. 33, requiring notice to defendant of injuries to persons claiming damages within 90 days and the commencement of suit within a year after the injuries occurred, prior to its disapproval by Congress, was applicable to a cause of action against a railroad company that could be served within the territory, under Comp. Laws N. M. 1897, § 2963, providing that service might be made on any station agent or on a passenger or freight conductor of the defendant.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 33.\*]

**12. STATUTES (§ 56\*)—TERRITORIAL LAWS—DISAPPROVAL BY CONGRESS.**

Under Organic Act N. M. (Act Sept. 9, 1850, c. 49, 9 Stat. 449) § 7, providing that all laws passed by the Legislative Assembly and Governor shall be submitted to the United States Congress, and, if disapproved, shall be void, Laws N. M. 1903, p. 51, c. 33, requiring notice to the defendant of injuries to persons claiming damages within 90 days and the commencement of suit within a year, which was in force for five years before its disapproval by Congress, was valid and enforceable during such period.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 17; Dec. Dig. § 56.\*]

**13. STATUTES (§ 56\*)—TERRITORIAL LAWS—DISAPPROVAL BY CONGRESS.**

The New Mexico Legislature having conferred a right of action for damages resulting from death, which did not exist at common law, by Laws 1903, p. 51, c. 33, declared that such right should be exercised only on condition that within 90 days after the given cause of action arose plaintiff should give specified notice to defendant. *Held*, that such provision was not in the nature of a limitation on the right of action, but was a condition precedent thereto, so that where plaintiff had not complied therewith, and therefore could not maintain her cause of action

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

while the act was in force, the subsequent disapproval of the act by Congress did not entitle plaintiff to sue.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 56.\*]

In Error to the Circuit Court of the United States for the District of Colorado.

T. L. Philips (E. N. Clark, on the brief), for plaintiff in error.

Charles A. Clark (M. B. Carpenter, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action for damages by the widow of Henry A. Wagner on account of his death, resulting from injuries alleged to have been received by the derailment of a coach in which he was a passenger on the defendant railroad in New Mexico. The only material allegations of the petition are that said Wagner, on the 20th day of October, 1905, was a passenger for hire on the defendant's train of cars, which was so derailed through the negligence and carelessness of the defendant, and that by the statute of the territory of New Mexico a right of action is given to the surviving widow of the deceased.

After taking issue on the material allegations of the petition, the answer pleaded the statute of the territory entitled "An act establishing the law and procedure in certain cases," constituting a portion of chapter 33, Laws N. M. 1903, p. 51, which was amendatory of the statute giving the right of action to the surviving widow. After reciting in the preamble that it had become customary for persons claiming damages for personal injuries received in the territory to institute suits for recovery thereof in other states and territories, to the annoyance and oppression of the business interests of the territory and in derogation of the dignity of its courts, it declared that thereafter there should be no civil liability under either the common law or any statute of the territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in the territory, unless the person claiming damages therefor shall within 90 days after such injuries shall have been inflicted make and serve upon the person or corporation against whom the same is claimed, and at least 30 days before commencing suit, an affidavit, made before some officer within the territory authorized to administer oaths, in which the affiant shall state his name and address, the name of the person receiving the injury, if such person be other than the affiant, the character and extent of such injury in so far as the same may be known to affiant, the way or manner in which such injury was caused, in so far as the affiant has any knowledge, the names and addresses of witnesses to the happening of the facts or any part thereof known to the affiant; and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the District Court of the territory in and for

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the county in which such injuries occur, or in and for the county of the territory where the claimant or person against whom such claim is asserted resides, or, in the event such claim is asserted against a corporation, in the county in the territory where such corporation has its principal place of business; and said suit after having been commenced shall not be dismissed by the plaintiff unless by the written consent of the defendant filed in the case, or for good cause shown to the court; it being expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries, except as herein otherwise provided. The act not to apply to cases in which the person or corporation against whom damages are claimed cannot be duly served with process in this territory. The answer then alleged that neither the plaintiff nor any one for her, within 90 days after the injuries alleged, or at any other time, made or served upon the defendant the required affidavit; and that the plaintiff has not attempted in any manner to comply with the provisions of said statute; and that the defendant could at all the times in said complaint mentioned and thenceforth have been served with process in said territory. Said special matter of defense so pleaded was, on motion of the plaintiff below, stricken out by the court. On trial to a jury there was a verdict and judgment for the plaintiff in the sum of \$5,000, to reverse which the defendant below prosecutes this writ of error.

The statute of the territory enacted at the same session commanded that every railroad corporation operating in the territory should file its charter with the Secretary of the Territory, giving its principal place of business therein, designating some person upon whom service of process could be had in an action against the railroad company. As the petition alleges that the railroad company was operating a railroad in the territory in which the injury occurred, and as it could not so operate therein without complying with the foregoing statute, every person being presumed to obey the law until the contrary is made to appear, we must assume that the defendant company had complied with the statute, so that at the time of the accident and thenceforth there was such designated place of business and agent upon whom service of process and notice could have been made. We are required to assume further, on settled principles of law, that this condition of compliance with the statute thereafter continued to exist. The petition must show compliance with the precedent conditions, or, if they could not be complied with for any reason, the pleader should aver the excuse.

The action of the court in striking out said portion of the answer was based upon the assumption that the statute is not applicable where the suit is instituted in a foreign jurisdiction, such as in the state of Colorado. As the record fails to show that the defendant saved any exception to this action of the court, it may not here be assigned for error. Notwithstanding this oversight of counsel, the defense was, nevertheless, open to the defendant. The federal courts take judicial notice of the public statute laws of the states and territories of the

United States. They do not have to be pleaded or proved for such purpose. The petition discloses on its face that the action is predicated of a special statute of the territory, and this court will take cognizance of said amendatory act as inseparable from the statute declared on.

It is the recognized rule of procedure in the state of Colorado that, if the petition on its face does not show compliance with a statute giving a right of action in its essential prerequisites, objection thereto may be interposed by objecting to the introduction of any evidence at the trial; and it was effectually raised by the motion made by the defendant at the close of all the evidence for a directed verdict, and exception duly saved. *Mills' Ann. Code Colo.* § 55; *Laws 1887*, p. 111, c. 4; *Marriott v. Clise*, 12 *Colo.* 561, 563, 564, 21 *Pac.* 909; *Toothaker v. City of Boulder*, 13 *Colo.* 219, 223, 22 *Pac.* 468; *McKee v. Howe*, *Adm'r.*, 17 *Colo.* 538, 539, 31 *Pac.* 115; *Mackey v. Monahan*, 13 *Colo. App.* 144, 146, 56 *Pac.* 680; *Hall v. Linn*, 8 *Colo.* 264, 268, 5 *Pac.* 641; *Carpenter v. Sibley* (*Cal.*) 94 *Pac.* 879, 15 *L. R. A.* (N. S.) 1143, decided March 13, 1908. This is logically correct, for the reason that the request for a directed verdict suggests, under the law and the undisputed evidence applied thereto, that the plaintiff is not entitled to recover.

It is not to be entertained that a party given a right of action by a local statute can escape the performance of precedent acts, which condition the right, by resort to the forum of another jurisdiction. In upholding the statute of the state of Ohio, declaring that no action is maintainable in that state for wrongful death occurring in another state, except where the deceased was at the time of death a citizen of Ohio, the Supreme Court, in *Chambers v. Baltimore & O. R. R. Co.*, 207 *U. S.* 142, 28 *Sup. Ct.* 34, 52 *L. Ed.* 143, held that the restriction operated equally upon the representative of the deceased, whether a citizen of Ohio or some other state; that the state, in the exercise of its police power, decides for itself to what extent actions may be instituted. Different states may have different policies at different times. The only constitutional limitation upon its exercise is that any policy it chooses to adopt must operate in the same way on its own citizens and those of other states.

This statute of New Mexico was directly involved in the germane case of *Swisher v. A. T. & S. F. Ry. Co.*, 76 *Kan.* 97, 90 *Pac.* 812. The action was brought in a district court of Kansas by the representative of the deceased to recover damages against the railroad company for an injury resulting in death occurring in the territory of New Mexico. The Supreme Court of Kansas said:

"It does not seem reasonable that a cause of action created by the law of one state should be materially enlarged when the beneficiary moves across the state line and appeals to the court of another state to enforce his impaired right. The rule of state comity does not imply such a result. We think that an action in this state for a wrongful death occurring in another state or territory is incumbered with all the limitations and burdens which may have been imposed by the statutes of the state where the right of action was created. In this case the notice provided by section 1 of the act of 1903 is an essential part of the cause of action, and until such notice is given no cause or right of action exists either in New Mexico or elsewhere."



This rule is recognized in *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, in which it is held that, in an action based on a statute conditioning the right given, it is incumbent on the plaintiff to plead the performance of such condition, and the defendant is not required to plead the limitation in the statute to entitle him to insist upon the objection that the action was not brought within time, etc. Chief Justice Waite, among other things, said:

"The liability and the remedy are created by the same statute, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

In *Stern v. La Campagne Generale Transatlantique* (D. C.) 110 Fed. 996, it was held that, in an action based on a statute making the giving of such notice and the time of bringing such suit express conditions of the right, it is incumbent upon the plaintiff to plead the performance of such conditions, and the defendant is not required to plead them to entitle him to insist on the objection at the trial.

So Judge Hook, in *Lange v. Union Pacific R. Co.*, 126 Fed. 338, 342, 62 C. C. A. 48, 52, said that:

"Failure to give the notice is fatal to the case. The enforcement of the liability of the company was, by the act which created it, conditioned upon the giving of the notice. Without compliance with the condition there can be no enforcement of the liability."

This is obviously so for the reason that pleading the statute must be stating the facts which bring the case within it; "and counting on it the strict language of pleading is making express reference to it by apt terms to show the source and right relied on." *Howser v. Melcher*, 40 Mich. 185; *Chicago, etc., Ry. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. 213; *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792; *Hall v. Bumstead*, 20 Pick. (Mass.) 2; *Berry v. Stinson*, 23 Me. 140; *King v. Felton*, 63 Cal. 66; *Colorado Springs Co. v. Hopkins*, 5 Colo. 206; *Barker v. Hannibal & St. Joe Railway Company*, 91 Mo. 86, 14 S. W. 280.

The absence of any allegation in the petition that the required notice had been given, and the absence of any proof thereof, entitled the defendant to the directed verdict requested, without considering or determining any other question of law in the case, unless the contention of plaintiff's counsel be well made that the amendatory act of 1903 is invalid. This contention is predicated, first, of the assumption that by its phraseology the act is made to apply to an injury resulting from the carrier's negligence toward the passenger where death does not ensue, and, as such cause of action exists at common law independent of the statute, it is not competent for the Legislature to condition its exercise, as sought by the statute in question. And, as the other provision of the statute limiting the right of action where death ensues is inseparably connected therewith, the whole provision must fall. Why may not the Legislature, in the exercise of the police power, impose upon the party injured the duty of giving notice within a given time of the fact of the injury and claim of damage therefor? Is it in legal effect anywise different from the short time limited in which actions for personal injuries shall be brought? It does not take away the common-law right of action. Such legislation rests

upon principles of sound policy. The incident of an injury claimed to have resulted from the negligence of the carrier or master may be wholly unknown at the time to the company or the master. Unless advised thereof by the complainant, the latter may wait years, as the statute of limitations may be, before instituting suit, and other witnesses to the accident may have scattered and the means of knowledge have lessened or become entirely lost to the carrier or master; while the actor has always his own testimony, and can keep in view his witnesses. By giving notice of his claim, it affords the defendant an opportunity to make inquiry to ascertain the facts, and, perhaps, to adjust the claim on more equal grounds. The surviving injured party has the advantage of his own testimony and assistance, and it would, therefore, seem to be more reasonable why he should be required to give such notice than in the case of death of the injured person.

The validity of such statutes in the case of injury to a servant has been approved by courts of recognized authority. *Healey v. Blake Mfg. Co.*, 180 Mass. 270, 62 N. E. 270; *Cahill v. New England Telephone & Telegraph Company*, 193 Mass. 415, 79 N. E. 821; *Colorado Milling & Elevator Company v. Mitchell*, 26 Colo. 284, 58 Pac. 28; *Barry v. Desk Company*, 121 App. Div. 810, 106 N. Y. Supp. 575; *Finnegan v. Contracting Company*, 122 App. Div. 712, 107 N. Y. Supp. 855; *St. Louis & S. F. R. R. Co. v. Little*, 75 Kan. 716, 90 Pac. 447; *Pullman Company v. Woodfolk*, 121 Ill. App. 321; *Moyle v. Jenkins* (1881) L. R. 8 Q. B. Div. 116.

Like statutes requiring notice to municipal corporations in case of personal injuries have been upheld. *Ulbrecht v. City of Keokuk*, 124 Iowa, 1, 97 N. W. 1082; *Tattan v. City of Detroit*, 128 Mich. 650, 87 N. W. 894; *Doyle v. City of Duluth*, 74 Minn. 157, 76 N. W. 1029; *Schmidt v. City of Fremont*, 70 Neb. 577, 97 N. W. 830; *Fugere v. Cook*, 27 R. I. 134, 60 Atl. 1067.

The second contention is that it was not within the competency of the Legislature to restrict the venue of such actions to the courts of the territory. Even if this were conceded, which we need not decide, it would not follow that the provision respecting the giving of notice as a precedent act to the right of action would fall because contained in the same statute. It is the settled rule of construction that a given portion of a statute may be in part invalid, but, if other parts separately considered are valid, that which is valid may stand while the other may be rejected, unless the parts are so mutually connected and interdependent, indicating "considerations or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not have passed the residue independently." *Warren v. Mayor & Aldermen*, 2 Gray (Mass.) 84. The two provisions in question may be regarded as separable and independently enforceable. *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318; *Railroad Companies v. Schutte*, 103 U. S. 119, 26 L. Ed. 327; *Noble v. Mitchell*, 164 U. S., loc. cit. 372, 17 L. Ed. 110, 41 L. Ed. 472; *Diamond Glue Company v. United States Glue Company*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328; *Jaehne v. New York*, 128 U. S. 189, 9 Sup. Ct. 70, 32 L. Ed. 398.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

On Rehearing.

PER CURIAM. The motion for rehearing is predicated of two grounds: (1) That the territorial statute of 1903 (Laws N. M. 1903, p. 51, c. 33), requiring every railroad corporation doing business in the territory to file its charter, giving its "principal place of business" and designating some person upon whom service of process could be had, was repealed before the plaintiff's cause of action accrued. (2) The statute of 1903, which amended the prior statute giving the right of action for wrongful death, by imposing the conditions therein expressed in the original opinion herein, was disapproved by Congress on May 13, 1908, after the judgment in the trial court, and after the cause was brought to this court for review on writ of error, but before the final decision in this court. 35 Stat. 573.

The suggestion in the original opinion respecting the provision "where such corporation has its principal place of business" was merely arguendo, on the assumption of its existence and validity. The Supreme Court of the territory, in *Singer Manufacturing Company v. Hardee et al.*, 4 Johns. (N. M.) 175, 16 Pac. 605, decided in 1888, held that the provision of the statute requiring foreign corporations doing business in the territory to do certain acts as a condition under which they could transact business therein, was invalid in so far as it constituted a regulation of interstate commerce, and that a failure to comply therewith was no defense to an action by the foreign corporation against a local defaulting agent. That provision of the statute was repealed by act of the Legislature in 1905. It does not follow, however, that a rehearing should be granted because of the reference to that statute in the opinion. Section 5 of the amendatory act of 1903 provided that:

"This act shall not apply to cases in which the person or corporation against whom damages for personal injuries are claimed cannot be duly served with process in this territory."

Section 2963, Comp. Laws N. M. 1897, in force at the time of the injury in question, provides that service of process may be had upon any station agent at any station or depot along the line within any county in the territory, and, if there be no such station or agent, service may be made upon any conductor of a passenger or freight train of such company. Therefore it cannot be claimed that there was no method under an existing valid statute of New Mexico of obtaining service upon a foreign railroad corporation operating within the territory.

In respect of the second ground of the motion, that the said statute of 1903 was disapproved of by Congress before the decision of this case on writ of error, we deem it proper to say that this fact was not called to the attention of the court, either in the brief of counsel or at the hearing; otherwise, the effect of it would have been considered and disposed of in the opinion. It is sufficient, however, to say that, had the fact been called to the attention of the court, it

would not have altered the result. The disapproving resolution of Congress was predicated of section 7 of the organic act of the territory (Act Sept. 9, 1850, c. 49, 9 Stat. 449), which, aliunde, provides that:

"All laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

A similar provision is found in the General Statutes of the United States (section 1850), applicable to all territories not excepted therefrom. Presumptively the territorial legislative acts are submitted to Congress within a reasonable time after adoption. Said provision of the organic act does not require any action to be taken by Congress to validate territorial enactments. It only provides that, when the enactments are disapproved, they shall thenceforth be null and of no effect. The legislative act of New Mexico passed in 1903 had stood for five years before its disapproval by Congress. Up to the day of its disapproval it was the law of the territory, unless at its inception it was not within the first clause of said section 7 of the organic act, which declares:

"That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act."

There is no foundation for the contention that the provision of the act of 1903 in question, as shown by the original opinion herein, is inconsistent with the Constitution of the United States or the provisions of the organic act; and therefore, until disapproved by Congress, it was the law of the territory, in force and operative. Accordingly it was said in *Miners' Bank v. State of Iowa*, 12 How. 7, 13 L. Ed. 867:

"Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for—nay, might have disarmed them of the very power of self-preservation. An invasion, or insurrection, or any other crisis demanding the most strenuous action, would have had to remain without preventive or remedy, till Congress, if not in session, could be convened, or, when in session, must have awaited its possibly procrastinated aid."

So in *Walker v. New Mexico & Southern Pacific Railroad Co.*, 165 U. S. 593, loc. cit. 604, 17 Sup. Ct. 421, 41 L. Ed. 837, Mr. Justice Brewer observed:

"New Mexico is a territory; but in it the Legislature has all legislative power, except as limited by the Constitution of the United States and the organic act and the laws of Congress appertaining thereto."

The same idea is expressed in *Hornbuckle v. Toombs*, 18 Wall. 648, loc. cit. 655, 21 L. Ed. 966.

Counsel's whole argument in support of the motion for rehearing is based upon a false premise, to wit: That the provision of the amendatory act of 1903, requiring the giving of notice within 90 days

after the injury, pertains merely to matter of procedure, and was in the nature of a statute of limitation on the right of action; and, therefore, when the statute was disapproved by Congress, it was like a repealing act affecting the remedy, passed while the case is on appeal and before final judgment thereon, either destroying the right of appeal or removing the bar. The Legislature of New Mexico gave to the defendant in error a right of action for damages resulting from death—a right which did not exist at common law. The Legislature which gave that right, by the act of 1903, declared that it could be exercised only on the condition that within 90 days after the given cause of action arose, the plaintiff should give the specified notice. This was a condition precedent to the right of action, the nonperformance of which took away the cause of action. When this injury occurred, and this suit was brought, the act of 1903 was a valid law, in force and effect. Under it, when this suit was brought, the plaintiff had no cause of action, as she had not performed the condition precedent. The subsequent disapproval by Congress was prospective only in its operation. It did not have the effect to revivify that which had been dead for 2½ years.

The petition for rehearing is denied.

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WILLIAMS v. JOHN L. ROPER LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. January 13, 1909.)

No. 830.

1. LOGS AND LOGGING (§ 21\*)—CONTRACTS—CONSTRUCTION—TERMS IMPLIED.

A contract by which defendant, which was the owner of tracts of timber lands in a certain locality, agreed to furnish logs to plaintiff's mill to be manufactured into lumber for it by plaintiff until all the logs on such tracts were manufactured, subject to its right to sell or itself manufacture any of such timber, provided it furnished plaintiff sufficient to cut 250,000 feet of lumber per month, by implication required it to furnish the usual run of logs in the woods according to the usual custom, and was not complied with where defendant manufactured practically all of the good logs and furnished plaintiff with culls only, which were more difficult and expensive to cut.

[Ed. Note.—For other cases, see *Loggs and Logging*, Cent. Dig. § 53; Dec. Dig. § 21.\*]

2. SALES (§ 434\*)—ACTION BY BUYER FOR BREACH OF CONTRACT—PLEADING.

A count in a complaint to recover damages for alleged misrepresentations and breach of warranty in the sale of a boiler by defendant to plaintiff construed, and *held* to state a cause of action.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 434.\*]

In Error to the Circuit Court of the United States for the Eastern District of North Carolina, at Elizabeth City.

E. F. Aydlett (Aydlett & Ehringhaus, on the brief), for plaintiff in error.

Edward R. Baird, Jr. (W. M. Bond, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

PRITCHARD, Circuit Judge. This was a civil action. Two causes of action were set up in the complaint: (1) Failure to furnish logs as provided in the contract; and (2) damages on account of false representations and failure of warranty on sale of a boiler. At the trial the defendant moved to dismiss each of the causes of action set out in the complaint, upon the ground that the complaint did not state facts sufficient to constitute a cause of action in either instance. Both motions were granted, and the plaintiff, having duly excepted, assigns the same as errors.

Defendant below contends, as to the first cause of action, that its only obligation under the contract was to furnish sufficient logs to manufacture 250,000 feet of lumber per month, regardless of the quality of the logs and without regard to the usual run of timber. That they had the right under the contract to send plaintiff only cull logs, if they so desired, the only obligation being that they send him enough to manufacture 250,000 feet. That there is no allegation in the complaint that a sufficient quantity for that purpose was not furnished, and therefore a cause of action was not stated. As to the second cause of action, defendant contends that the boiler was sold under a written contract, the same being attached to the complaint and made a part of plaintiff's first cause of action, and that no warranty appears therein.

It appears from the record that, after a jury had been empaneled, the court, on motion of counsel for defendant in error, dismissed the complaint of the plaintiff in error upon the ground that the complaint did not state a cause of action. The first cause of action stated in the complaint reads as follows:

"(2) That plaintiff and defendant entered into a contract on the 27th day of September, 1902, in writing, a copy of which is hereto attached and made a part of this complaint, which has been modified from time to time as to the amount to be paid for the manufacture of the lumber from \$2 to \$3.50 per M.

"(3) That the plaintiff entered upon the fulfillment of the terms of said contract according to the terms thereof, and was and has been at all times ready, willing, and able to perform his part, and has in every respect performed his part of said contract.

"(4) That the defendant has failed and refused to perform its part of said contract and deliver the logs to the mill of plaintiff as provided for in said contract.

"(5) That defendant has been ever since the execution of said contract and up to the present cutting the timber described in said contract and sending it to its mill or mills in the state of Virginia to be manufactured, and sent to the plaintiff all of the cull logs.

"(6) That under the contract it was the duty of the defendant to deliver to the plaintiff its timber as it came, the good logs as well as the culls, and not to separate the good logs and send the same to its mill in Virginia and culls to the plaintiff.

"(7) That the defendant only delivered to the mill of the plaintiff a small quantity of good logs, but delivered all of its culls against which the plaintiff repeatedly protested, and insisted that it should comply with the contract and deliver the logs as they came and in the usual length.

"(8) That the cull logs were not in regular length, but longer, different, and unusual lengths, crooked, and full of long knots and limbs, which required the

plaintiff at great expense to have the same trimmed off before same could be sawed in lumber, and many of said cull logs were so crooked that it was difficult to get any lumber out of same, and at great and unusual expense.

"(9) That, by reason of defendant refusing and failing to comply with its contract and deliver logs according to the terms and true meaning of said contract, the plaintiff was unable to cut and deliver the lumber at a reasonable cost, but at a heavy expense and in much less quantities per day, and to his great damage during the period since he commenced performing his part of said contract.

"(10) That, by reason of the defendant failing and refusing to comply with its part of the contract, the plaintiff has been prevented from cutting the logs according to the agreement, to his great damage and loss."

It is insisted by counsel for the plaintiff in error that the foregoing allegations constitute a good cause of action, and that the court below erred in dismissing the same.

A motion to dismiss, under the practice of the state courts of North Carolina, will be treated as a demurrer, and, for the purpose of determining the questions sought to be reviewed, such motion will be treated as an admission on the part of the defendant in error that the facts stated in the complaint are true.

To determine the question as to whether the court erred in dismissing this cause of action, it becomes necessary to construe the contract relied upon by the plaintiff in error. The complaint alleges the existence of a contract; that the plaintiff in error has endeavored to comply with such contract, and his readiness to perform his part of the same; and alleges that the defendant has failed to perform its part of said contract. Does the contract upon which this suit was instituted require the defendant in error to furnish the usual run of logs in the woods, or can the defendant in error, at its discretion, furnish only cull logs? Here we have a contract by which the plaintiff in error agrees to saw the logs belonging to the defendant in error on certain tracts of land located in North Carolina, and the defendant in error agrees to furnish logs to the plaintiff in error until all the logs on such tracts are manufactured into lumber. It is true that there is a proviso in the contract that the defendant may sell timber on any of its tracts or manufacture any or all of its timber, and sell any of its timber tracts; but this proviso clearly recognizes the obligation of the defendant in error under the contract to furnish logs sufficient each month to manufacture not less than 250,000 feet of lumber. In the first instance, the agreement is to furnish all the timber on said tract, which must necessarily mean the usual run of logs on said tract; and, while it is provided that the defendant in error may sell all of its timber, this provision is modified by the closing words of the paragraph, which are as follows:

" \* \* \* The only obligation under this contract of the said John L. Roper Lumber Company as to furnishing logs or timber to said R. L. Williams being to furnish him as provided in this contract sufficient logs to manufacture each month not less than two hundred and fifty thousand feet of lumber."

The foregoing leaves no doubt as to the extent of the limitation contained in the proviso to the effect that the defendant in error may sell or dispose of any or all of its timber on the tracts in question, which we construe to mean that the defendant in error may sell any or all of its timber or any of its timber tracts in that vicinity, provided that

In doing so it retains a sufficient amount of timber to enable it to comply with its contract with the plaintiff in error, to wit, to furnish logs sufficient to saw 250,000 feet per month. Therefore, in determining the question as to whether under this contract the defendant in error is required to furnish the usual run of logs, or instead of doing so, may furnish culls or worthless logs, we must necessarily consider the provision in the contract wherein the defendant in error undertakes in the following language to furnish logs to be sawed by the plaintiff in error:

"It is understood and agreed that this contract shall continue, and said John L. Roper Lumber Company shall furnish logs and said R. L. Williams shall continue to manufacture and deliver the same under this contract so long a time as shall be necessary to fully discharge and pay off said debts of \$3,250.00 and interest, in the manner hereinabove provided, and also until all timber owned by said John L. Roper Lumber Company in the neighborhood of said mill site and in said Tyrell county, and all timber owned by it tributary to its railroad in Tyrell county, shall have been manufactured into lumber and delivered according to this contract."

Anything like a fair construction of this part of the contract, standing alone, must be that the defendant in error undertakes to furnish the plaintiff in error logs in accordance with the usual custom, which, of course, in the absence of any exception, would mean the general run of logs to be found on such tract of land. In the case of *Smythe v. Persons*, 37 Kan. 79, 14 Pac. 444, the court said:

"Parties are presumed to contract with reference to a uniform or well-settled custom or usage pertaining to the matter expressed in the contract, where such a custom or usage is not unreasonable or opposed to well-settled principles of law."

In *Long v. Straus*, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87, it is said:

"The principle is thus stated by Mr. Bishop: 'What is implied in an express contract is as much a part of it as what is expressed.'"

According to the principles enunciated in the foregoing cases, we think that a fair construction of the contract is that the defendant in error, under the terms of this contract, agreed to furnish the plaintiff in error logs in accordance with the usual custom, to wit, the run of logs to be found in the woods, and therefore the allegations of the complaint raise an issue of fact for determination by the jury as to whether the defendant in error has failed to comply with his contract in this respect.

There is another significant proviso to be found in this contract, which tends to show that it was the intent of the parties that the average run of logs were to be furnished. For instance, the following expressions are found in the contract:

"All boards manufactured and delivered under this contract are to be properly trimmed for lengths of 12, 14 and 16 feet, allowing usual percentage 12 feet lengths."

Also:

"Said John L. Roper Lumber Company not to pay for any miscuts unfit for shipment as four quarters (4/4) or any worthless red heart or culls."



Why was it necessary to provide for the usual percentage of short timber, as was done in this instance, if it was not contemplated by the parties to the contract that the average run of logs was not to be supplied? It seems to us that these provisions show conclusively that it was in the minds of the contracting parties at the time the contract was executed that the usual run of logs to be found in the woods was to be furnished. Any other construction would result in great injustice to the plaintiff in error, as is shown by the allegation contained in its complaint to the effect that:

"The defendant only delivered to the mill of the plaintiff a small quantity of good logs and delivered all of its culls, against which the plaintiff in error repeatedly protested, and insisted that the defendant in error comply with the contract and deliver the logs as they came in the usual length," and "that the culls were not of the regular length, but longer, different and unusual length, crooked and full of long knots, and limbs which required the plaintiff at great expense to have the same trimmed off before same could be sawed into lumber, and many of said cull logs were so crooked that it was difficult to get any lumber out of same and at great and unusual expense."

This quotation from the complaint clearly states that the defendant in error failed and refused to comply with its contract in this respect. We are therefore of opinion that the court erred in dismissing the first cause of action of plaintiff in error.

We will now consider the second assignment of error, which relates to the ruling of the court in dismissing plaintiff in error's second cause of action, in which it is stated that the defendant in error sold to the plaintiff in error an 80 horse power boiler, to be in first-class condition, which was to be used by the plaintiff in error in his mill in the manufacture of the lumber in question. That the boiler was delivered by defendant in error and placed in the mill of plaintiff in error, but the same was not in first-class condition and did not meet the requirements of plaintiff in error. That plaintiff in error made known this fact to defendant in error, and, at the request of defendant in error, the plaintiff in error made certain changes, but after repeated trials the boiler was found to be defective and incapable of doing the work of plaintiff in error, and because of its condition, and its repeated breaking down, plaintiff in error was put to heavy expense and damage. It is charged also that defendant in error contracted to sell said boiler for \$350, guaranteeing it to be in first-class condition, and that it would do the work of plaintiff in error. That after a year's trial it proved to be worthless, and was worthless at the time the defendant in error sold the same to the plaintiff in error. That the representations of the defendant in error to the plaintiff in error as to the condition of the boiler were false, and known to be false at the time they were made by the defendant in error. It is also alleged that, on account of the defective condition of the boiler, the plaintiff in error was greatly damaged, etc.

It is insisted by counsel for the defendant in error that the sale of the boiler in question was by virtue of the contract which is attached to the complaint. There is nothing in the complaint which refers to this contract as being the contract under which the purchase of the boiler was made, nor is the contract made a part of the complaint for

that purpose. The document in question is merely a contract to convey the property at a future time, and does not constitute a bill of sale. There is nothing contained therein to indicate that there was a delivery of the property, nor does it appear from such contract that there was ever an execution of the papers in accordance with its provisions, and, nothing else appearing, the title could not pass. It is true that it is provided in the contract that the property was to be delivered, but such delivery was to be made at a future time. Therefore, under its provisions, there were many things left to be done, both by the vendor and the vendee, in the future. At most, it was simply an agreement on the part of the John L. Roper Company, the defendant in error, to sell and deliver to the plaintiff in error this property, provided the plaintiff in error should comply with certain stipulations therein contained.

We are of opinion that the plaintiff in error states a good cause of action, and that the court below erred in dismissing the same.

For the reasons hereinbefore stated, the judgment of the court below is reversed, and the cause will be remanded with instructions to proceed in accordance with the views herein expressed.

Reversed and remanded.

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PENNSYLVANIA R. CO. v. HUMMEL

(Circuit Court of Appeals, Third Circuit. January 21, 1909.)

No. 24.

1. RAILROADS (§ 275\*)—DEFECTIVE APPLIANCES—INJURIES TO LICENSEES—NATURE OF LIABILITY.

Where a railroad company furnished a defective freight car to plaintiff's employer to be loaded, and plaintiff was injured, while endeavoring to close the car door, because of the defect, the railroad company's liability to plaintiff was one arising *ex delicto* and not *ex contractu*.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 876; Dec. Dig. § 275.\*]

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. COURTS (§ 360\*)—FEDERAL COURTS—PRINCIPLES OF COMMON LAW—GENERAL JURISPRUDENCE.

The federal courts determine for themselves the principles of the common law and of general jurisprudence, independent of the rules applied by the courts of the several states.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 360.\*]

Conformity of practice in common-law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

3. RAILROADS (§ 275\*)—DEFECTIVE CARS—INJURIES TO LICENSEES.

Defendant railroad company furnished a car having a defective door to plaintiff's employer to be loaded. While loading the car, plaintiff and a fellow servant endeavored to close the door, which ran off its track because of the defect, and fell on plaintiff, breaking his back. *Held*, that the railroad company was bound to use reasonable care to keep the doors

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of its cars in safe operative condition, and that it was therefore liable for plaintiff's injury resulting from a breach of such duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 876; Dec. Dig. § 275.\*]

**4. RAILROADS (§ 279\*)—DEFECTIVE CARS—INJURIES TO LICENSEES—PROXIMATE CAUSE.**

Where the servant of a licensee, having ordered a railroad car to be loaded with goods, was injured by the falling of a door of the car on him, as he was endeavoring to close it, due to a broken lug which permitted the door to run off its track, the railroad company's negligence in failing to keep the door in a safe operative condition was the proximate cause of the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 901; Dec. Dig. § 279.\*]

**5. RAILROADS (§ 282\*)—INJURY TO PERSON WORKING ON CAR—EVIDENCE—MATERIALITY—REMOTENESS.**

Where plaintiff was injured by the fall of a car door as he was endeavoring to close the same at 5:30 o'clock in the afternoon, evidence as to the condition in which witnesses found the door on the succeeding morning, to the effect that there was a broken lug which appeared to have been in that condition for a considerable period and which permitted the door to run off the rail, which was also rickety, was not objectionable for remoteness.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

**6. RAILROADS (§ 282\*)—OPERATION—INJURY TO PERSON WORKING ON CAR—EVIDENCE—RELEVANCY.**

On an issue as to the defective condition of a car door by the fall of which plaintiff was injured, evidence that on the morning succeeding the injury the car was found with a broken lug which permitted it to run off the rail, that the break appeared to be old, and that the track was rickety, was relevant.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

E. J. Sellers, for plaintiff in error.

Thomas Leaming, for defendant in error.

Before DALLAS, Circuit Judge, and LANNING, District Judge.

LANNING, District Judge. This is an action in tort. In the statement of his case, Hummel, the plaintiff below, averred that on March 20, 1907, the Pennsylvania Railroad Company, the defendant below, upon an order of I. P. Thomas & Son, sent certain of its box freight cars upon one of its floats to that firm's private wharf, at Mantua Point, N. J., to be loaded with merchandise for shipment by that firm; that the plaintiff, on the day above mentioned, "occupying the position of foreman for the said I. P. Thomas & Son, was sent by his employers to their private wharf to load the aforesaid cars"; that the plaintiff, "while lawfully and carefully endeavoring to close a door on one of the aforesaid box cars, was severely and permanently injured, due to the negligence and carelessness of the defendant in sending a car whose door was in a dangerous, unsafe, and rotten condition; that the door of the said car, by reason of the dangerous and unsafe condition in which it was, fell upon, crushed, and severely injured the said Louis

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

E. Hummel, from which injuries he has suffered great pain and distress from thence hitherto, having received a permanent injury to his spine, bruises and contusions, and nervous shock." Damages were claimed to the amount of \$35,000. The plea was not guilty, and the verdict and judgment on the trial were for the plaintiff in the sum of \$7,000.

It was conceded on the argument that the liability of the defendant, if any, does not arise out of any contract. The contract set forth in the declaration was one between I. P. Thomas & Son and the defendant, and not between the plaintiff and the defendant. A statute of the state of Pennsylvania (Act May 25, 1887 [P. L. 271]) abolishes, as to procedure, the distinctions between the different actions arising *ex contractu*, and calls them all actions in *assumpsit*, and provides that the plea to a statement or declaration in any such action shall be non *assumpsit*. It abolishes, also, as to procedure, the distinctions between the different actions arising *ex delicto*, and calls them all actions in trespass, and provides that the plea in any such action shall be "not guilty." In the present case, the summons was issued in an action in trespass, the statement or declaration sets forth a cause of action arising *ex delicto*, and the plea is "not guilty." The action is founded, therefore, on an alleged tort, and not on a breach of contract. The case was tried on that theory. We find nothing in the charge to the jury delivered by the learned judge of the court below, or in any other part of the record of the case, that indicates, as counsel for the defendant argues, any confusion on this point. It is true that in the charge reference was made to the contractual relation between the defendant and I. P. Thomas & Son, but the cause of action was not anywhere referred to by the trial court as one based on the contract.

The most important question raised by the assignments of error is whether the defendant owed to the plaintiff the duty of reasonable care in providing cars whose doors could be safely operated. The argument of the defendant's counsel is to the effect that the *lex loci delicti commissi* is applicable, and that, as the accident to the plaintiff occurred in New Jersey, the law of that state is to be applied. It is not claimed that the law of New Jersey on the point under consideration is statutory. On the contrary, the New Jersey cases referred to by counsel are cases in which the common-law rule on the subject is considered and explained. The federal courts, however, determine for themselves the principles of the common law and of general jurisprudence. *Smith v. Alabama*, 124 U. S. 478, 8 Sup. Ct. 564, 31 L. Ed. 508; *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 101, 21 Sup. Ct. 561, 45 L. Ed. 765. In their brief the defendant's counsel, after reviewing a number of New Jersey decisions, say:

"It will therefore be observed that by the law of New Jersey—the *lex loci*—one injured in consequence of the breach of duty which a defendant owed another pursuant to a contract, express or implied, cannot recover in a suit against such defendant, although, had such breach not occurred, the injury to the plaintiff might have been avoided."

If, as above stated, the New Jersey courts have extracted such a rule from the principles of the common law, it does not bind a federal court. But as the courts of that state adhere very rigidly to common-law

forms of procedure and common-law principles of practice, we have, in our endeavor to ascertain the true common-law rule on the subject of liability in such a case as the one now before us, carefully examined all the New Jersey authorities referred to by defendant's counsel. They are *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19; *Clyne v. Helmes*, 61 N. J. Law, 358, 39 Atl. 767; *Styles v. Long Co.*, 67 N. J. Law, 413, 51 Atl. 710, and 70 N. J. Law, 302, 57 Atl. 448; *Fielders v. North Jersey St. Ry. Co.*, 68 N. J. Law, 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552; and *Conklin v. Staats*, 70 N. J. Law, 771, 59 Atl. 144. These cases do not support the broad conclusion of counsel. While they hold that A. cannot recover damages from B. for B's breach of contract with C., they do not hold that A. may not recover damages from B. for B's breach of duty to A. On the contrary, it was said in *Marvin Safe Co. v. Ward* that:

"There is a class of cases in which a person performing service or doing work under a contract may be held in damages for injuries to third persons, occasioned by negligence or misconduct connected with the execution of the contract, but these are cases where the duty or liability arises independent of the contract."

In *Fielders v. North Jersey St. Ry. Co.* it was said:

"A duty, the breach of which is an actionable wrong, may arise from a contract or be imposed by positive law, independent of contract. In the first case, the party to the contract only can sue; in the other case, any person may sue if he be one of the class of persons for whose benefit the duty is imposed."

In *Van Winkle v. American Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. 472 (a case not referred to by counsel), there is an illuminating discussion of the principle. There, the defendant entered into a contract to insure the boiler of the *Ivanhoe Paper Company*. The policy of insurance provided that the insurer should have the right from time to time to have access to the boiler for the purpose of examining and testing it, and that if the load on the safety valve should at any time exceed that approved by the insurer's inspector, according to his certificate, the policy should be void. It appeared by the averments of the declaration, the truth of which was admitted by the demurrer thereto, that the insurer's inspector had in fact made repeated inspections of the boiler and furnished the required certificates for the guidance of the paper company's engineer. Subsequent to these inspections, and during the life of the policy, the boiler exploded and damaged the adjoining property of the plaintiff. The court said:

"The plaintiff was the owner of the adjacent property, near to the place of this boiler. The machine, unless carefully operated, was dangerous to everything in its immediate neighborhood. No one could open his eyes and not see this situation, for, in this respect, *res ipsa loquitur*. Plainly, therefore, the owner of the machine, even according to the limited rule adopted by the courts of this country, was answerable to the plaintiff for the results of the careless management of such machine. And so, for a like reason, as we think, must every person be similarly responsible who participates in a substantial degree in such management, whether he be a contractor with the owner, or his servant, or even if he be a mere volunteer. The situation itself creates the duty to exercise care and skill in a high degree in every one who meddles in a matter fraught with such peril to the property of another. The defendant, the insurance company, as soon as it took part,

practically, in the management of this machine, became subject to a duty in that particular by virtue of its contract with the Ivanhoe Paper Mill Company to conduct itself with care and skill, and, by virtue of the law, to a similar duty towards the plaintiff, and it is the violation of this latter duty which, we think, forms a legal foundation for this action. And it would seem that there is a broader ground than the one above defined on which the present case can be based. It is this: that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill. The law hedges round the lives and persons of men with much more care than it employs when guarding their property, so that in this particular it makes in a way every one his brother's keeper, and therefore it may well be doubted whether in any supposable case redress should be withheld from an innocent person who has sustained immediate damage by the neglect of another in doing an act which, if carelessly done, threatens, in a high degree, one or more persons with death or great bodily harm. Such misfeasances, if they result fatally, are indictable crimes. Where they inflict particular damage upon individuals, they should, it is conceived, be actionable. There are many decisions that appear to rest on this basis."

The same doctrine was applied in *Schulte v. United Electric Co.*, 68 N. J. Law, 435, 53 Atl. 204, and *Guinn v. Del. & Atl. Telephone Co.*, 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668.

We do not think the decisions in our federal courts have established a different rule. In *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621, the defendant owed to the plaintiff no duty arising from contract or imposed by law. The opinion in that case, however, clearly concedes that, if an act of negligence be immediately dangerous to the lives of others, the wrongdoer is liable to the injured party whether there be any contract between them or not. So do the opinions in *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C. C. A. 1; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924; *Huset v. Case Threshing Mach. Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303; and *Keep v. National Tube Co.* (C. C.) 154 Fed. 121.

In the case in hand the defendant, the Pennsylvania Railroad Company, furnished box cars to I. P. Thomas & Son to be loaded with merchandise for shipment by Thomas & Son. The plaintiff, Hummel, an employé of Thomas & Son, in the performance of his duty as such employé, attempted with another of such employés to close the door of one of the cars. The door was a heavy, sliding one, running back and forth on an iron rail. At the bottom it was provided with two iron lugs, somewhat resembling an inverted U which fitted on the rail. The evidence showed that the part of one of these lugs which should extend down alongside the rail between it and the side of the car, and therefore not easily observable by one operating the door, was broken off, so that, when the plaintiff and his associate attempted to slide the door so as to close the car, the door ran off its track, fell on the plaintiff, and broke his back. Do these facts disclose a violation of duty from the defendant to the plaintiff? If so, it must be because when the defendant furnished its cars to Thomas & Son it owed to all per-

sons who might have work to do for Thomas & Son in loading them, or in operating their doors, the duty of reasonable care in keeping the doors in safe operative condition. The door which fell upon the plaintiff was a heavy one. The plaintiff says it generally takes two men to close such a door. The evidence not only shows that the lug was broken, but that the track was rickety. It seems to us plain that the defendant company was bound to anticipate injury to one who should attempt to operate the door in that condition, and that it did owe to all persons who, as employes of Thomas & Son, should have occasion to open or close the door, the duty of reasonable care in keeping it in a safe condition. The contract between the defendant company and Thomas & Son created the condition out of which the duty of the defendant to the plaintiff arose, but the plaintiff's right of action was founded on that duty—a duty imposed by the law—and not on the contract.

Nor do we think the cause of the accident was a remote and not a proximate one. There was no intervening duty of inspection imposed on Thomas & Son. The negligence was that of the defendant company only, and that negligence was the immediate and direct cause of the plaintiff's injury.

We think, therefore, that there was no error in the refusal of the court below to direct a verdict for the defendant. This disposes of all the assignments of error except the first, second, third, and eighth.

The eighth assignment was abandoned on the argument.

The first, second, and third assignments are based on exceptions to the admission of the testimony of three witnesses as to the condition in which they found the door, the lug, and the rail the next morning after the plaintiff received his injury. The accident occurred about 5.30 o'clock in the afternoon, just as the work for the day was closing. The witnesses were employes of Thomas & Son, and, early the next morning after the accident, examined the parts about which they testified. The only objections to the testimony were that it was too remote, and that it was not relevant to the issue. Their testimony was to the effect that the broken lug failed to perform its function of keeping the door on the rail, that the surface of the broken part of the lug was rusty, and had the appearance of having been broken for a considerable period, and that the track was rickety. The admission of such testimony was not erroneous. It was neither too remote nor irrelevant. Its probative force, in view of the time that had elapsed between the accident and the examinations, was a question for the jury. It could not have been properly excluded. *O'Connell v. Pennsylvania Co.*, 118 Fed. 992, 55 C. C. A. 483.

The judgment will be affirmed, with costs.

## COOK V. FIDELITY &amp; DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,591.

## 1. COMPROMISE AND SETTLEMENT (§ 18\*)—IMPEACHMENT FOR FRAUD—ACCEPTANCE OF BENEFITS.

A party to a settlement cannot avoid the same on the ground of fraud while retaining money and notes received by him thereunder.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 81; Dec. Dig. § 18.\*]

## 2. REPLEVIN (§ 123\*)—BOND—IMPEACHMENT FOR FRAUD.

In an action at law in a federal court against the surety on a replevin bond, plaintiff cannot avoid the effect of a settlement made by the parties to the replevin suit by virtue of which it was dismissed on the ground that it was procured by the fraud of the plaintiff therein.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 123.\*]

In Error to the Circuit Court of the United States for the Southern Division of the District of Idaho.

This was an action upon a replevin bond executed by the defendant in error to the plaintiff in error, who was plaintiff below.

The complaint alleges that on the 28th day of August, 1905, the Uinta Hereford Cattle Company filed in the court below an action against Cook to recover the possession of certain sheep, horses, and other personal property, alleged to be of the value of \$30,000; that in that action one McLaughlin, for and in behalf and by authority of the cattle company, executed his affidavit on claim and delivery, upon which affidavit was indorsed by the attorneys for the cattle company a requirement directing the United States marshal of the District of Idaho to take the said property from Cook's possession, and that the undertaking here sued on was given in that action by the Fidelity & Deposit Company of Maryland, under and by virtue of which proceedings the marshal, on certain days therein mentioned, seized and took from the possession of Cook, 7,971 head of sheep, 4 horses, and 2 sheep-camp wagons, and delivered the same to the cattle company; that at the time of such seizure Cook was the owner of the property and in the lawful possession thereof; that on the 21st day of September, 1905, the aforesaid notice and affidavit on claim and delivery, as well as the said undertaking, were duly filed in the court below, and that on the 18th day of December of the same year, the cattle company filed in the court below its praecipe requesting the dismissal of the action, and that, accordingly, the replevin action was on that day dismissed at the cost of the plaintiff thereto; that by reason of such dismissal the condition of the undertaking was broken, and that "said undertaking by reason of said breach of said condition has become forfeited to this plaintiff, and that defendant herein has become and is liable to this plaintiff in said undertaking for the amount hereinafter set forth; that, at the time of the seizure of the property as aforesaid by the United States marshal, the value of the same was as follows, to wit: The value of said sheep was \$29,891.25; the value of said horses was \$400; the value of said camp outfits was \$500"; that the cattle company removed all of said property from the state of Idaho and converted the same to its own use, and that by reason of the alleged taking and the alleged breach of the undertaking the said property has become and is wholly lost to the plaintiff, to his damage in the sum of \$30,791.25, for which sum, with costs, the plaintiff sued.

The defendant in the action, in its amended answer, denied that the marshal took more than 7,855 sheep from the possession of the plaintiff Cook under the process mentioned, which number of sheep it admits the marshal delivered

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



to the cattle company, and alleges that he "so delivered said property in accordance and in compliance with the instructions of Alonzo Cook, the plaintiff herein." The amended answer also denied that Cook was at any time after August 25, 1905, the owner or in the lawful possession of any of the said property, and alleges that all times after the date last mentioned the cattle company was the owner and entitled to the possession of all of the said property. It admits that the cattle company filed in the court below its praecipe for the dismissal of its action in claim and delivery against Cook, which praecipe it alleges was (omitting title of court and cause) in this language:

"To Hon. A. L. Richardson, Clerk of the Above-Entitled Court:

"Please dismiss of record the above-entitled action, the controversy therein involved having been settled between the parties. The dismissal may be at plaintiff's costs.

"Dated this 17th day of December, 1905.

"P. W. Spaulding and

"F. S. Dietrich,

"Attorneys for Plaintiff."

That said praecipe was filed and the said cause was dismissed in compliance with the terms of agreements, made, after the commencement of the action and the seizure of the sheep, by Cook and the cattle company, by the terms of which the cattle company became bound to dismiss the action, "said parties having by mutual agreement settled the controversy involved in said suit, and said Cook having delivered said sheep and other property to said Uinta Hereford Cattle Company."

The amended answer denies that by reason of such dismissal, or for any reason, the condition of the undertaking was broken, and denies that for any reason the said undertaking became forfeited to the plaintiff, or that the defendant became or is liable to the plaintiff on said undertaking in any respect. It denies that at the time of the seizure of the property mentioned the sheep were of any greater value than \$19,637.50, or that the horses were of any greater value than \$50, or that the camp outfit was of any greater value than \$50.

The amended answer further alleges, among other things, that on the 15th day of August, 1905, in Douglas county, Neb., the plaintiff Cook sold and transferred to the cattle company all of the property already mentioned, with other property, executing to it a bill of sale therefor, which was annexed to and made a part of the amended answer; that at the same time and place Cook and the cattle company entered into a written agreement in which is recited the fact of such sale, and in which it was agreed that in case there were less than 8,200 head of sheep Cook was to give the cattle company credit for such shortage at the rate of \$3 a head, and in case there were less than 450 head of cattle Cook was to give the cattle company credit at the rate of \$22 per head, such credits for shortage to be indorsed on the note of the cattle company given to Cook as a part of the purchase price of the sheep and cattle; that by the contract of August 15, 1905, it was further agreed that the cattle company was to pay Cook \$3,000 in cash, and that the balance of the purchase price was to be paid in the notes of the company, secured by mortgage on certain lands therein described, which notes and mortgage were to be delivered by the cattle company to North & Stone, bankers at Evanston, Wyo., who were to deliver the same to Cook upon the delivery by Cook of the sheep and cattle to the cattle company, and when the cattle company should give notice that such delivery had been made; that by the contract of August 15, 1905, it was further agreed that Cook should deliver the sheep on their range in Bear Lake county, Idaho, on or before August 25, 1905, and to deliver the cattle at Pegram, Idaho, on or before December 1, 1905; that at the time of the execution of the agreement of August 15, 1905, the cattle company paid to Cook the \$3,000 in cash, which he accepted, "and in due time and manner said Uinta Hereford Cattle Company duly complied with said agreement, and was at all times able, willing, and ready duly to fulfill and perform all the obligations of said agreement upon its part to be performed"; that on the 28th day of August, 1905,

the cattle company was, and for some time prior thereto had been, and at all times subsequent thereto continued to be, the owner and entitled to the possession of all of the property described in the plaintiff's complaint, but that the plaintiff then wrongfully withheld the possession thereof from the company, and, having refused to yield the possession thereof after demand made therefor by the company, the latter commenced the replevin action; that while that action was pending, and immediately after the property involved therein had been seized by the marshal as stated, and while the same was in his possession, the cattle company and Cook, for the purpose of settling their pending disputes and difficulties involved therein, and terminating the controversy in respect to the property, on the 2d day of September, 1905, without the knowledge, acquiescence, or assent of the defendant, the Fidelity & Deposit Company of Maryland, entered into the following agreement in writing.

**"Agreement.**

"This agreement made and entered into in triplicate this second day of September, 1905, by and between the Uinta Hereford Cattle Company, of So. Omaha, Nebr., and Alonzo Cook, of Paris, Idaho, witnesseth:

"That whereas, on the 15th day of August, 1905, at So. Omaha, Nebr., the said Alonzo Cook sold to the said Uinta Hereford Cattle Company certain sheep and cattle enumerated in an agreement for escrow, said agreement, together with one certain promissory note for two thousand dollars, and four certain promissory notes for seven thousand eight hundred dollars each made by the Uinta Hereford Cattle Company, and payable to said Alonzo Cook, now being in the bank of North & Stone, bankers, at Evanston, Wyo., in escrow, and deliverable to Alonzo Cook upon certain conditions and instructions as are specified in said agreement;

"And whereas certain questions arising therefrom have caused the said Cattle Co. to commence suit in the United States Circuit Court for the District of Idaho against the said Alonzo Cook in claim and delivery for certain sheep sold as aforesaid:

"It is therefore agreed by and between the parties hereto that the said suit be dismissed at plaintiff's costs upon the fulfilling of this agreement;

"That the Uinta Hereford Cattle Company is forthwith and within a reasonable time to conform with the laws of the state of Wyoming for the doing of business therein;

"That the Uinta Hereford Cattle Company shall execute a good and sufficient real estate mortgage, using form #33169 as published by the Irwin Hodson Co., of Portland, Ore., without erasure or interlineation; said real estate mortgage to be for the same amount, securing the same notes and covering the same property as mentioned, named and described in a certain real estate mortgage now in the hands of said North & Stone, bankers, together with the above mentioned agreement and notes, executed by the Uinta Hereford Cattle Company on August 15th, 1905, and wherein said Alonzo Cook is named as grantee; that said new mortgage, together with this original agreement, is to be delivered to North & Stone, and said North & Stone to deliver same to Alonzo Cook under the same terms and conditions as those which cover the delivery of the mortgage and notes, now in the hands of North & Stone as aforesaid, and together therewith;

"That the three bands of sheep taken possession of by the United States marshal of Idaho in the action above named and now in his custody are to be counted by said Alonzo Cook and a representative of said Uinta Hereford Cattle Co. forthwith, and are to be trailed forthwith to the east side of Bear Lake in Bear Lake county, Idaho, and towards the Idaho-Wyoming state line and to be delivered to the Uinta Hereford Company by said marshal under the provisions of the Idaho statutes in claim and delivery;

"That thereafter and as soon as the amount of expenses and disbursements incurred by the Uinta Hereford Cattle Company by reason of the failure of said Alonzo Cook to deliver the sheep above mentioned to the said Uinta Hereford Cattle Company under the terms of the agreement aforesaid and in the hands of said North & Stone, bankers, can be ascertained, said amount is to be deducted from the amount owing upon the said note

for two thousand dollars above mentioned and described, and the balance owing upon said note to be paid by said cattle company to said Alonzo Cook, and said Alonzo Cook is to give a written order to said cattle company upon said North & Stone, bankers, that said two thousand dollar note to be delivered to said cattle company or its attorney.

"That the mortgage to be made and executed as above set forth is to contain besides the description as above set forth a clause conveying the water rights and ditches appurtenant thereto.

"It is further understood that this agreement is supplemental to and in addition to the agreement above mentioned as being in the possession of said North & Stone, and is no change of the terms therein, except as expressly expressed herein;

"That each party to this agreement is to have a written copy hereof marked duplicate and triplicate respectively, and the original copy hereof to be delivered as above set forth.

"In witness whereof the parties hereto have set their hands and seals hereto.

Unita Hereford Cattle Co., [Seal.]

"By A. T. McLaughlin,

"President and Manager.

"Alonzo Cook. [Seal.]

"Option.

"The said Alonzo Cook is to have the option that upon giving notice in writing to said Uinta Hereford Cattle Company that he desires to take stock in said company instead of and in lieu of the mortgage above mentioned and described and of the payment of the said two thousand dollar note as set forth in the above agreement, then said company is to, within twenty days after receiving said notice in writing, deliver to said Alonzo Cook, as security for the payment of the notes mentioned in this agreement certificates of capital stock of said Uinta Hereford Cattle Company of the par value of thirty thousand dollars, and at the same time to pay the said Alonzo Cook the sum of six thousand dollars to be applied upon the payment of the above mentioned notes and to be indorsed thereon, and the notes as paid to be delivered to said cattle company. Said capital stock to be as security for the payment of the balance owing upon the five notes above mentioned.

"Unita Hereford Cattle Co.,

"By A. T. McLaughlin.

"Alonzo Cook."

The amended answer further alleges that the sheep mentioned in the agreement last set out are the same sheep referred to in the aforesaid complaint and bill of sale; that the cattle company duly performed all of the conditions and obligations of the agreement of September 2, 1905, including the said option attached thereto, on its part to be performed, except as subsequently modified or waived by the respective parties as afterwards stated; that pursuant to the agreement Cook directed the marshal to turn over all of the property he had seized to the cattle company, and on or about September 5, 1905, caused all of the property covered by the agreement to be delivered to the cattle company, all of which was done without the knowledge, acquiescence, or consent of the defendant, the Fidelity & Deposit Company of Maryland. That on or about September 5, 1905, Cook exercised his right under the option attached to the agreement of September 2, 1905, and gave to the cattle company this notice in writing:

"Notice.

"To the Uinta Hereford Cattle Company, Cokeville, Wyoming:

"Gentlemen: You are hereby notified that I desire to take the payment of \$6,000.00 and delivery of \$30,000.00 par value of the capital stock of your company instead of and in lieu of the \$2,000.00 payment and real estate mortgage named and specified in a certain agreement made and entered into by and between yourself and myself this 2d day of September, 1905.

"[Signed] Alonzo Cook.

"Witness: W. R. Bryan, Bug Creek Canyon, Bear Lake County, Idaho.

"Sept. 5, 1905."

That thereafter, and on or about September 19, 1905, Cook and the cattle company, without the knowledge, acquiescence, or assent of the defendant to the present suit, entered into an agreement in writing, in addition and supplemental to the agreements of August 15 and September 2, 1905, in and by which, in consideration of the mutual covenants and agreements of each party thereto, it was agreed, among other things, as follows: "Said Cook agreed to deliver to said cattle company seven thousand nine hundred and seventy-one (7,971) head of stock sheep at \$3.00 per head, and four hundred and fifty (450) head of mixed cattle, more or less, at \$22.00 per head, it being agreed therein that said sheep had already been delivered at the time of the execution of said contract, and this defendant alleges that said sheep referred to in said contract are the same sheep referred to in said contract and bill of sale of August 15th, and said contract of September 2d, and in the amended complaint, and it was therein further agreed by said Cook that he would bear all the expenses attending said suit in claim and delivery up to the 9th day of September, 1905, except the costs of court, not including the United States marshal's expenses and costs. And said cattle company in and by said agreement agreed to pay said Cook at the rate of \$3.00 for each head of said sheep, and \$22.00 for each head of cattle in the way and in the manner and at such times as were stated in said agreement;" that in and by the instrument of September 19, 1905, it was further agreed that Cook had already been paid by the cattle company \$3,000 on account of the purchase price, and that \$1,000 should be paid at the time of signing said agreement, and that the cattle company should pay the balance upon its promissory note dated September 19, 1905, due and payable on the 15th day of December, 1905, for the sum of \$29,813, which note was to be secured by delivering to said Cook \$30,000 worth of the capital stock of the cattle company shares at par value, and the certificates of stock to be delivered on or before September 25, 1905; that in accordance with the terms of the contract of September 19, 1905, and immediately thereafter, the cattle company paid Cook \$1,000, and prior to September 25, 1905, executed and delivered to him its promissory note for the sum of \$29,813, and also 300 shares of its capital stock of the par value of \$100 per share, making a total of \$30,000 worth of stock, which said note and stock he received as a full compliance with and satisfaction of the obligations of the cattle company under the said agreements and contracts, and in full of the balance due from the cattle company as the purchase price of all of the property, including that mentioned in the complaint in the present action; that the cattle company in due time and manner duly performed all of the conditions and obligations imposed on it by the agreement of September 19, 1905.

The amended answer in the present case further alleges that Cook was duly served with process in the replevin action in Bear Lake county, Idaho, by the United States marshal, on the 2d day of September, 1905, such service being duly indorsed on the original summons by the marshal, and by him duly returned to and filed in the court below on September 21, 1905; that by such summons Cook was required to appear and answer the complaint therein within 40 days from date of service, and that the summons further provided that if he failed to so appear and answer the plaintiff thereto would take judgment against him for the recovery of the sheep and other property there sued for, or for the value thereof in damages, and that he never did appear in that action, or answer or demur to the complaint as required by such summons, and was, after October 12, 1905, in default; that after the aforesaid agreements had been executed and delivered, and the provisions thereof complied with by the respective parties thereto, and the said sheep and other property had been turned over to the cattle company, and Cook had failed to appear or answer or demur in the replevin action after service upon him of process, and being in default, the cattle company, in accordance with its agreement with him, caused that action to be dismissed in accordance with the præcipe set out; that at the time the defendant, the Fidelity & Deposit Company of Maryland, agreed to furnish the undertaking sued on, it was understood and agreed by and between it and the cattle company that the compensation or premium to be

paid by the cattle company to the defendant for the undertaking should be and was \$250, which was the sole consideration therefor; that on or about September 26, 1905, the cattle company informed the defendant that the replevin action and the controversy therein involved had been settled by mutual agreement, exhibited to the defendant a copy of the aforesaid agreement of September 19, 1905, and requested the defendant to remit a portion of its premium, which it did, in consideration of those representations, charging and receiving \$175 in full payment for furnishing the undertaking, instead of \$250, which it would have charged and received therefor had the plaintiff not entered into the aforesaid agreements and delivered the sheep as aforesaid; that at all times subsequent to the making of the agreements of September 2 and September 19, 1905, both Cook and the cattle company have acted under and recognized the existence, validity, and obligations thereof, and prior to the commencement of the present action those agreements were fully executed by both of the parties thereto; that Cook received and retains the \$1,000 in the agreement of September 19th provided to be paid by the cattle company to him, in addition to the \$3,000 paid to him by the cattle company on August 15, 1905, as a part of the purchase price of the sheep, and which he also still retains; that under the contract of September 19th he received from the cattle company its note for \$29,813, negotiable in form, together with \$30,000 worth of its capital stock to secure the said note, and that neither the note nor any part of the stock has ever been returned by him, and that he either retains the same and the whole thereof, or has otherwise disposed of the said property; that on or about the 18th day of December, 1905, the cattle company commenced an action in the district court of Buffalo county, Neb., against Cook, to recover \$20,302 as damages alleged to have been sustained by it on account of the false warranty of Cook in relation to the sale of the said sheep, cattle, and other property mentioned in the aforesaid agreements and bill of sale; that on or about January 13, 1906, Cook appeared in that action, and filed his answer and cross-petition to the plaintiff's complaint; that in that answer and cross-petition Cook refers to the aforesaid replevin action in which the bond upon which the present suit is brought was given, and alleges that while said replevin action was pending, and for the purpose of settling the same, he and the cattle company entered into the aforesaid contract of September 2, 1905, and the option annexed thereto, and further set up that after the delivery and acceptance of the sheep as provided for in the said agreement of September 2, 1905, he and the cattle company entered into still another agreement concerning the subject-matter of said agreement of September 2d and the prior agreement of August 15th, to wit, the aforesaid agreement of September 19, 1905, which last-mentioned agreement the said Cook in his answer and cross-petition alleged was the final agreement made between him and the cattle company. And in his said answer and cross-petition Cook alleged that in accordance with the contract of September 19, 1905, the cattle company executed and delivered to him its promissory note for the sum of \$29,813, payable December 15, 1905, and 300 shares of the par value of \$100 each of its capital stock, and that he, Cook, delivered the cattle referred to in the said agreement, which were received and accepted by the cattle company without objection or complaint. And in his said cross-petition Cook set forth a copy of the said note for \$29,813, and alleged that the same was executed by the cattle company in his favor as the balance of the purchase price of the sheep and cattle referred to in the aforesaid agreements and bill of sale, and in his said answer and cross-petition prayed for judgment against the cattle company for the full amount of the said note, with interest thereon from September 19, 1905, the date of the note, which answer and cross-petition was verified by him and filed with the clerk of the said court on or about January 13, 1906, copies of which answer and cross-petition are annexed to and made a part of the answer of the defendant to the present action.

The various agreements and exhibits referred to in the amended answer were introduced in evidence, and the record also shows that the \$4,000 in cash paid by the cattle company to Cook was retained by him, and that he never offered to return any part thereof, and that he also retains the note

of that company for \$29,813 secured by a deposit of its capital stock of the par value of \$30,000, none of which has he ever returned or offered to return. It further appears from the record that the cattle company, which is a corporation of the state of Nebraska, complied with the laws of Wyoming governing foreign corporations doing business in that state. The execution by Cook of the bill of sale and various agreements is not disputed, nor is it anywhere pretended that he did not understand their purport, but the attempt was made on his behalf to show, by the witness McLaughlin, fraud and misrepresentations leading up to the execution of the agreements entered into subsequent to August 15, 1905.

Upon the conclusion of all of the evidence in the case, the court, on motion of the defendant company, directed a verdict in its favor, which was returned, and upon it judgment against the plaintiff in error was entered.

Jesse R. S. Budge, Frank K. Nebeker, and Stewart & Stewart, for plaintiff in error.

John W. Parish and D. Worth Clark, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). Even if it be conceded that by the agreement of August 15, 1905, the title to the personal property thereby embraced did not pass to the cattle company (see *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, 76, 77, 78, 9 Sup. Ct. 458, 32 L. Ed. 854), still it cannot be doubted that by the subsequent agreements between the parties, and by the subsequent delivery of the property by Cook's direction to the cattle company, title thereto did pass to it. And even if it should be conceded that in this action at law the plaintiff in error was entitled to show, if he could, that the agreements entered into subsequent to August 15, 1905, were executed by reason of fraud and misrepresentations, still, upon the most obvious principles of right, he could not avoid them while retaining the money and other property received by him by virtue of their execution. *Hill v. Northern Pacific Railway Co.*, 113 Fed. 914, 51 C. C. A. 544, and cases there cited. But we think it very clear that the court below was right in refusing to permit the plaintiff in error to prove in the action at law that the agreements between Cook and the cattle company executed subsequent to August 15, 1905, were procured by fraud and misrepresentations. *Pacific Mutual Life Insurance Company of California v. Webb*, 157 Fed. 155, 84 C. C. A. 603, and the numerous cases there cited.

In respect to the suggestion that the plaintiff in error was at least entitled to nominal damages, it is enough to say that courts of justice do not reverse causes to award nominal relief only. *Kelly et al. v. Fahrney*, 97 Fed. 176, 38 C. C. A. 103, and cases there cited.

The judgment is affirmed.

## CAMPBELL et al. v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,617.

## 1. COURTS (§ 325\*)—JURISDICTION OF FEDERAL COURTS—ALLEGATIONS IN PLEADINGS—WAIVER.

The objection that a complaint in a federal court omits to allege the place of residence of defendants, or that they are residents of the district in which they are sued, is one that they may waive, and they are held to have waived it when they make a general appearance and in a demurrer join such objection with the objection that the complaint does not state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 325.\*]

Waiver of right as to district in which suit may be brought, see notes to *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 192; *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 87 C. C. A. 634.]

## 2. COURTS (§ 322\*)—JURISDICTION OF FEDERAL COURT—ALLEGATIONS IN PLEADINGS.

Where the original complaint in a federal court contained proper allegations of the citizenship of the parties at the time of the commencement of the action, the court on service of process thereon acquired jurisdiction, which it did not lose by a repetition of such averments in an amended complaint in the present tense.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 322.\*]

## 3. PLEADING (§ 252\*)—AMENDMENTS—CONSTRUCTION.

An amended complaint will be deemed to speak as of the time of the commencement of the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 736; Dec. Dig. § 252.\*]

## 4. CONSPIRACY (§ 11\*)—CIVIL LIABILITY—ACTIONS—DEFENSES.

The fact that the members of a labor union have the right under its laws and rules to suspend a member does not deprive him of a right of action against them for a conspiracy to suspend him unlawfully.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 11.\*]

## 5. CONSPIRACY (§ 19\*)—CIVIL LIABILITY—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* to sustain a verdict and judgment for damages in favor of a member of a typographical union against other members for a conspiracy to cause his suspension as a member unlawfully and contrary to the rules of the union.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 19.\*]

## 6. CONSPIRACY (§ 21\*)—CIVIL LIABILITY—ACTIONS—INSTRUCTIONS.

Instruction in an action for damages for injury caused plaintiff by a conspiracy between defendants considered and approved.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 21.\*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

The defendant in error was the plaintiff in an action against the plaintiffs in error, who were alleged to be partners doing a fraternal beneficiary business under the firm name of Seattle Typographical Union No. 202, organized under the laws of the state of Washington, with its chief office in the city of Seattle. The complaint alleged that on October 31, 1905, and for many years prior thereto, the plaintiff in the action was a member in good and regular standing of the said partnership; that the defendants therein were also members; that prior to October 29, 1905, they "wrongfully and unlawfully enter-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed into a conspiracy to suspend this plaintiff from the Seattle Typographical Union No. 202, and to thereby deprive this plaintiff of the advantages and privileges of such membership therein, and to prevent him from following his usual occupation and from earning for himself and family a living"; that in pursuance of the said wrongful and unlawful conspiracy, at a meeting held on October 29, 1905, of said Union No. 202, the members thereof wrongfully and unlawfully suspended the plaintiff from the union. The complaint proceeded to allege further that, by reason of such wrongful and unlawful conspiracy and suspension of the plaintiff, he was discharged from his position as night foreman on the Seattle Daily Times, and was prevented from obtaining any other position. The facts in that regard were further set up in detail in the complaint. To this complaint a demurrer was interposed for want of jurisdiction, also for want of an allegation that either the plaintiff or the defendants or either of them were residents of the Western district of Washington, and because the complaint failed to state facts sufficient to constitute a cause of action, also for defect of parties defendant, in that the complaint did not show that all the members of the partnership were made defendants. The demurrer was overruled. The answer admitted that the defendants were members of the union. It alleged that the union is affiliated with the national association known as the International Typographical Union, and is governed by the rules made by that union; that, by such rules, a member of the union who has been declared guilty of contempt, either of the union or of a committee thereof, may be fined, reprimanded, or suspended from membership by a two-thirds vote of the union; that such member may appeal from such decision to the president of the International Typographical Union, and from his decision may again appeal to the executive council of said International Union, and from the decision of the executive council to the International Union in regular session; that prior to October 29, 1905, the plaintiff was charged by a committee of said Union 202 with contempt of said committee; that on a hearing and consideration of said charges had at a meeting duly held by said Union on October 29, 1905, at which 103 members were present, the plaintiff was declared guilty of said charge of contempt, and was suspended from said association for a period of 30 days by a vote of 100 of said members; that, if injustice was done him by said suspension, he had a full, complete, and adequate redress therefor by appeal. To this affirmative defense the plaintiff in the action demurred for want of facts sufficient to constitute a defense. The demurrer was sustained. Upon these issues on a trial before a jury, a verdict was returned for the plaintiff for \$500 damages and judgment was entered thereon.

The following facts appeared in the evidence at the trial: The plaintiff was night foreman on the Seattle Daily Times, receiving a weekly salary of \$35. Some time prior to October 29, 1905, the members of the union being informed that matters occurring at meetings of the union which were supposed to be private were reaching the Times office, the union appointed a committee to investigate. The committee met and summoned before it the members of the union who were employed in the Times office. All summoned except the plaintiff answered the questions propounded to them, but the plaintiff refused to answer upon the ground that his answers might tend to incriminate him. The next regular meeting of the union was held on October 29, 1905. The plaintiff knew that at this meeting the committee would report on his refusal to answer questions. He did not attend the meeting. The committee reported that the plaintiff had refused to answer its questions. A motion was made that the plaintiff be declared in contempt of the committee. The presiding officer ruled that under the laws of the union it was unnecessary to give the plaintiff a trial on the question of his contempt of the committee. One of the members gave warning to the meeting that the plaintiff could not be found guilty of anything of which he was not directly charged, and that he ought to have a trial. The motion was carried by a vote of 100 in favor thereof to 3 against it. It was stipulated on the trial that all of the defendants now plaintiffs in error were present at that meeting. Two days after that meeting, the plaintiff was notified of such suspension, and notice thereof was given to the managing officers of the Daily Times. The plaintiff was thereupon suspended from his position, and another was put in his place, and he was



notified by his employers that he must win his appeal from the action of the union within two weeks or be discharged. The plaintiff appealed to the president of the International Typographical Union, and the appeal was sustained, and the action of the Union 202 was reversed on November 18, 1905. In the meantime, on November 11th, plaintiff was discharged by the managers of the Daily Times.

W. H. Bogle and Charles P. Spooner, for plaintiffs in error.  
G. A. C. Rochester, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The plaintiffs in error contend that the Circuit Court was without jurisdiction of the action, for the reason that it was not alleged in the amended complaint that the defendants therein were residents of the Western district of Washington, and because the amended complaint filed on April 6, 1907, alleged the citizenship of the parties in the present tense, and did not allege their citizenship at the time of the commencement of the action; citing *Laskey et al. v. Newtown Mining Co.* (C. C.) 56 Fed. 628. The objection that the complaint omits to allege the place of residence of the defendants, or that they are sued in a district other than that of their residence, is one that may be waived by them, and they are held to waive it when they make a general appearance and in a demurrer to the complaint join such objection with the objection that the complaint does not state facts sufficient to constitute a cause of action. *St. Louis, etc., Railway v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; *Western Loan Co. v. Butte & Boston Min. Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101. In answer to the other jurisdictional objection, it is sufficient to say that the original complaint alleged citizenship of the parties at the time of the commencement of the action. By that complaint and the service of process thereunder the Circuit Court acquired jurisdiction. By the repetition of the averments of citizenship in the present tense in the amended complaint the court did not lose jurisdiction. The amended pleading will be deemed to speak as of the time of the commencement of the action. *Toledo Traction Co. v. Cameron*, 137 Fed. 48, 69 C. C. A. 28; *Mexican Ry. Co. v. Pinkney*, 149 U. S. 195, 13 Sup. Ct. 859, 37 L. Ed. 699. In the case of *Laskey et al. v. Newtown Min. Co.*, supra, a demurrer to the original complaint had been sustained for want of proper jurisdictional averments. Therein it differs from the case at bar.

Error is assigned to the ruling of the court in sustaining the demurrer to the affirmative defense alleged in the answer. The substance of that defense was that the rules of Union 202 provided for the suspension of a member who has been declared guilty of contempt by a two-thirds vote of the union, and for an appeal from such decision; that, in fact, the defendant in error was so suspended for a period of 30 days by the vote of the union; and that, if injustice was done him thereby, he had a remedy by appeal. But the gist of the cause of action alleged in the complaint is that the plaintiffs in error wrong-

fully and unlawfully entered into a conspiracy to suspend unlawfully the defendant in error from the union, and to prevent him from following his usual occupation, and that the conspiracy was carried out. It may be assumed that in all associations of a similar character provision is made for the suspension or dismissal of members. The fact that the members had that power, and that provision was made for appeal, does not affect the question of their liability in case of a conspiracy such as was alleged in the complaint. In charging the jury the court expressed the opinion that the motion for a nonsuit would have been granted if the evidence had been clear that the position of the defendant in error would have been retained for him after the period of suspension, but decided to submit to the jury on the evidence the question whether the suspension necessarily deprived him of his position by bringing about a permanent discharge. The members of the union undoubtedly had the right to suspend the defendant in error, but that is not to say that they had the right to conspire together to suspend him unlawfully.

It is earnestly contended that the trial court erred in denying the motion of the plaintiffs in error at the close of the evidence for a directed verdict in their favor on the ground that the evidence was not sufficient to show a cause of action against them. We are unable to sustain this contention. There was evidence of strong personal feeling against the defendant in error on the part of many members of the union. He had twice before been fined by the union on account of alleged breaches of its rules, and on each occasion he had appealed to the International Typographical Union, and his appeal had been sustained. At one of the meetings one of the plaintiffs in error had stated that he was after the defendant in error's scalp, and he was roundly applauded. Other members had said: "We will get him yet," "We will have his card," and made other expressions of their ill will toward him. There was evidence that his refusal to testify before the committee, for which he was charged with contempt, was not contempt, and that, according to the rules of the union, he could not be required to testify against himself. It is not denied that he was furnished no copy of the charges on which he was finally suspended, and that he had no notice to appear and was not present at the meeting at which he was suspended. There was evidence that the officers of the union refused to allow him an appeal, and refused to show him the record on which he had been suspended, and that he was compelled to take his appeal by telegraphing his own affidavit to the president of the International Typographical Union. It sufficiently appears, also, that he was discharged from his position on account of his troubles with the union and his suspension therefrom, and the hostile attitude of the members of the union.

There are numerous assignments of error to the rulings of the court in admitting and excluding evidence. We find no error in any of them.

It is contended that the court erred in charging the jury as follows:

"It is not required for the plaintiff to prove in this case a criminal conspiracy. The only kind of conspiracy that has to be proved is that there was

a common purpose and a concert of action with the plain intent in the minds of the different persons to cause the suspension of the plaintiff from membership in the union. If that purpose existed and was successful in causing his suspension, and the members who were participants in that knew that the necessary consequence of the suspension would be the loss of his position, then the jury have a right to find from these conditions that their purpose was to injure him," etc.

It is urged against this instruction that the court thereby took away from the jury the consideration of all question of malice or ill will on the part of the plaintiffs in error. But elsewhere the court gave the jury an instruction which is to be read in connection with the instruction above quoted. The court said:

"And the decision of the case turns upon the question of whether the defendants did anything from malice and ill will, and by a concert of action, with a common purpose to do an injury, or whether they, as members of an association, acting in good faith and without malice and without ill will, acted in accordance with their best judgment to promote the interests of the association."

We find no error for which the judgment should be reversed. It is accordingly affirmed.

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#### HENDRICHS v. MORGAN.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,626.

TRUSTS (§ 63½\*)—AGREEMENT TO ACQUIRE MINING CLAIMS—VALIDITY—STATUTE OF FRAUDS.

A verbal agreement between two parties to acquire the ownership of a mining claim by location on joint account, pursuant to which they stake the claim, mark the boundaries, and do the necessary development work together, each contributing one-half the expense, the location being made in the name of one, although it does not create a partnership where the agreement does not extend to working the claim, is not within the statute of frauds, but a resulting trust is imposed on the one holding the title in favor of the other to the extent of his half of the claim.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 93; Dec. Dig. § 63½.\*]

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

The appeal in this case is from a decree adjudging the appellee to be the owner of an undivided one-half interest in the Byrnes Bench claim, in the Nome Mining District, Alaska, and requiring the appellant to convey to him such interest. The decree is based on findings of fact which, in substance, are as follows: That on June 12, 1905, the appellee and the appellant entered into an oral agreement to locate jointly, in the name of the appellant, and appropriate the placer claim in controversy, each to own an undivided one-half thereof when located; that, pursuant to that agreement, the appellant on said date located the claim, and that in making said location the appellee and the appellant together marked the boundaries of the claim by placing stakes at the corners thereof, and that working together they thereafter made discovery of gold upon the claim, and performed all the acts necessary to constitute a valid mining location; that after locating it they went upon the claim and together prospected for a period of about two

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

weeks; that each contributed his individual labor, and they jointly furnished the provisions, tools, and implements used in prospecting the claim, and each equally contributed to the expenses incurred during said period; that the appellee performed all the conditions on his part to be performed under the terms and conditions of the agreement, and that the appellant holds the legal title to an undivided one-half interest in and to said mining claim in trust for him.

Orrin K. McMurray, Hobbes & Bell, and Grigsby & Hill, for appellant.

Albert H. Elliott, O. D. Cochrane, and W. A. Gilmore, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant contends that the oral agreement alleged in the bill is not proven by such clear and satisfactory evidence as to justify the court in decreeing a specific performance thereof. As to some of the material questions involved, the testimony of the two parties to the suit was directly contradictory. But the following is not disputed: Prior to the location of the claim they had been jointly interested in other mining property, and on the morning of June 12th, they were living together in a cabin on the Alma Bench claim, in which they were partners. On that morning they went out in different directions to look for water for their ditch. When they met at noon, the appellant reported that he had found some ground which he was going to stake. In the afternoon he and the appellee prepared stakes, went to the ground so discovered by the appellant, and, working together, staked the Byrnes Bench, the claim in controversy; the appellee writing the notices thereof. Upon completing that location, which was located in the name of the appellant, they went together and staked an adjoining claim, which was located as the Florence Bell, in the name of the appellee. Having made the two locations, they fixed upon a point on the line between them to sink a shaft. It was in sinking this shaft that the labor was performed which is referred to in the findings of fact. So far there is no dispute as to what was done. The appellant testified that there was no partnership or joint interest in either of the locations. The appellee testified that the agreement was, before they left the cabin, that they would make two locations, and that they should be jointly and equally interested in both. He testified, further, that before sinking the shaft he had discovered that the location he had made of the Florence Bell overlapped another claim, and that he considered the remaining fraction thereof insufficient in value to justify assessment work, and, on consultation with the appellant, he tore up the location notice. The appellant denied that he had any knowledge of the abandonment of the Florence Bell claim, and his testimony was that the shaft which was sunk on the line between the two claims, although it was done by the joint labor of the two locators, was intended for the benefit of each locator in support of his individual right to his own location, and not for their joint benefit as owners in the Byrnes Bench claim. The court below found the fact to be otherwise, and it is reasonable to presume that the finding was influenced largely by the testimony of one

Ewing, a disinterested witness, who testified that in April, 1906, while the appellant was working with him and another in sinking a shaft in a claim near by the property in controversy, the appellant pointed out to him the shaft on the Byrnes Bench, and stated that he and the appellee had sunk it, and that they expected to go back with a boiler and put the hole down to bedrock, and, referring to the Florence Bell claim, said that he and the appellee did not think "it was worth being bothered with to do the assessment work or worth recording; that they had tore up the location notice; that they did not record it; that Mr. Morgan and he believed it was not big enough to bother with, or something to that effect; \* \* \* he said at the time they abandoned it had they known it was as wide as it was they would have held on to it, but they thought it was mostly covered by the Big Eight." We discover in the evidence no ground for setting aside or discrediting the findings so made on the conflicting testimony. As made, they are sufficiently particular and definite to sustain the decree.

The principle contention of the appellant is that the agreement is within the statute of frauds. Authorities are cited to the proposition that an agreement to locate a mining claim in the name of one, the same to be held for his benefit and the benefit of the other party to the agreement, is an agreement to create a co-tenancy in real estate, and is therefore within the statute, that all agreements to convey or hold real estate in trust are within the statute, and that while agreements to form a partnership to acquire mining claims by location or by purchase with partnership assets and to operate the same or to deal in such properties are not within the statute so far as the right to share in the profits is concerned, there was in the case at bar no partnership agreement and no partnership, and no agreement to operate the mining claim or to obtain joint profits therefrom. The appellee, on the other hand, contends that there was a mining partnership sufficient to take the case out of the operation of the statute of frauds, that the parties agreed to locate the claim, that they did jointly locate it, and jointly worked together to make discovery, and prospected it for a period of two weeks, and, in so doing, they used a common stock of provisions and common tools and implements, and each contributed equally to the expenses incurred—citing cases such as *Shea v. Nilima*, 133 Fed. 209, 66 C. C. A. 263; *Gore v. McBrayer*, 18 Cal. 582; *Settembre v. Putnam*, 30 Cal. 490; *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803, 11 Am. St. Rep. 229; *Hirbour v. Reedling*, 3 Mont. 15; *Raymond v. Johnson*, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908; *Murley v. Ennis*, 2 Colo. 300; *Welland v. Huber*, 8 Nev. 203.

While we agree with the appellant that there was no relation of partnership between the parties, we are clearly of the opinion that the proven facts are sufficient to impose upon the appellant's title to the mining claim a resulting trust for the benefit of the appellee to the extent of his one-half interest therein, and that the case comes within the class of judicial exceptions created by equity to prevent the use of the statute of frauds in support of inequitable and fraudulent schemes. The facts show a joint venture to acquire the owner-

ship of a specific mining claim. In all its essential features it is the case of a joint purchase of property in which each of the two persons interested advances one-half of the purchase price, and the title is taken in the name of one for the benefit of both. The title to the mining claim, so far as there was title, was acquired by appropriation under the mining laws. To appropriate it, it was necessary to stake the claim and mark its boundaries and make a discovery of mineral. To do these acts was to pay the purchase price. In doing them, each of the parties to the agreement contributed one-half, and in equity each is entitled to one-half of what was acquired thereby. Every principle of equity on which are sustained resulting trusts and grubstake contracts is applicable to such a case. In *Gore v. McBrayer*, 18 Cal. 583, where the plaintiff, the defendant, and others verbally agreed to prospect for quartz and to be equally interested in claims taken up, and the defendant discovered a lead, and located it by putting up a written notice with the names of the plaintiff and others on it, it was held that the plaintiff's right attached by these proceedings, and could not be divested by the mere act of the defendant in taking down the notice and putting up other notices with other names. The court said:

"It is as if Gore had made McBrayer his agent to take up the claim for him and in his name; and, upon performance of the act, Gore's title, so to speak, vested, and he was the owner, subject to the rules of the vicinage, of the claim, or his share of it. We do not see what the statute of frauds has to do with such a case."

In *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195, it was held that an agreement by which each of two parties was to have a one-half interest in whatever mining claims either might thereafter locate or obtain an interest in, each to furnish labor and supplies, was not within the statute of frauds, and that since there was no allegation or evidence that the agreement extended to working the mines on joint account no partnership existed. In *Bryant v. Hendricks*, 5 Iowa, 256, it was held that a verbal agreement between two or more persons having claims on public lands that one shall enter the tract on which the claims are located, and the other shall pay his proportion toward the entry of the land, is not within the statute, and that the contract created an implied or resulting trust. In *Gibbons v. Bell*, 45 Tex. 417, it was held that a contract by which parties agree to acquire public land together, one furnishing the certificate, and the other the labor and expense of surveying and procuring patent, is not a contract for the purchase and sale of land by one to the other, but is an agreement by which they are to acquire land jointly, and that the legal title acquired was a bare naked trust in the patentee, held in subordination to the superior equitable rights of the other party to the extent of his undivided interest before partition. The same was held in *Smith v. Crosby*, 47 Tex. 121.

The decree is affirmed.

## LEVY et al. v. LARSON.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1909.)

No. 1,628.

## 1. BANKS AND BANKING (§ 154\*)—ACTION BY DEPOSITOR FOR DEPOSIT—PLEADING.

A complaint alleging that defendants were conducting a banking business, that plaintiff deposited a stated sum of money with them to his credit on open account and payable to him or his order on demand, that payment of his check for the amount when presented was refused, and that no part thereof has been repaid, states a cause of action for its recovery; the latter allegation covering every manner of repayment to plaintiff.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 516; Dec. Dig. § 154.\*]

## 2. CONTINUANCE (§ 51\*)—ABSENCE OF WITNESS—SECOND CONTINUANCE—DISCRETION OF COURT.

The refusal of a motion for a second continuance of a cause, based on the absence of a witness shown to be under indictment and a fugitive from justice, was not an abuse of discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 147; Dec. Dig. § 51.\*]

## 3. TRIAL (§ 419\*)—WAIVER OF ERRORS—RULING ON MOTION FOR NONSUIT—SUBSEQUENT INTRODUCTION OF EVIDENCE.

A motion for a nonsuit made at the conclusion of plaintiff's evidence is waived by the introduction of evidence by defendant after it has been overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.\*]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska.

Ostrander & Donohoe and R. F. Lewis, for plaintiffs in error.

Campbell, Metson, Drew, Oatman & MacKenzie, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error objects to a consideration of the merits of this writ on the ground that the assignment of errors was not filed in the court below until after the allowance of the writ. From the printed transcript the point appears to be well taken, but an examination of the original record shows that at the time the order allowing the writ became effective the assignment of errors was on file in the trial court.

The action was brought by the defendant in error to recover \$2,000 deposited by him through his Seattle bank in the bank of the plaintiffs in error at Valdez, Alaska, and which the plaintiffs in error shortly afterwards paid out to one McGovern, upon his representation that he was authorized to draw Larson's money. The latter denied any such authority, and the question of agency was the real issue tried before the court and jury.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Objection is here made to the sufficiency of the complaint; it is said that it does not state facts sufficient to constitute a cause of action. A reference to that pleading shows that there is no merit in the contention. It appears therefrom that the defendants were conducting a banking business at Valdez, and that on a certain named date the plaintiff caused to be deposited with them \$2,000 "to the credit of plaintiff on open account, and payable to plaintiff or order on demand; and defendants took and received said money at said time and placed the same to the credit of plaintiff on open account, payable to plaintiff or order on demand"; and that thereafter, on a day named, the plaintiff drew and presented his check upon them at their bank for the \$2,000 so deposited, payment of which was refused on the ground that he had no funds with the bank. The complaint contains a further allegation that no part of the money so deposited has been paid, and that the whole thereof is due him from the defendants. Nothing further was needed in the complaint. That a deposit of money in a bank, or with a banking concern, establishes the relation of debtor and creditor between the depositor and depository is well-established law. The allegation that no part of such money has been repaid to the depositor covers every manner of payment to him.

It is further contended on behalf of the plaintiffs in error that the court below abused its discretion in refusing their motion for a continuance of the trial of the case. The record shows that McGovern was indicted by a grand jury in Alaska for drawing Larson's money from the bank in question, and fled; that about six months after the present action was brought it came on for trial, when the defendants thereto asked for a continuance on the ground that McGovern was an important witness for them, and that they had been unable to procure his attendance; to which continuance the plaintiff consented. At the succeeding term of the court—some five months later—the case again came on for trial, when the defendants thereto again asked for a continuance, the only ground now calling for consideration being the continued absence from Alaska of McGovern—an affidavit in support of the motion stating that he was then under indictment and a fugitive from justice, and that when last heard from he was in California. Under such circumstances, it needs no argument or authorities to show that there was no such abuse of the discretion of the court in refusing another continuance of the trial as would justify any interference here.

It is also contended for the plaintiffs in error that the court below erred in refusing to grant their motion for a nonsuit. The record shows that such a motion was made upon the conclusion of plaintiff's case, and denied by the court; whereupon the defendants introduced evidence on their own behalf and went to the jury without any motion for an instructed verdict. The rule is well settled that a motion for a nonsuit, upon which the party making it does not choose to stand, is waived by the subsequent introduction of evidence on his own behalf.



The record shows that the evidence upon the question as to McGovern's agency was sharply conflicting. It was, therefore, plainly a matter for the jury, under appropriate instructions. And since there is no assignment calling in question any of the instructions of the trial court, there is nothing to do but to affirm the judgment.

The judgment is affirmed.

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THE CARROLL. THE NANSEMOND. THE ROANOKE.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1908.)

No. 854.

1. SALVAGE (§ 34\*)—ELEMENTS IN DETERMINATION OF AMOUNT—TOWAGE.

Where a salvage service rendered by a tug was in the nature of a towage, and the danger was not certain and extreme, an allowance of a lump sum as compensation, bearing some relation to the cost of the service if rendered under a contract, is fairer than a percentage of the value of the salvaged property.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 80-83; Dec. Dig. § 34.\*]

2. SALVAGE (§ 51\*)—SUITS FOR SALVAGE—APPEAL—REVIEW.

A salvage award made by a judge who saw the witnesses and was familiar with the locality and the special perils to which the salvaged vessels were exposed will not be reduced by an appellate court unless clearly and greatly excessive.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 133, 134; Dec. Dig. § 51.\*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Admiralty.

For opinion below, see 163 Fed. 425.

H. H. Little (Robert M. Hughes, on the brief), for appellants.

Floyd Hughes, for appellee.

Before PRITCHARD, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

PER CURIAM. This is a case of salvage in which the claimants of the three barges salvaged have appealed upon the ground that the allowances in the District Court were excessive.

The steam tug *Bohemia*, proceeding from Baltimore to Norfolk with a tow of five barges, all loaded with coal, was, during the night of January 26, 1908, caught in a gale of wind from the south-southwest with a heavy sea when near Thimble Light, off Old Point Comfort. The wind and sea caused the barges to labor heavily and the waves to break over them. The *Bohemia*, although a powerful tug of the first class for Chesapeake Bay towing, was unable to make headway, and made scarcely any progress from 6 p. m. to 10:30 p. m. At this time a schooner ran across the tug tow line and parted it between the first and second barges, so that the second, third, fourth, and fifth barges went adrift. After they went adrift, the *Mascot*, the last barge of the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tow, sank and was lost. The Bohemia, with the one remaining barge which was still attached to her, proceeded towards Norfolk and arrived at an anchorage in safety. Three of the barges which had gone adrift put out their anchors, and, as it happened that the wind did not increase, their anchors held; the barges were, however, in dire distress and danger because of the waves breaking over them, and the crews were alarmed. At this time the tug Dauntless, which had been out to the Capes, was returning and going towards Norfolk with a barge she had in tow. As she passed the Bohemia, the Bohemia blew four whistles to her indicating that her tow was in trouble, and the Dauntless replied with four whistles indicating that she understood. The Dauntless proceeded and anchored her own barge in Hampton Roads, and immediately returned to render service. As she was returning and was passing the Bohemia, her master called to the master of the Dauntless to go to the barges and rescue their crews. The Dauntless went past the Thimble Light in search of the barges which had gone adrift, and found them about 12 o'clock midnight, anchored about three-quarters of a mile eastward of the Thimble Light. The sea was dashing over the decks and the crews were anxious to have the barges taken to a place of safety, fearing they might sink, although it does not appear that they had as yet taken water in their holds. Finding that the Roanoke had on board the master's wife, who was suffering from terror at her situation, the master of the Dauntless first went to her relief, and after difficulties in getting a line to her, which took near an hour on account of the danger of approaching her, he took her about 15 miles to a safe anchorage off Lambert's Point. Returning, he in like manner, with difficulty and some risk to his tug and crew, got a line made fast to the other two barges, and, getting up their anchors, he towed in the Nansemond and the Carroll, completing the service at about 8:30 a. m.

The Roanoke and her cargo and freight were valued at \$11,000, the Carroll and her cargo and freight at \$6,000, and the Nansemond and her cargo and freight at \$7,625. The District Court, considering the very exposed place where the barges were anchored, and their peril, and the promptness and success of the service, held that it was a case of very meritorious salvage, and awarded as against the Roanoke, her freight and cargo,  $12\frac{1}{2}$  per cent., amounting to \$1,375, and as against the other two barges  $7\frac{1}{2}$  per cent., amounting for the two to \$951.87, a total of \$2,326.87, and costs.

We think these sums were liberal, and more than, from the case as it appears from the printed record, we should have been disposed to have allowed. While salvage awards should be sufficiently liberal to excite the enterprise and daring of salvors, and handsomely compensate them for the risks to which they expose their lives and property, the award should not be such as to deter the vessel in distress from accepting the necessary help on account of its excessive cost. It would seem that in a case of this class, where the service rendered, although a salvage service, is not in its nature different from the customary employment of the salvor, and the danger is not certain and extreme, an allowance of a lump sum bearing some relation to the cost of the serv-

ice, if rendered under a contract, is fairer than a percentage of the value of the salvaged property.

While we are inclined to think that the awards in the present case are somewhat more than we can see that the facts called for, we cannot say they are excessive. Great weight is to be given to the conclusion of the learned District Judge, experienced in admiralty and familiar with the special perils of the locality where the barges were exposed, and who had the advantage of having seen the witnesses. The rule is not to disturb the awards in such cases unless clearly and greatly excessive. This we do not think was so in this case, and the decree is affirmed.

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LENNOX v. ALLEN-LANE CO. et al. (two cases). SAME v. ROSENCRANTZ et al. (two cases). SAME v. COBB et al. (two cases).

(Circuit Court of Appeals, First Circuit. December 16, 1908.)

Nos. 790, 791, 792, 793, 794, 795.

1. BANKRUPTCY (§ 449\*)—ADJUDICATION AFTER JURY TRIAL—MODE OF REVIEW.

An adjudication of bankruptcy following a jury trial and based on the verdict of the jury is reviewable only on writ of error as in an action at common law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 449.\*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 91\*)—ADJUDICATION—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain the verdict of a jury finding that an alleged bankrupt committed an act of bankruptcy by making a general assignment both individually and as a member of a partnership.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 91.\*]

Appeals from and in Error to the District Court of the United States for the District of Massachusetts.

John P. Leahy, for appellant and plaintiff in error.

Edward F. McClennen (Brandeis, Dunbar & Nutter and J. Butler Studley, on the brief), for appellees and defendants in error Allen-Lane Co., Francis A. Foster, Holyoke Nat. Bank, and Charter Oak Nat. Bank.

Jeremiah Smith, Jr., for appellees and defendants in error George S. Rosencrantz, Melville L. Cobb, and other petitioning and intervening creditors.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. The Allen-Lane Company filed a petition in bankruptcy against Patrick Lennox and James T. Lennox, doing business as copartners under the firm name of P. Lennox & Co. The act of bankruptcy alleged was a general assignment executed by both Patrick and James, which set out the existence of the partnership and assigned both partnership and individual property. James made no

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

substantial defense, and is not concerned with the case at bar. Patrick pleaded (1) that he did not commit an act of bankruptcy, but was induced to sign the general assignment fraudulently and without knowledge of its contents or legal effect, so that the same was void as far as he was concerned; (2) that he was not a partner of James T. Lennox or interested in the business carried on under the name of P. Lennox & Co. He claimed a jury trial in respect of the questions concerning which he was entitled thereto. The case was tried to a jury upon the following issue: "Did Patrick Lennox, individually and as copartner in the firm of P. Lennox & Co., consisting of himself and James T. Lennox, on or about September 5, 1907, make a general assignment for the benefit of creditors of said copartners and of said firm" to the assignee named in the above-mentioned instrument? The petitioners introduced the assignment and rested. Patrick took the stand in his own behalf, and called as witnesses James T. Lennox and Nutter, the common-law assignee. They testified concerning the circumstances of Patrick's signature. Upon this evidence, the court directed the jury to find upon the issue in the affirmative, and to this direction Patrick duly excepted. He sued out a writ of error to this court, No. 791, now before us, and brought an appeal, No. 790, from the adjudication which followed the verdict of the jury.

In *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, the Supreme Court held that a trial by jury under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) concerning the bankruptcy of a respondent is a trial according to the course of the common law; that the court of bankruptcy cannot enter judgment contrary to the verdict, and that the verdict may be set aside or the judgment reversed by an appellate court only upon writ of error, as in an action at common law. Hence No. 790, being the appeal of Patrick from the adjudication of bankruptcy, must be dismissed.

Coming to the writ of error, No. 791, we find no error of law in the course of the trial. We have before us all the evidence which was before the jury, and it did not warrant a negative answer to the question at issue. Patrick signed the general assignment, which described him as a member of the partnership, and purported to convey to Nutter both partnership and individual property. Nutter came to him with a letter from James T. Lennox, asking Patrick to sign a document which was handed to Patrick by Nutter. Nutter told Patrick that the paper was an assignment. Patrick did not read it because "it looked like a good deal of a job for me to read it, so I didn't read it." He said that he did not know that he was assigning to Nutter all his assets. This falls far short of establishing the fraud and ignorance which Patrick set up in his pleadings, and the learned judge of the District Court was right in directing an affirmative answer to the question proposed to the jury. That question included all the elements needed to establish the bankruptcy of Patrick Lennox, and also his partnership in the firm of P. Lennox & Co.

From the record in No. 790 it appears that there was dispute concerning the tribunal which should try the issue of partnership or no

partnership. Counsel for Patrick contended that this issue should be determined by a jury. The learned judge directed an inquiry by the referee, who found that Patrick was a partner, and this finding was confirmed by the judge. Patrick contends that he was entitled to a jury trial upon the issue of partnership or no partnership. Notwithstanding that the District Court had passed upon this issue on the report of the referee made as above stated, it subsequently took thereupon the verdict of the jury, which expressly found that Patrick was a partner. This finding was based upon evidence which warranted no other conclusion. The proceedings had before the referee concerning the partnership issue may therefore be disregarded.

Inasmuch as adjudication of bankruptcy has correctly passed against Patrick Lennox, both as partner and as individual, under the Allen-Lane petition, we need not discuss the other petitions filed against him. So far as No. 793, Lennox v. Rosencrantz, and No. 795, Lennox v. Cobb, present issues not already dealt with, they raise merely moot questions. Two other appeals, No. 792, Lennox v. Rosencrantz, and No. 794, Lennox v. Cobb, will be dismissed for the reasons stated in our opinion concerning No. 790.

In No. 790, the appeal is dismissed without costs.

In No. 791, the judgment of the District Court is affirmed, and the defendants in error recover their costs in this court.

In No. 792, the appeal is dismissed without costs.

In No. 793, the judgment of the District Court is affirmed, and the defendants in error recover their costs in this court.

In No. 794, the appeal is dismissed without costs.

In No. 795, the judgment of the District Court is affirmed, and the defendants in error recover their costs in this court.

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#### WILLAMETTE PULP & PAPER CO. v. BONNER.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,616.

#### MASTER AND SERVANT (§ 286\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

In an action by a servant to recover from the master for an injury, where there was evidence tending to support plaintiff's allegation that his injury resulted from the negligence of defendant in failing to sufficiently light a passageway through which plaintiff was required to pass with a truck, and in permitting wet pulp to accumulate on the floor, rendering it dangerous, such issue was properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.\*]

In Error to the Circuit Court of the United States for the District of Oregon.

Franklin T. Griffith and Rufus Mallory, for plaintiff in error.

Henry E. McGinn and C. D. Latourette, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSS, Circuit Judge. The sole question presented by this writ of error is whether the court below erred in denying a motion made by the defendant to the action for a direction to the jury to return a verdict in its favor.

The action was one for damages for personal injuries sustained by the defendant in error, who was plaintiff in the court below, while trucking pulp. The record shows that the plaintiff had been employed by the defendant company for some time in its paper mills at Oregon City, state of Oregon, as a grinder, but that on the 31st day of October, 1906, he was put to trucking pulp from the warehouse out to the dock, in doing which he had to pass through a long passageway in which there was at one place a rather steep incline. The next day, November 1st, in running the truck, the plaintiff, in going down the incline, stepped on a piece of pulp, slipped and fell, sustaining the injury for which he sued. The ground of his action was the alleged negligence of the defendant in permitting pieces of pulp to so accumulate upon the floor of the passageway, and the floor to be so wet, as to make the passageway dangerous, and also in failing to keep it properly lighted.

There was evidence tending to show those alleged acts of negligence; for example, the plaintiff was questioned, and answered as follows:

"Q. Now, in going from the warehouse to the dock, just explain to the jury about this passageway that you had to go through? A. The passageway is dark all the way through there, principally. Q. Well, where was that—in the mill? A. Yes, sir. Q. You had to go through that, did you? A. Yes, sir. Q. Now, tell the jury about those lights in there. A. The lights where I fell and got my leg broke, where I fell, is, as he told you, there, about that door there, the door there where I come through, we would come like I was going through there; come down through; light comes through that door there. Q. Sit still; you don't need to gesture. Just tell the jury coming from the warehouse where that passage way was situated and how it was lighted. A. Well, I can't like that out myself, for it is a crooked road. I was never in there before. Q. How wide was the passageway—about how wide? A. In the place where I fell and broke my leg, or clear through the mill? Q. Yes, where you fell. A. Some places it was wider than it is in others. On that slip where I broke my leg I think that is something like 6 feet wide. There are other places, I should judge, it is in the neighborhood of 10 or 12 feet wide, I should judge. Q. How was that place lighted? What light was there there? A. There where I broke my leg there was one light sets out on a beam there, like over that door, 25 feet. There is another light. I fell like if that light was right there. Q. 25 or 35? A. 25 feet. Then on down from that one, 36 feet, there is another light. There's three lights in that one passage way. Q. How far is it from the light, from the daylight, at the entrance and over down to the next lamp down that passageway? A. It is 25 feet. Q. Down that passageway, is it? A. It is down that passageway there. Q. Now, I am talking about the passageway you went through. How far was it between those two lamps? A. It is 25 feet from the first one. That first one you might say is no lamp there. The daylight, when you come in from there, that light blinds anyway. You can't see nothing there. Q. You think there were about three lights through the passageway? A. I think there were three lights, if I remember right. Q. Was there any other light there—daylight or anything? A. No, sir, there is no light back that way at all more than what you get from those lamps. This way, as Mr. Griffith says, there's lights through there; but coming in from that way, it blinds you instead of giving you light. You can't see nothing; you can't see the bottom. Q. Was there any daylight in that passage-

way, Mr. Bonner? A. No, sir; not only what you get from this place back here. Q. From the end? A. Yes, sir. \* \* \* Q. Could you see the floor of the incline in passing over? A. No, sir. You can't see the bottom of the floor there. It is very dim there. Q. What is that? A. No, sir you can't see the bottom of the floor there when you go through there. Q. What do you mean by the bottom of the floor—the surface? A. Well, the floor of the incline where you are going up that passage. Q. You can't see it at all? A. Well, you might possibly see it by looking; but then you can't see anything—it is just like looking down in a well; you can see down into it, but then you can't see the bottom of it good. \* \* \* Q. Could you see the floor? A. If you had a lantern you might. Q. Did you see the floor at that time? A. No, sir; you can't see the floor down there where I fell without you had a lantern."

Fred Kennedy, a witness for the plaintiff, was questioned, and answered, among other things, as follows:

"Q. You heard the plaintiff testify about this passageway running from the storeroom out to the dock, have you not? A. How is that? Q. Where was he hurt? Now, are you acquainted, were you at that time acquainted, with that passageway? A. I was. Q. How about the light there at that time, Mr. Kennedy? Just tell the jury about those lights. A. The lights were dim, not sufficient. Q. Could you see the floor from those lights? A. I could by hesitating. Q. By what? A. By hesitating there a minute after coming in out of the light. By going slow and hesitating a few minutes, or a minute there, you can see the lights or you can see the floor. Q. Could you at that time see the floor of this incline, or see any pulp? Was the light sufficient at that time, on the floor? A. Yes, sir I think it was sufficient for that. Q. You could see it if you stopped? A. I could see it; yes, sir. Q. If you stopped and hesitated and examined? A. Yes, sir."

J. Sondergard, a witness for the plaintiff, was questioned, and answered, among other things, as follows:

"Q. Could a man coming down that incline with a truck in front of him, as Bonner was, could he see any wet pulp on the floor, do you think, from those lights? A. I don't know whether he could or not, coming from the outside, coming from the lights. Q. About how many lights were there? A. Well, I don't remember. Q. In the passageway—in the gangway? A. I don't know how many there were. Q. Were there any windows on the side, or any other daylight you could see in there? A. No, sir. Q. How were those lights, those lamps there, with regard to being smoky or dim? A. Dim. Q. Sir? A. They were smoky. Q. How long had they been that way? A. I don't know."

Robert Cook, a witness for the plaintiff, was questioned, and answered, among other things, as follows:

"Q. How were the lights in that passageway? A. Well, the lights seemed to be a little dim. Q. From what cause? A. Well, I don't know, unless it would be from the steam or something, maybe get on the globes, and cause it to be a little dim; something like that. Q. What was the color of the dimness? A. Oh, kind of dark; dark lights; I don't know. Q. Look anything like smoke? A. Yes, it was a little kind of dull. I don't know what color you call it. Q. How many lights did they have through that passageway? A. I don't know. I never counted them. Q. Well, did they have sufficient light there to show up the floor to the men? Mr. Griffith: That calls for a conclusion. Mr. Latourette: I suppose you are correct there as a matter of law. Q. State whether you could see the floor plainly, or anything on the floor? A. No, you couldn't see it very plainly. Q. On account of what? A. Well, on account of the lights being dim; I suppose that was it."

There was also evidence tending to show that the floor of the passageway was more or less wet and slippery, and that pieces of pulp

were permitted to accumulate upon it, thereby rendering it more or less dangerous.

The testimony referred to certainly tended to sustain the alleged negligence on the part of the defendant; and, that being so, the court below was, we think, clearly right in its ruling to the effect that that issue was one to be passed upon by the jury—the defendant to the action having put in issue its alleged negligence; for the law cast upon the defendant company the duty to furnish the plaintiff a safe place, in view of the nature of the employment and of all the facts and circumstances attending it, in which to work. It is also true that the plaintiff assumed the ordinary risks attending his employment, but he had the legal right to rely upon the performance by his employer of its legal duty, and if the place—all things considered—was not safe, by reason of which the plaintiff was subjected to some extraordinary risk or danger, not known, and which he in the exercise of reasonable and ordinary care would not have known, then surely it cannot be properly said as matter of law that the plaintiff assumed any such extraordinary risk or danger.

We are of the opinion that the court below properly submitted the issues in the case to the determination of the jury. *San Francisco & P. S. S. Co. v. Carlson* (C. C. A.) 161 Fed. 851; *Bunker Hill & Sullivan Min. & C. Co. v. Jones*, 130 Fed. 819, 65 C. C. A. 363; *George v. Clark*, 85 Fed. 608, 29 C. C. A. 374; *Great Northern Ry. Co. v. McLaughlin*, 70 Fed. 674, 17 C. C. A. 330.

The judgment is affirmed.

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STANDARD MARINE INS. CO., LIMITED, OF LONDON, ENG., v. NOME  
BEACH LIGHTERAGE & TRANSPORTATION CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,579.

1. APPEAL AND ERROR (§ 1058\*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error, if any, in excluding testimony given on a former trial by a witness since deceased, was harmless, where a deposition of the same witness was introduced in which he gave substantially the same testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4200; Dec. Dig. § 1058.\*]

2. JUDGMENT (§ 812\*)—CONCLUSIVENESS—PERSONS CONCLUDED.

In an action by a cargo owner against an insurer to recover for loss of the cargo, the record in a suit in which the vessel and cargo were sold for salvage was admissible in evidence; the decree being binding on all parties in interest, and it was immaterial that the final decree of distribution in the salvage suit had not been entered at the time the insurance action was commenced.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 812.\*]

In Error to the Circuit Court of the United States for the Northern District of California.

For opinion below, see 156 Fed. 484.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes



William Rix, for plaintiff in error.

Nathan H. Frank, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. When this case was formerly before this court (*Standard Marine Insurance Co. v. Nome Beach L. & T. Co.*, 133 Fed. 636, 67 C. C. A. 602, 1 L. R. A. [N. S.] 1095), we reversed a judgment rendered in favor of the defendant in error on a policy of insurance covering certain articles laden on the barkentine *Catherine Sudden* for a voyage from the port of San Francisco to Nome, Alaska. The judgment was reversed, and the cause remanded for a new trial, on the ground that the evidence of the master of the vessel, Capt. Panno, indicated that the loss of the cargo resulted directly from the master's act in designedly undertaking to force the vessel through floating ice in order to arrive more quickly at his destination, and secure a better market for his cargo, with full knowledge of the dangers to be encountered, and with ample time to have avoided them. Such conduct we held to be not mere negligence, but willful omission to perform a legal duty, and an intentional commission of a wrongful act, and we held that the insurer was not liable for loss caused thereby. On the second trial of the cause a verdict was again returned for the defendant in error, and judgment was rendered thereon. The evidence adduced on behalf of the defendant in error on the second trial differed from that which was introduced on the first trial, in that testimony of witnesses was taken to establish the fact that it was usual and customary with vessels on the voyage to Nome, when reaching floating ice, to enter the same, and proceed through it by selecting leads or channels and following from one opening to another, thus making their way forward by degrees.

The assignment of error which is now principally relied upon is that, on the trial in the court below, the plaintiff in error was denied the right to introduce evidence of the testimony given by Capt. Panno on the first trial; it being shown that he had died since so testifying. That such testimony was admissible, the plaintiff in error contends, is shown by *Ruch v. Rock Island*, 97 U. S. 693, 24 L. Ed. 1101, and *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409. The defendant in error, on the other hand, contends that in the federal courts, by reason of section 861, Rev. St. (U. S. Comp. St. 1901, p. 661), evidence of the testimony given by a witness on a former trial, deceased at the time of the second trial, is not admissible; citing *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117, *Diamond Coal & Coke Co. v. Allen*, 137 Fed. 705, 71 C. C. A. 107, and *Mulcahey v. Lake Erie & W. R. Co.* (C. C.) 69 Fed. 172. We deem it unnecessary to pause to consider which of these two contentions is correct; for, as we read the record, it appears therefrom that, if it was error to exclude the proffered testimony, the error was harmless, for the reason that substantially the same testimony is to be found in the deposition of Capt. Panno taken prior to the first trial, and introduced on the second trial, and in the testimony of Capt. Simmie, who testified on the second trial. It is not necessary to relate in detail all of the testimony of Capt. Panno on the first trial which the plaintiff in error offered on the sec-

ond trial. It all related to his navigation of the vessel after reaching the ice, and to his efforts to get through the ice. The most important portions of it are the following:

"Some of these small chunks that I noticed floating about were a quarter of a mile, a mile, and five miles apart. They were not very numerous. I sailed right on, and did not turn around and go back. My object was to get through it. When I got to the ice itself, I found leads once in awhile."

He testified to sighting a number of vessels about the time when he first struck the ice, and said that they were all in the position in which he was, steamers and sailing vessels bound for Nome with the same kind of cargo that he had. "We were all trying to get through as soon as we could—as early as we could get there. We wanted to market our goods. The next morning after sighting the ice it was broken, but rather larger—larger in proportion. \* \* \* On the third day we could not get through it. We got in a lead, and we could not get through. I tacked ship and stood back again, and found a lead I suppose 10 or 15 miles. I went right into it, still fighting to get up to Nome. \* \* \* There was a piece of ice that I supposed I would go clear of, and down under water it stuck out like that desk, and hit her bow down under water. \* \* \* The moment I struck the ice there was a hole in my bow." In his deposition above referred to, which was admitted in evidence on the second trial, Capt. Panno deposed:

"When I first sighted the ice, I presume I might have put about if I desired, and have gone to Dutch Harbor. As a matter of seamanship, I could have done it; for I could have come back to San Francisco if I so desired. I was eight days in the ice before I was taken out of the ice and to Nome. \* \* \* At the time I got into the ice some came together a little. There would be cakes of ice all through."

Capt. Simmie, a master mariner of 30 or 40 years' experience, who was on board the vessel, testified:

"About three or four days after we got into Behring Sea, we encountered the ice. It was small drift ice at first, gradually getting into larger pieces and floating fields, drift ice. \* \* \* Danger was first to be apprehended when we got into the ice. We could not get any further. We got to the end of the lead. The ice apparently is constantly on the move with open leads, and we followed the leads as far as we could, and then made fast to the ice. \* \* \* After we got into a position of that sort, and the danger was apparent, there was no means by which we could have turned back. \* \* \* The Catherine Sudden sailed in various directions, always making toward the north if possible—toward Cape Nome. Some days the wind was from the south, so that we had a fair wind, and, of course, we could not beat back, because there was not any room to beat back. \* \* \* Then the ice closed in on us, and it was then too late to return."

But it is not necessary to proceed further with the details of his testimony. It is substantially the same as that given by Capt. Panno on the first trial, and is not contradicted by any witness.

The only other assignment of error requiring notice is that the court overruled the objection of the plaintiff in error to the admission in evidence of the record of the salvage suit of Benson et al. v. The Barkentine Catherine Sudden, in the District Court of Alaska, Second Division. The objection was that the record was not binding on the plaintiff in error, and was *res inter alios acta*. On the argument in this court counsel for the plaintiff in error makes the further objection that

the final judgment in the salvage suit was not rendered until long after the commencement of this action. Neither of these objections is well taken. The judgment in the salvage suit, decreeing the sale of the barkentine for the benefit of the salvors and others, was binding upon all who had any interest in the res. *Gelston v. Hoyt*, 3 Wheat. 246, 313, 4 L. Ed. 381. As to the second objection, it is true that the final decree of distribution in the salvage case was made after the commencement of this action, but the vessel was ordered to be sold, and default was entered, and an order of reference was made long prior to the commencement of the action. Thereby the defendant in error was deprived of all right and title in the vessel. That the final decree was rendered after the commencement of this action does not render the record incompetent.

The judgment is affirmed.

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### UNITED STATES v. BREWSTER.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1909.)

No. 1,811 (1,961).

CUSTOMS DUTIES (§ 26\*)—CLASSIFICATION—ZINC ORES—"CALAMINE"—"MINERALS CRUDE"—"LEAD-BEARING ORE OF ALL KINDS."

The zinc ores known as carbonate, silicate, and sulphide of zinc are free of duty, the carbonate and silicate as "calamine," and the sulphide as "minerals, crude," under Tariff Act July 24, 1897, c. 11, § 2, Free List, pars. 514, 614, 30 Stat. 196, 199 (U. S. Comp. St. 1901, pp. 1682, 1685), except that when they contain lead they are subject to the duty provided on "lead-bearing ore of all kinds," in section 1, Schedule C, par. 181, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1644).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.\*]

Appeal from the Circuit Court of the United States for the Southern District of Texas.

The court below affirmed decisions by the Board of United States General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of Laredo. The case involves the following provisions of Tariff Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626):

"Par. 181. Lead-bearing ore of all kinds, one and one-half cents per pound on the lead contained therein. \* \* \*

"Par. 183. Metallic mineral substances in a crude state, and metals unwrought, not specially provided for in this act, twenty per centum ad valorem. \* \* \*

"Par. 514. Calamine. \* \* \*

"Par. 614. Minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture, not specially provided for in this act."

The character of the materials in controversy is stated as follows in the government's brief:

The imported ores, broadly described, were: (a) Concentrated sulphides containing 28 per cent. zinc and 2 per cent. lead. (b) Carbonates crushed and hand-picked, containing 28 per cent. zinc and 7 per cent. lead. (c) Carbonates and silicates combined, crushed and hand-picked (21 to 35 per cent. carbonate, 2 to 26 per cent. silicate), in some less than 1 per cent. of lead, and in others no lead.

In some instances duty was assessed under said paragraph 183, Tariff Act 1897; in other instances duty was assessed on the lead contents under said

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paragraph 181, and on the zinc contents under paragraph 183; and in one case duty was assessed only on the lead contents.

The Board of General Appraisers held, as claimed by the importer, that the merchandise was free of duty, the carbonates and silicates under paragraph 514, as "calamine," and the sulphides under paragraph 614, as "minerals, crude," except that the lead-bearing ores were held subject to the duty provided in said paragraph 181 for "the lead contained therein." This conclusion was affirmed by the Circuit Court, except that the latter tribunal held that said provision in paragraph 181 for "lead-bearing ores" was exclusive.

The opinion filed by the Circuit Court is as follows:

"BURNS, District Judge. This is an appeal in the nature of a petition to review the action of the Board of General Appraisers in holding the several importations in question subject to duty under paragraph 181 of the tariff act of July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1644). Said paragraph is as follows:

"Lead-bearing ore of all kinds, one and one-half cents per pound on the lead contained therein."

"The counsel for the importer concedes that this assessment is correct; and, whilst the action of the collector of customs in so assessing duty was embraced in the original protests, it was abandoned upon the hearing, and therefore is not at issue here. The appellant in its petition complains of the action of the board in not sustaining the action of the collector in assessing an additional duty of 20 per cent. ad valorem under paragraph 183 on the value of the zinc contents. The importations involved in the several protests consist of zinc ore; and the importer in his protests claims the same to be free of duty under paragraphs 514, 614, 629, or, in the alternative, that, in the event the same is subject to duty, only the lead contents thereof are dutiable at the rate of 1½ cents per pound.

"In so far as the specific duty is concerned, the question presents no difficulty; the language clearly and specifically provides that the lead contents shall be subject to duty at the rate assessed by the collector. Besides as suggested, this feature has been eliminated by the counsel for the respondent, and therefore not a subject for further inquiry.

"The single question here presented is, are the ores free of duty under paragraphs 514 and 614, or subject to duty at the rate of 20 per cent. ad valorem under paragraph 183? If the latter provision does not apply, it follows that the General Board is not in error in holding the importations not subject to the ad valorem tax.

"Paragraph 183 is as follows:

"Metallic mineral substances in a crude state, and metals unwrought, not specially provided for in this Act, twenty per centum ad valorem."

"From the evidence in this case it appears that zinc as metal is not found in the ores involved herein, nor are they metallic mineral substances, and therefore not subject to duty under paragraph 183. This conclusion is reached from the entire record as an original proposition, and is supported by the opinion in the case of *Hempstead v. Thomas*, 122 Fed. 538, 59 C. C. A. 342.

"The court is of the opinion that the importations in question are free of duty under sections 514 and 614, and the contention of appellant cannot be sustained that the latter section is without application by reason of the importations having been advanced in value by what is claimed as 'a process of manufacture'; said process consisting of eliminating the rock and dirt by hand and hammer, in order to reduce the bulk and save the paying of freight charges upon useless and foreign matter. This contention would require a broad stretch of the imagination to designate the labor performed as 'a process of manufacture.'

"The case cited, *Hempstead v. Thomas*, supra, is conclusive of the contention made by the appellant. It follows as a conclusion of law:

"First. That the provision for lead-bearing ores in paragraph 181, under the facts in this case, is exclusive, and that the importations are not subject to additional duty.

"Second. That paragraph 183 is without application to the merchandise in question.

"Third. That the ores are free under paragraphs 514 and 614 of the tariff act of 1897.

"The petition for review disclosing no error, the finding of the Board of General Appraisers should be in all things affirmed; and the decree will so provide, with directions to the collector of customs to liquidate the entries in accordance with this holding."

Lodowick McDaniel and Rufus E. Foster, U. S. Attys. (James C. McReynolds, Sp. Asst. Atty. Gen., of counsel; Charles E. McNabb, on the brief), for the United States.

Baker, Botts, Parker & Garwood (W. Wickham Smith, of counsel; Henry S. Wardner and Howard T. Walden, on the brief), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Under the facts in this case it is not necessary to decide whether the provision for lead-bearing ores in paragraph 181, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1644), is exclusive. On the merits the Board of General Appraisers and the Circuit Court ruled correctly.

The judgment of the Circuit Court is affirmed.

#### THE DORCHESTER.

#### THE FANNIE S. GROVERMAN.

(Circuit Court of Appeals, Fourth Circuit. December 12, 1908.)

No. 858.

#### COLLISION (§ 99\*) — STEAMER AND SAILING VESSEL — FAILURE TO KEEP PROPER LOOKOUT.

A decree affirmed which adjudged a steamship solely in fault for a collision with a small schooner at night in the Elizabeth river near Norfolk, based on findings that the schooner carried proper lights, and that they should have been seen by the steamer in time to have avoided the collision had she kept a proper lookout.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 211; Dec. Dig. § 99.\*]

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

For opinion below, see 163 Fed. 779.

Robert M. Hughes, for appellant.

W. W. Old and W. W. Old, Jr. (James F. Duncan, on the brief), for appellees.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

PER CURIAM. This is a case of collision in the nighttime between a large passenger steamship and a small schooner-rigged sailing vessel of only seven tons, occurring in the channel of the Elizabeth river about one mile south of the Deep Water Pier of the Jamestown Exposition shortly after midnight on September 12, 1907. The steamship struck the schooner amidship on her port side and cut her in two, her forward part passing the steamship on the steamship's port side, and the after portion of the schooner passing on the steamship's

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

starboard side. The three persons who constituted the schooner's captain and crew were thrown into the water, but were rescued, and John B. Lawson, who was a passenger, was severely injured. The District Judge found the steamship solely in fault, and decreed against her for the value of the schooner and her cargo, and awarded damages to Lawson, the passenger who was injured.

There are only two matters found by the District Judge which are controverted on this appeal. The first is whether or not the red light, which it is proved the sail vessel had in her port rigging, was bright enough to be seen at a sufficient distance to give notice to the steamship in time to avoid her, and the other is at what distance the sail vessel or her red light was actually seen, or should have been seen, by those navigating the steamship. On both these matters of fact the learned District Judge found for the schooner. Although there was a conflict of testimony, there was ample proof to sustain the libellant's contention that the schooner's red light was visible if the lookout of the steamship had performed his duty at a distance sufficient to have enabled the steamship to have avoided the schooner if she had ported instead of starboarding and attempting to cross the schooner's bow.

After a consideration of the testimony, aided by the argument of counsel, we are satisfied the conclusions of the learned District Judge were right, and that the decree should be affirmed.

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TOEG et al. v. SUFFERT.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,534.

1. COURTS (§ 405\*)—CIRCUIT COURTS OF APPEALS—APPELLATE JURISDICTION FROM UNITED STATES COURT IN CHINA—MODE OF REVIEW.

Act June 30, 1906, c. 3934, § 34 Stat. 814 (U. S. Comp. St. Supp. 1907, p. 797), creating a United States Court for China, provides, in section 3, that "appeals shall lie from all final judgments or decrees of said court to the United States Circuit Court of Appeals of the Ninth Judicial Circuit, and thence appeals and writs of error may be taken from the judgments or decrees of the said Circuit Court of Appeals to the Supreme Court. \* \* \* Said appeals or writs of error shall be regulated by the procedure governing appeals within the United States from the District Courts to the Circuit Courts of Appeal and from the Circuit Courts of Appeal to the Supreme Court \* \* \* respectively." *Held*, that such act recognizes the distinction between cases at law and in equity and admiralty, and requires the appellate procedure to conform to that of the Circuit and District Courts, and that a judgment of such court in an action at law is reviewable only on writ of error.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.\*]

2. COURTS (§ 356\*)—UNITED STATES COURTS—PROCEDURE—APPEAL AND ERROR.

Where it is sought to review an action at law by appeal instead of writ of error, the Circuit Court of Appeals will dismiss the appeal on its own motion, though appellee makes no appearance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1001, 1010; Dec. Dig. § 356.\*]

Appeal from the United States Court for China.

Jernigan & Fessenden and Chickering & Gregory, for appellants.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GILBERT, Circuit Judge. The appellants in this case seek to review by appeal a judgment of the United States Court for China rendered in an action at law which they brought against the appellee to recover upon a promissory note. Section 3, Act June 30, 1906, c. 3934, 34 Stat. 815 (U. S. Comp. St. Supp. 1907, p. 798), creating a United States court for China, provides:

"That appeals shall lie from all final judgments or decrees of said court to the United States Circuit Court of Appeals of the Ninth Judicial Circuit, and thence appeals and writs of error may be taken from the judgments or decrees of the said Circuit Court of Appeals to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of said Court of Appeals in cases coming from District and Circuit Courts of the United States. Said appeals or writs of error shall be regulated by the procedure governing appeals within the United States from the District Courts to the Circuit Court of Appeals, and from the Circuit Court of Appeals to the Supreme Court of the United States, respectively, so far as the same shall be applicable; and said courts are hereby empowered to hear and determine appeals and writs of error so taken."

It is apparent from a reading of this section that it was the intention of Congress to recognize the distinction between cases at law and cases in equity and admiralty, and to provide that the mode of procedure by which the appellate jurisdiction of this court may be invoked shall conform in all respects to the statutes and rules of court governing appeals and writs of error from the District and Circuit Courts. The statute is not unlike the statute which was construed in *Chase v. United States*, 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 284. The case could have been brought to this court only upon writ of error. For want of jurisdiction we are required to dismiss the appeal, notwithstanding that the appellee has made no motion nor appearance herein. *Jones v. La Valette*, 5 Wall. 579, 18 L. Ed. 550; *Generes v. Campbell*, 11 Wall. 193, 20 L. Ed. 110; *Bevins et al. v. Ramsay et al.*, 11 How. 185, 13 L. Ed. 657; *Behn, Meyer & Co. v. Campbell & Go Tauco*, 200 U. S. 611, 26 Sup. Ct. 753, 50 L. Ed. 619. The appeal is dismissed.

#### UNITED STATES v. SIOUX CITY STOCK YARDS CO.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1909.)

No. 2,935.

**1. TRIAL (§ 395\*)—FINDING BY COURT—TRIAL BY COURT—"SPECIAL FINDING"**  
UNDER REV. ST. §§ 649, 700, DEFINED.

The special finding contemplated by Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), is a specific statement of those ultimate facts upon which the law must determine the rights of the parties. It corresponds to the special verdict of a jury, is equally specific and responsive to the issues, and is spread at large upon the record, as part thereof, in like manner as is such a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934; Dec. Dig. § 395.\* For other definitions, see Words and Phrases, vol. 7, p. 6576.]

**2. TRIAL (§ 395\*)—OPINION OF TRIAL JUDGE—NOT A "SPECIAL FINDING."**

An opinion of the trial judge setting forth the reasons for his decision in an action at law tried by a Circuit Court without the intervention of a jury cannot be regarded as a special finding within the meaning of Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570).

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934; Dec. Dig. § 395.\*]

(Syllabus by the Court.)

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Northern District of Iowa.

For opinion below, see 162 Fed. 556.

Frederick F. Faville, U. S. Atty., and James A. Rogers, Asst. U. S. Atty.

William Milchrist and George C. Scott, for defendant in error.

Before VAN DEVANTER, Circuit Judge, and RINER and AMIDON, District Judges.

VAN DEVANTER, Circuit Judge. This was a civil action to recover a penalty alleged to have been incurred under section 3 of the act of June 29, 1906, c. 3594, 34 Stat. 608 (U. S. Comp. St. Supp. 1907, p. 919), known as the "28-Hour Law." The answer was practically a general denial, and the issues of fact were determined by the Circuit Court without the intervention of a jury, pursuant to a written stipulation of the parties. The trial resulted in a judgment for the defendant, which necessarily imported, although it did not expressly contain, a finding in the defendant's favor. Error was originally assigned upon several rulings of the trial court, but counsel for the government concede, in their reply brief, that they must rely upon the single contention that what they assume was a special finding is not sufficient to support the judgment. Unfortunately for this contention, however, there was no special finding. That which counsel assume was such is not so designated in the record, was not so intended by the trial court, and cannot be so regarded by this court. It is an extended opinion (reported 162 Fed. 556) in which the trial judge refers to the issues formed by the pleadings, portions of the evidence, the statute, and the contentions advanced by counsel, and then discursively disposes of those contentions, and concludes that the penalty sought to be recovered had not been incurred by the defendant. Repeated decisions of the Supreme Court, as also of this court, make it altogether plain that such an opinion is not a special finding within the meaning of the statute (Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570]), and cannot be resorted to for the purpose of controlling, modifying, or supplementing the finding otherwise disclosed or imported by the record. *British Queen Mining Co. v. Baker Silver Mining Co.*, 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; *Saltonstall v. Birtwell*, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128; *Stone v. United States*, 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477; *York v. Washburn*, 64 C. C. A. 132, 129 Fed. 564; *Hayden v. Ogden Savings Bank*, 85 C. C. A. 558, 158 Fed. 90. The special finding contemplated by the statute is a specific statement of those ultimate facts upon which the law must determine the rights of the parties. It corresponds to the special verdict of a jury, is equally specific and responsive to the issues, and is spread at large upon the record, as part thereof, in like manner as is such a verdict. *Burr v. Des Moines Co.*, 1 Wall. 99, 102, 17 L. Ed. 561; *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *St. Louis v. Ferry Co.*, 11 Wall. 423, 428, 20 L. Ed. 192; *Wilson v. Merchants' Loan & Trust Co.*, 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113; *Minchen v. Hart*, 18 C. C. A. 570, 72 Fed. 294; *Anglo-American*



Co. v. Lombard, 68 C. C. A. 89, 102, 132 Fed. 721; United States v. Cleage (C. C. A.) 161 Fed. 85.

As there was no special finding, and as it is only when there is such a finding that this court can consider the sufficiency of the facts found to support the judgment (*Dickinson v. Planters' Bank*, 16 Wall. 250, 257, 21 L. Ed. 278), it follows that the single contention now relied upon relates to a matter which it not open to review upon this record. And, this being so, we express no opinion upon the propositions of law advanced by the trial judge in support of his conclusion.

The judgment is affirmed.

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NEIDER et al. v. HIGGIN MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. December 18, 1908.)

No. 1,805.

PATENTS (§ 328\*)—ANTICIPATION—TUFTING BUTTONS FOR CUSHIONS.

The Neider patent, No. 630,553, and the Marggraff patent, No. 695,468, both for improvements in tufting buttons for cushion seats, consisting of strengthening the base of the prongs which are passed through the material and clinched, so that the bending point, when clinched, will be at some distance from the head of the button where the metal has not previously been weakened by bending, conceding that the improvements involve invention, are void for anticipation by the Jensen patent No. 377,029, for a paper fastener.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

W. F. Murray, for appellants.

Wm. H. Fisher and F. A. Faber, for appellee.

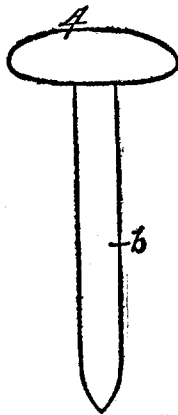
Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill to restrain infringement of patent No. 630,553, granted to Fred A. Neider, and of patent No. 695,468, granted to Frederick Marggraff, both assigned to the complainant corporation. Both patents are for improvements in tufting buttons for cushion seats. Both are clinching buttons, and consist of a head with two outwardly projecting metal prongs which are passed downward through the material forming the cushion and are then bent back over the back, or under, side of the cushion. Such clinching buttons were well known before the Neider patent, and, as his specifications state, had been stamped out of sheet metal; the prongs being of uniform width from the back to the tapered point. A well-known form of such button, prior to Neider's patent, is shown in the Pitner button; a side and perspective view being seen in figures 1 and 2, set out below. Similar views of the improved Neider button are shown in figures 3 and 4, all being taken from correct representations in brief of the solicitors for appellees.

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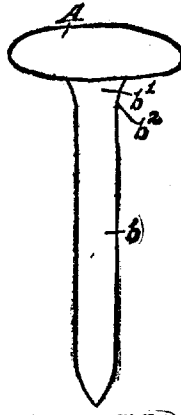
\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

FIG. 1.



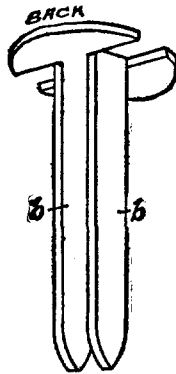
Straight Button—Side View

FIG. 3.



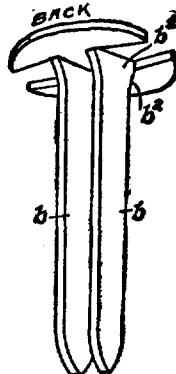
Wider Button—Side View  
See Fig. 2 of his patent.

FIG. 2.



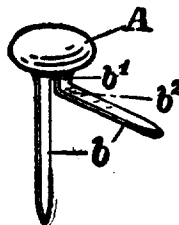
Straight Button—Perspective View

FIG. 4.



Wider Button—Perspective View

FIG. 5.



In each figure A represents the cap, or head; b indicates the clinching prongs. Fig. 3 is an enlargement of Fig. 2 of the Neider patent. Fig. 5 is an enlargement of Fig. 3 of the same patent.

The only visible difference between the Pitner button, which is a fair type of well-known forms of such buttons, and the improved Neider button, is that the prongs on the latter button are tapering from the base up to the point  $b^2$ , from whence they are of uniform width until they slope at their termination to form a point for penetrating the material of the cushions, while the Pitner prongs are of uniform width from the base or back down to the same sloping point. This widened and tapering base was Neider's improvement over the old art. The purpose and consequences of this change we shall see later.

The Marggraff improvement followed the general lines of Neider; but, instead of widening the material in the prong at its base, he struck up a rib where Neider had widened his prong. The defenses are no invention, anticipation, and no infringement. The Circuit Court found that both Neider and Marggraff had been anticipated by an earlier patent to Jensen, being patent No. 377,029. It is clear that the Marggraff patent cannot stand if that of Neider is void for either noninvention or anticipation by Jensen. We shall, therefore, refer only to the Neider patent hereafter.

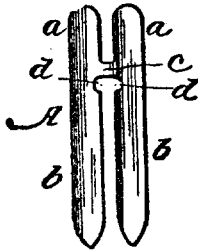
The trouble with the uniform pronged button was that its weak point was at the juncture of the prong with the back or base of the button, due to crystallization of metal there occurring in manufacture when bent up to form the prongs. Neider says in his specifications that it had been found in use that buttons so made had, when their prongs were turned over on the upholstering material, "an inclination to bend near the body of the button back, \* \* \* which in use brought all of the strain upon the clinching prongs at their base or juncture with the button back," and that they "had a tendency to straighten out or break off" at this bending point near the body of the button. The object of his invention, he adds, "is to overcome this defect and form the tines or clinching prongs with a heavy base back of the button disk, and taper their base down to a point some distance from the back of the button to its junction with the straight or parallel sides of the tines, so that in bending the inclination is at the base of the tapered base forming practically a neck for the button between the button back and the angular bend of the tines when turned over the button or base of the cushion, whereby the strain upon the button and the tines is a direct strain, having no tendency to break the clinching prongs near the base of the button nor to straighten them out beneath the cushion base." In Fig. 5, as shown above, Neider indicates his bending point at  $b^2$ , and in his specifications indicates that the termination of the tapering base "determines the line at which it is bent at a right angle to the base to pass through the perforations" in the cushion material. In actual practice the bending point is not always at the point indicated. That it will be so, if the thickness of the material is less than that of the wide tapering base, is likely; but, if otherwise, the bending point in actual use, as shown by the evidence, is determined by the thickness of the upholstering material over which the prongs

are pressed down or clinched. The only claim which is here asserted is the second. That reads as follows:

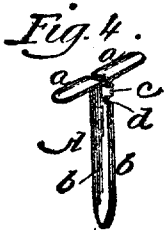
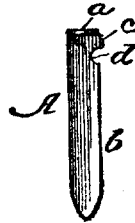
"The hereinbefore-described tufting-button consisting of the cap having clenching-prongs projecting from its back, said clenching-prongs having an enlarged base tapering to the parallel sides of the clenching-prongs, substantially as shown and described."

It will be seen that this claim is not limited to a button having an arbitrary bending point at the termination of the widened tapered base, though the inventor evidently supposed this to be the case from his description of his invention. What Neider did, shortly put, was to strengthen the base of the well known clinching prong of the commercial cushion clinching button. The base was the weak point, because there the metal had suffered more or less crystallization in manufacture. The bending point of such a prong was likely to be at the crystallized base, its weak point. That point he strengthened by widening the material there and tapering the widened base. From this widened base he made his prongs of uniform width. By this device the bending point would occur above this tapered and crystallized base—a point determined by the thickness of the material under the clinching prongs. If we assume that invention is involved in so constructing such clinching prongs as to determine a point of bending, the idea was anticipated. This is best illustrated by the Jensen fastener, made under his 1888 patent, No. 377,029. The Jensen device was for a paper fastener. We show below figures 1, 2, 4, 5, and 6 from his patent.

*Fig. 1.*



*Fig. 2.*



His object was to determine a bending point below the connecting bar, c, joining the two prongs together, as he had found in use that the prongs were likely to break at the point of juncture with the connecting piece. Instead of thickening or widening, or otherwise strengthening, the prong at this point of juncture, he weakened his prong at a point below by cutting the notch, d, in the inner edge of each prong near the upper end thereof. He adds:

"By the notches, d, at the bending point, which slightly weaken the metal and allow of this nearly square bending of the prongs, and by reason of this square bending the connecting piece, c, is not so liable to be broken off as when the prongs are bent back in a more rounding manner."

It was not invention to do what Jensen had done by widening the base of the tines, as Neider did, or by striking out a rib in the base, as Marggraff did. Jensen determined a bending point by weakening the metal at the point it was desired to make the bending point by cutting away some of the metal there. Neider did the same thing by adding metal below the point he wished to determine as the bending point. Marggraff reached the same result by striking out a rib at the base of the prongs, thus strengthening the prong there and determining a bending point above where the metal was weaker.

We agree with the court below in holding, that the Jensen patent, without considering other devices shown in the record, was an anticipation. What Neider did was the mechanical equivalent of what Jensen had done and taught.

Decree affirmed.

NOTE.—The following is the opinion of Cochran, District Judge, in the court below:

COCHRAN, District Judge. This suit is to enjoin infringement of certain letters patent and to obtain an accounting. The letters patent concerned are No. 630,553, granted August 8, 1899, to Fred A. Neider, and No. 695,468, granted March 18, 1902, to Frederick Marggraff, and subsequently assigned to complainant. They relate to buttons used in upholstery, known as "tufting buttons." Such buttons are so used to connect the cover and back of a cushion at the depressions therein in order to preserve the tufts. Said patents do not relate to tufting buttons in general, but only to a subordinate class thereof, and to a subordinate class of such subordinate class. The subordinate class of tufting buttons to a subordinate class of which the patents relate are known as "clenching buttons." They consist of a head, or, as it is more inaptly called, a "back," and two prongs; the latter projecting from the former. They made the connection aforesaid by being passed, prongs foremost, through said parts of the cushion and intervening material, if any, and then having the outer ends of the prongs bent over in opposite directions against the back, thus clenching the cover and back together. That subordinate class thereof are such as have the prongs integral with the back and are made out of sheet metal by stamping, except as to a cap covering the back. The utility of the inventions for which the patents were granted consists in overcoming the effect of a weakness in such buttons at the point where each prong unites with the back. This weakness is due to crystallization thereat, caused by the stamping process. Its effect is to make the button readily breakable at that point when or after the prongs are bent for the purpose of clenching, if such weakness is not in some way overcome.

Conceivably there are but three ways in which to overcome this weakness. One is to remove the crystallization, the cause of the weakness. Another is in some way to strengthen the button at that point otherwise than by removing the crystallization. A third is to prevent the force applied to the end of the

prongs in the process of clenching from reaching this point of weakness. The possibility of overcoming it in the first way is not mooted in this case, and there may be no such possibility. It is claimed by defendant that the invention of the patent overcomes it in the second of these two ways. In fact, and such is complainant's position, it overcomes it in the last way. This it does by providing another weak point in the course of the prongs at which they will bend, and thus stop said force before it reaches said point. It provides this other weak point by resolving each of the two prongs into two parts of different strength; that of greatest strength being next to the weak point sought to be guarded, and the weak point provided being at the union of those two parts. The Neider patent so resolves them in one way, and the Marggraff in another. Here our consideration of these two patents should part, and each should be taken up and disposed of in its turn.

The Neider patent—the earlier of the two—so resolves each of the prongs by dividing them into different widths; the part next to the back being of greater width than the outer part. It contains two claims, the second of which is alone relied on; the other being abandoned. It is in these words:

"2. The hereinbefore described tufting button, consisting of the cap, having clenching prongs projecting from its back; said clenching prongs having an enlarged base tapering to the parallel sides of the clenching prongs, substantially as shown and described."

It will be noted that the enlarged base is referred to as "tapering to," and the outer part of the prongs as having "parallel sides." These limitations, however, are hardly of the essence of the invention. Its essence consists in dividing each of the prongs into two parts of different strength, that of greater strength being nearest the back, and accomplishing this by enlarging the base of each prong. It is not said how the base is to be enlarged. The language used is broad enough to cover any method of enlargement. In the drawings and specifications, however, the method of enlargement described is that of making the base wider than the outer part. For convenience sake I will treat that as the method of enlargement called for by the patent. But, though the method of so resolving each prong into two parts of varying strength is referred to as an enlargement of the base, it might just as well have been referred to as a lessening of the width of the outer part.

The thing which the invention has in view is resolving each of the prongs into two parts of varying strength and of accomplishing this by making the two parts of different width. And the so doing can be described either as making one part of smaller width than the other or of greater width than the other. Each description fits the process—one as aptly as the other. It is because the claim in question describes it as enlarging the base that counsel for defendant have been led into the position that the way in which the invention undertakes to overcome the weakness due to crystallization at the junction of the prongs and the back is by strengthening the button at that point otherwise than by removing the crystallization. But this is not so. The button is not strengthened at that point. This is shown by the consideration that if two buttons, having prongs of equal width, are taken, and the outer parts of the prongs of one of them are clipped down so as to make them of smaller width than the base, such button will be stronger than the other and less liable to break because of the bending of the prongs in clenching. In so doing the bases, much less the weak points at their feet, are not strengthened. Simply a weak point in the body of such prong is provided by which the bending force may escape and never reach the weak point at its junction with the back.

There is nothing said in the claim as to how far from the back of the button this change in the width of the prongs—i. e., the point of division between the enlarged base and the outer part with the parallel sides—is to take place. So far as it is concerned, it may be located at any point between the back and the outer end of the prong. But the nature of the article and the uses to which it is put necessarily locate it not farther away from the back than the least thickness of material that is likely to be between the back of the button and the bent portion of the prongs after the buttons have been used; for otherwise they will not perform the function of clenching. It need not, how-

ever, be as far away as such thickness. The material around the prongs, particularly if supplemented by washers, as is the case in their use, save where used in what are termed "edge rows," supplies an external force which is sufficient in and of itself to provide a bending point, and thus prevent the bending force from reaching the weak point at the base of the prong. Indeed, owing to this circumstance, it seems to be established by the proof that the invention is of no value save in said edge rows, where no washers are used, and where the material is not of sufficient thickness to in itself provide a bending point far enough away from the weak point at the base of the prong to prevent the bending force from reaching it.

It is claimed that this Neider patent is invalid as to the second claim, as well as to the first claim, which has been abandoned. The foregoing will enable one to appreciate the grounds upon which it is claimed that it is invalid and determine their value. In the first place, it is urged that the claim of the patent that it provides a bending point in the prongs of the button—i. e., a definite point therein at which they will always bend—is untrue, and that, this being so, the only thing in the invention claimed to be meritorious is without any utility. It is undertaken to be made out that the patent does not define a bending point by the consideration that when the thickness of the material, supplemented by the washers around the prong, is greater than the distance of the outer end of the enlarged base of the prongs from the back of the button, the prongs will bend, not at said outer end thereof, but at the top of the washer, and as the distance of the top thereof varies in different cushions, and even in the same cushion, the prongs of the buttons have no well-defined bending point. Undoubtedly such is the case, and it is established by the evidence. But the claim of the patent is not as to the location of the bending point in the prongs when the button is in use, but before being used as they come out of the factory. At that time there can be no question that they do have a well-defined bending point, which exists in all of them, everything else being equal, and that point is the junction of the enlarged base and the outer and smaller part of the prong. Possibly language may be found in the specification tending to indicate that the claim was that when used there is a well-defined bending point at which, under all circumstances and conditions, the prongs bend, or at least showing that care was not taken to limit the claim as to the bending point to the time when the buttons have come out of the factory and before they have been put in use. But it could not have been intended to claim other than at such time and under such conditions the prongs of the buttons have such bending point, and such a construction must be given to the patent.

The question, then, as the utility of the patent resolves itself into this: Does the fact that such buttons, when not in use, have a well-defined bending point, located as heretofore indicated, render them of value when in use? Is this particular feature of them such as to better the making of cushions in upholstery? Of course, if in all instances the thickness between the back of the buttons and the bent portion of the prongs, by which same is clenched, is sufficient to provide a bending point far enough away from the weakness at the junction of the back and the prongs to prevent the bending force, when applied to the prongs in bending them, reaching such weakness or giving it effect, then such feature is of no utility and does not better the making of upholstery; for if, in the making of cushions, a means is always supplied, outside of the buttons, which provides a bending point in the prongs that guards the weakness at their base, why the necessity of anything in the buttons themselves to provide such a bending point? The evidence tends to show that such a means is supplied outside of the buttons in all cases where what are called "edge rows" are not concerned. There washers are invariably used, and the thickness of the material supplemented by the washers is such as to provide a bending point sufficiently far away from said weakness and of such a character as to guard it. It establishes, however, that where edge rows are concerned no washers are used, and the thickness of the material is not such as to provide a bending point of such a character, though it may be sufficiently far away, as to render such protection. This is made out by the testimony of the patentee and complainant's other witnesses as to the trouble with breakages before the invention and the freedom therefrom after the invention. This

evidence is not overthrown or affected by the testimony of defendant's witnesses as to freedom from breakages where such invention was not used. Where this testimony did not have to do with edge rows, it had no bearing on the matter of breakages where they were concerned; and where it did have to do with edge rows, it dealt only with Morely buttons. Such buttons are a subordinate class of clenching tufting buttons, separate and distinct from that class to which the patent in question relates. They have no weakness at the junction of the back and the prongs. The back and the prongs are not integral and are not made out of sheet metal by stamping. The Morely button has a papier-maché head and a metal prong, the latter being driven into the former.

The sole effect that can be given to defendant's said testimony is to confine the utility of the invention in question to the buttons when used in edge-row work. It can be given no greater effect than this. The invention in question is, therefore, such as to prevent breakages in edge-row work, and possibly, if not probably, at times in other work. It certainly does no harm in other than edge-row work, and does good there. Its utility there is sufficient to uphold the patent. That the invention has utility is shown by defendant's own conduct in relation to the manufacture of buttons, as shown by the witness Quehl, and to its own patent. In the specification thereof it is stated that the invention covered by the patent, which is imitative of complainant's, is such as to "cause the tongs to bend at a line 'a' some distance from the button head." It might be thought that the attempt of the defendant to get away from this concession is some what disingenuous.

The other two attacks made upon the second claim of the patent may be considered together. They are that it involved ordinary mechanical skill only—not patentable invention—and that, if it did involve patentable invention, it had been anticipated. As stated by counsel for complainant, the invention involved two ideas, to wit, a result to be accomplished and a means of accomplishing that result. The result to be accomplished was to protect or guard the weak point in the button at the foot of the prong against the bending force applied to its head in the process of clenching, and possibly subsequently, after the clenching has been completed, and whilst the cushion is in use. The means of accomplishing that result which it adopted involved two subordinate ideas. One was that the way to so protect or guard said weak point was to resolve the prong into two parts of different strength; that of greatest strength being located next to that point. The other was that the prong could and would be so resolved by making the base next to that point of greater width than the outer part. Now, all these ideas seem quite simple. It does not seem to require a great amount of skill to conceive the idea that a flat prong would be resolved into two parts of different strength by dividing it into two parts of different widths, or to conceive the idea that the weak point at the base of the prong would be protected or guarded by resolving the prong into two parts of different strength, with the part of greater strength next to that point, or even to conceive the idea that the way to prevent the bending force, when applied to the outer end of the prong in the process of clenching, from causing the prong to break at that point, is by protecting or guarding it from the attack of that force.

I hesitate, however, to hold that the invention involved no patentable invention, but only ordinary mechanical skill, and that for two distinct reasons: One is that I am conscious of the fact that my hindsight is better than my foresight. The other is I do not feel fully equipped to deal with such a question. I am not sufficiently familiar with the decisions where the question of patentable invention or ordinary mechanical skill was involved and decided to be so equipped. It is true that it has been said that the word "invention" cannot be defined, so as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. But the cases are so many where that question has been up and decided, and that by able judges, that a reasonable familiarity with them must at least sharpen one's wits when he has a similar question to decide. The great thing to be done in all such cases is for one to place himself in sympathetic relation with the inventor at the time of the invention, and to speak from his standpoint at that time as to whether what he has done involved the exercise of the inven-



tive faculty or not; and to do this well and successfully he needs all the assistance obtainable. But I do not have to decide this question in this case, as I am constrained to hold that the invention was anticipated, and the patent is for this reason invalid. Hence I pass it by.

In passing upon the question of anticipation, it is important that one have a firm grasp of what the invention is, as I have heretofore pointed out. It is a certain means of protecting the weak point at the base of the prong against the attack of the bending force, and not strengthening that point so as to enable it to withstand that force when attacked. These are two entirely distinct ideas. It is one thing to protect a position against attack. It is another thing to strengthen that position against attack, so as to enable it to withstand the attack when it comes upon it. That it is the former idea, and not the latter idea, which is involved in the invention in question, is settled by the consideration heretofore alluded to. That consideration is that if two buttons with prongs equally of uniform width from the back of the button to the point of the prongs are taken, and at a reasonable distance from the back of one of the buttons its prongs are clipped out to the point, thus changing the prongs into two parts of different width, with that of greatest width next to the foot of the prong, such button will be stronger and less liable to become broken than the other button. This is so, not because the prongs of that button have been strengthened at the foot thereof, but because in that case a bending point in the course of the prong has been provided, which will prevent the bending force from reaching the base of the prong and causing it to escape by that point. It is also settled by the consideration adduced by complainant's counsel. That consideration is that if two such buttons are taken, and the prongs of one of them are clipped on each side from the base to the point, thus making the prong a triangle in shape and consisting of but one part, with no well-defined bending point, such button will be but little, if any, stronger than the other, notwithstanding the fact that it is widest at its base. There is nothing in its course to stop the bending force from reaching the base.

With this distinction clearly in mind, we are in position to deal with the question of anticipation. The defendant has introduced a mass of articles and patents, which it is claimed on its behalf show anticipation. I do not find in them, however, any article and but one patent that shows anticipation. Possibly the finding of this one patent, which I consider to show anticipation has led me not to consider the articles and the other patents as carefully as I might otherwise have done. Certainly the bulk of them do not show anticipation. So far as they are concerned, they simply involve the idea of strengthening a weak point so as to enable the articles to withstand force when applied to that point. I do not find it necessary to take this up in detail and show that this is the case. Such is the case in the natural instance so much relied on—that of the tree. It is true that its trunk is largest at its junction with the roots, the limb is so at its junction with the trunk, the branch is so at its junction with the limb, and so on. But the idea there involved is that of protecting the weak point, which, in each instance, is at the junction of the part of greatest strength with that of less strength, by increasing the size of the latter at such junction, so as it may be enabled the better to withstand the force of the wind. There is no idea involved of protecting such point from an attack from such quarter.

As to the McGill and Pack & Van Horn fasteners, of which so much is made, they have no application whatever, in my judgment, to the case in hand. Being made of soft metal, there is no constitutional weakness in them at the base of the prong, and there is, therefore, no necessity of strengthening the fasteners at that point, or of protecting that point from the attack of the bending force, and so we find no device or arrangement in either fastener for either of such purposes. The tubular formation in the Pack & Van Horn fastener at the base of the prongs, which are no part of the prongs themselves, and lie between said base and the head or back of the fastener, is not there for any such purpose. They are there simply to provide an opening through the fastener, so as to enable the papers, through which it is passed, being strung upon a cord or hung upon a pin or bracket.

The patent to which reference is had as showing anticipation is the patent No. 377,029, granted to J. C. Jensen, January 31, 1888, for a paper fastener.

The device covered by that patent is formed by stamping from sheet metal. The prongs are cut from a blank so as to lie side by side, with a connecting bar between them, which is nearer one end of the prong than the other; that end being intended for the head of the fastener. In the inner edges of the prong, underneath the connecting bar, but near to it and opposite each other, notches are cut. These notches, according to the specification of the patent and the testimony of complainant's expert, weaken the prongs. After the blank is formed the fastener is made by bringing the two prongs face to face, by bending the connecting bar so as to lap one prong upon the other. After this the head is formed by bending the upper ends of the prongs above the connecting bar—called "half heads" in the patent—away from each other. With this the fastener is complete and ready for use. In use the lower end of the prongs are passed through the paper and then bent away from each other towards the paper. As theretofore constructed without the notches, it was found, as stated in the specification, that when securing together only a few sheets of paper, the prongs could not be bent back and up against the sheet, so as to lie in close contact therewith, as when the blow was made on the fastener, to secure the same tightly in place, one or both of the prongs would be given a sudden and sharp bend that would cause the prong, or prongs, to break when bent back to the original position for the purpose of removing the fastener. The breakage would be at the connecting bar. As stated by complainant's expert, the fastener would "tear across the bar," or by his counsel, the connecting bar would be "broken."

To prevent this the patentee invented the notch. He thus describes his invention: "My invention is designed to construct a metallic fastener that will overcome and obviate the difficulty above referred to; and its nature consists in providing a notch in each prong of the fastener below the strip, or piece connecting the prongs together, to allow of a square bending of the prongs." He further states that with the notches "the prongs can be turned back, so as to lie nearly parallel their full length to the head, instead of bending back in an arc of a circle, as in the fasteners heretofore constructed. This advantage is gained by the notches at the bending point, which slightly weaken the metal and allow of the nearly square bending of the prong, and by reason of this square bending the connecting piece is not so liable to become broken off as when the prongs are bent in a more rounding manner." As is well said by complainant's counsel: "The surplus metal in the width of the prongs, greater than at the notch, is mere surplusage." Of course he means the surplus in width from the notch out to the lower end of the prongs. With that surplus removed, what do we have? We have the prong divided into two parts of different strength by being made of different widths; the base being of greater width than the outer part, thus providing a weak point, a bending point, in the course of the prong at the junction of the two parts. We have also a weak point to be protected, to wit, the connecting bar, and that weak point is protected from the attack of the bending force by the location of the weak or bending point in the course of the prong between it and the end of the prong where the bending force is applied.

The only difference between this patent and the one in hand is that in the latter instance the weak point to be protected is at the base of the prong, whereas here it is at its side. This, however, is not a difference in essence. The two patents are essentially the same. The complainant's expert undertakes to differentiate the two patents by the difference between the heads of the two patents. I cannot see, however, anything in this to differentiate them, so as to make the one not an anticipation of the other. He states his conclusions in these words, as follows, to wit: "I am therefore of the opinion that the paper fastening devices shown and described in the Jensen patents, above mentioned, do not disclose or suggest the combination and arrangement of parts as recited in the Neider and Marggraff patents in suit, due to the prongs being notched or weakened, to determine the point at which they shall bend, and to prevent the bending operation from tearing the bar, which is the only point at which the prongs are united together, the absence of head sections shown in the Neider and Marggraff patents, and of the means shown and described in the Neider and Marggraff patents, for strengthening the point at which the root of the prong unites with such head section."

The presence of means in the Neider patent for strengthening the point at which the root of the prong unites with the head section is what defendant claims makes the mass of articles and patents introduced by it an anticipation. And it must be admitted that, if such means are present in the Neider patent, they are an anticipation. It is because I have found that there are no such means present in said patent at that point that I have been able to get rid of such anticipation. There are no means in the Neider patent for strengthening that point. The means provided thereby are to protect that point from the attacking force. As to the head section, as already stated, the difference between the two patents in this particular is no reason for the one not being an anticipation of the other. There the thing which is pointed out as distinguishing the Jensen patents is the very same thing which we find covered by the claim of the Neider patent in question herein, and which makes it of any utility.

I hesitate somewhat to hold that this patent is an anticipation, inasmuch as so little emphasis has been placed upon it by defendant's expert and counsel; but I cannot see it in any other light, and must so hold. I think I see anticipation, also, in the bow to which reference has been made by the defendant's counsel. The middle or center part thereof is thicker than each of the outer ends. The weak point in a bow of same width from end to end is, everything else being equal, at the center. There the two bending forces, applied at the outer ends and drawing in opposite directions, meet. By thickening the middle, they never meet. Two bending points are provided at either end of the middle portion, so that said bending forces do not meet. It is true that there is no constitutional weakness at the center of the bow, and the center is strengthened by the thickening, and it may be that the difference in strength has something to do with the efficiency of the bow in throwing the arrows; but involved, also, is the additional idea of preventing the bending forces reaching the center of the bow and thereby making what would otherwise be a weak point.

So much then as to the Neider patent. The only difference between it and the Marggraff patent is that the latter provides a different method of strengthening the base of the prongs, to wit, by the process of ribbing. There is room to say that the Neider patent is an anticipation of the Marggraff patent, in that the former covers any enlargement of the base, however made, and the ribbing process of the latter is an enlargement of the base. But, this aside, the method of increasing the strength of metal by ribbing is old. There is no invention, therefore, in increasing the strength of the base of the prong by ribbing, and thereby protecting the weak point in the prong at its base from the attack of the bending force. The Marggraff patent simply protects that point by increasing the strength of the base in another way, and that a way old and well known.

I am therefore constrained to hold the patents in suit invalid, and to direct that the bill be dismissed.

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#### SACKETT PLASTER BOARD CO. v. RUTKOWSKY.

(Circuit Court, D. New Jersey. February 3, 1909.)

#### PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—PLASTER BOARD.

The Sackett patent, No. 520,123, for a board or plate for use as a substitute for lath and plaster as an inside wall covering, consisting of alternate layers of paper and a mineral plaster in the nature of a lime cement, was not anticipated, and discloses invention; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

W. B. Hutchinson, for complainant.

Edward Q. Keasby, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LANNING, District Judge. The defendant is charged with infringement of patent No. 520,123, for improvements in inside wall coverings, granted May 22, 1894, to Augustine Sackett, and now owned by the complainant. The specification of the patent declares its object to be "to provide boards or plates which may be used as a substitute for lath and plaster as a material for forming the inner walls of houses or rooms." The boards are designed to be nailed to the studding of walls or partitions. They consist of "alternate webs of paper and layers of some hard adherent plastic substance in the nature of a lime cement." The patent also says:

"The substance which I have thus far found preferable is plaster of paris (calcined gypsum). The inherent brittleness of the plaster or other substance of this character is sufficiently overcome by applying it in thin layers alternated with webs of paper to produce, as the result of the superposition of a suitable number of such layers and webs, a board or plate of great stiffness, strength, rigidity, and toughness in comparison with its thickness, and which is in every way admirably adapted as a material for inside wall surfaces. \* \* \* Ordinarily from four to eight or ten sheets of paper, with their intervening layers of plaster composition, will be used, the number depending upon the thickness of the board desired. For a board three-sixteenths of an inch thick, which would be suitable for ordinary purposes, eight layers give a good result. The thickness of the layer of plaster composition may vary greatly, say, for example, from one one-hundredth to five one-hundredths of an inch, or even thicker."

When the requisite number of layers of plaster and webs of paper have been placed upon one another, the material is subjected to pressure and dried in a perfectly flat condition. One side of the board is water-proofed by water-proof paper, varnish, or other water-proof composition. The board, thus made, is declared to be fire-proof, to make a dry, firm, and durable wall surface, and to take paint or calamine as well as ordinary plaster walls. "My invention," the patentee also says, "excludes cements or binding materials in the nature of rosins, glue, or other cements of an animal or vegetable origin. My invention is essentially limited to cements of mineral origin, or the essential ingredients of which are of a mineral character. It excludes, also, waxy materials, and, in fact, all materials which soften by heat, such for example as ozocerite and bitumen. I am aware that bituminous cements, such as pitch, have been used, combined with sheets of paper in the manufacture of roofing material, but such products are essentially different from the new product introduced by my invention."

The claims are:

"(1) A flat board or plate for wall coverings consisting of webs of paper alternated with layers of hard adherent plastic substance in the nature of lime cement, substantially as and for the purpose set forth.

"(2) A flat board or plate for wall coverings consisting of webs of paper alternated with layers of plaster, substantially as and for the purpose set forth.

"(3) An inside wall covering as a substitute for lath and plaster consisting of boards or plates of alternated paper and plaster or other equivalent plastic substance in the nature of a lime cement, the boards being stiff and firm, but sufficiently soft to admit the driving of nails through them to fasten them to the studding, substantially as set forth."

The defense is that the patent is invalid for lack of invention. The contention is that the disclosures of a number of the patents of the prior art are so suggestive of the product described by Sackett that it is impossible to attribute to it the novelty which must be found in every good patent. As originally filed, Sackett's application was broad enough to cover a board or plate used for other than inside wall coverings. The application was repeatedly rejected by the examiner in the Patent Office, but was finally allowed by the board of examiners on condition that the claims should be confined to wall coverings. After referring to Martindale's patent, No. 286,321, dated October 9, 1883, for a paving block, made by cutting it from a compacted mass of layers of paper cemented together, and to Kelley's patent, No. 273,689, dated March 6, 1883, for a covering for steam pipes, etc., made by spreading a plaster combination on paper and rolling it into a tube, and stating that neither of these products was intended as a wall covering nor as a substitute for lath and plaster on any surface, the board said:

"We think that the conception of an article containing plaster which in sheets is applicable when dry by unskilled labor to walls to subserve the purpose of lath and plaster, which requires the services of men skilled in two trades, followed by the embodiment of the idea in this new structure, is an invention, and therefore, while sustaining the rejection of claims 4 and 5, we must reverse the decision of the examiner as to claims 1, 2, and 3, subject to the requirement for their amendment to confine them to wall coverings."

The defendant cites now, however, patents of the prior art which are not referred to in the file wrapper or in the proceedings before the board of examiners. The most important of them in the present inquiry, I think, are the Hamilton reissued patent, No. 10,387, dated September 25, 1883, and the Gardner patent, No. 361,686, dated April 26, 1887. The first of these is for a paper board formed of several sheets of paper saturated with resin and oil, then coated with a solution of milk-curd and lime, and finally passed through heated pressure rollers. The patent declares that the pressure causes the sheets "to adhere together and to form a board that has any desired thickness or size," and that the board, thus constructed, "is thoroughly homogeneous, is entirely unaffected by water or dampness, is in a great degree fire-proof, and possesses greater density, strength, and durability than is possessed by any of the woods ordinarily used for building purposes." The design of the invention is said to be "to render practicable the employment of paper for purposes to which wood, metal, or stone has heretofore been applied." The Gardner patent relates to the ornamentation or construction of walls, ceilings, etc., by the use of what is known as "straw lumber," such as that described in the Hamilton patent above mentioned, which Gardner owned at the time of the issue of his patent. In the specification of the Gardner patent the patentee says that:

"With suitable sheets of this article I propose to form the walls and ceilings of buildings, halls and dwellings, or to decorate walls already formed in such places."

Its only claim is for "a wall or ceiling decorated by the application directly to the studding or joists of straw-board lumber, embossed

on the exposed surface." Evidently straw-board lumber thus used takes the place of lath and plaster. But it is a material whose sheets of paper are saturated with resin and oil. Paper thus treated must be highly inflammable. While the sheets are coated with a solution of milk-curd and lime, I am satisfied from the description in the Hamilton patent, and from the Hamilton board produced in court, which is admittedly the board used by Gardner, that the coatings are sufficient only to aid in cementing together the sheets of paper upon pressure, and not sufficient materially to reduce the inflammability of the product.

In the Sackett patent cements, or binding materials in the nature of resins, glue, and other cements of an animal or vegetable origin, and waxy materials, ozocerite, bitumen, and other materials that soften by heat, are excluded. The cements used are of a mineral character. Emphasis is given to the fact that there are between the sheets of paper intervening layers of plaster or other hard adherent plastic substance in the nature of a lime cement. While the patent declares that the thickness of the layers may vary from one one-hundredth to five one-hundredths of an inch, it also declares that they may be "even thicker," and the claims do not in anywise limit their thickness. The product is expressly declared to be a substitute for lath and plaster in constructing the inner walls of houses and rooms, and it is, in my opinion, fire-proof to a much greater degree than are the Hamilton and Gardner products. We may fairly speak of the Sackett product, I think, as a plaster board with paper binders, and of the Hamilton and Gardner products as paper boards with very light binders of resin, oil, milk-curd, and lime. Indeed, Gardner himself says that the Hamilton product "consists of a board or sheet of homogeneous material formed of several sheets of paper cemented and united by heat and pressure."

I deem it unnecessary to make particular reference to any of the other patents of the prior art mentioned in the proofs. They have all been examined, but none of them anticipates Sackett. He appears to have been the first to make a plaster board that could be successfully used as a substitute for lath and plaster. The business carried on under the patent has grown steadily from the date of its issue in 1894 until the present time. It now amounts to about \$600,000 a year. In all these 13 or 14 years builders and manufacturers generally seem to have refrained from acts of infringement of the patent, and thereby to have conceded its validity. The defendant is the first, so far as the proofs show, who has ventured to turn out a product essentially the same as that of the complainant. The very fact that he copies the complainant's product, and not that described in any of the patents of the prior art, is strong evidence of the superiority of the thing copied.

In the brief of the counsel for the defendant it is admitted that, when this suit was begun, the defendant was making and vending boards that "were within the terms of the patent." The exhibits of the defendant's manufacture confirm the admission.

Concluding that the complainant's patent is valid, there will be a decree for injunction, and, if the complainant desires it, for an accounting of profits and damages.

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UNITED STATES v. REUGGER.

(Circuit Court, S. D. New York. November 28, 1908.)

No. 4,961.

CUSTOMS DUTIES (§ 25\*)—CLASSIFICATION—COMMON YELLOW EARTHENWARE—"COMMON."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 94, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633), providing for "common yellow \* \* \* earthenware," "common" is not a commercial, but a descriptive, term; and Sarreguemines ware, which is of a superior quality, is not within said provision.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 45; Dec. Dig. § 25.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1310-1312.]

On Application for Review of a Decision by the Board of United States General Appraisers.

In the decision below the Board of General Appraisers reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Charles R. Reugger. The imports in controversy are described as follows in the board's opinion (per Hay, General Appraiser):

The importer testified that the ware is called "Sarreguemines earthenware"; that it is made from clay taken from the ground in Sarreguemines, Germany. One of the government witnesses called the ware ivory porcelain of very superior grade, made of a composition clay and finished with a fretting glaze. The other government witness said that an article of Sarreguemines make would sell at retail for 10 cents, while a similar article of common yellow earthenware would only sell for 3 cents; but both of the witnesses for the government spoke of the ware as yellow earthenware of a superior quality. \* \* \* The testimony in this case, when carefully analyzed, goes no further than to show that the ware under consideration is a good quality of yellow earthenware.

D. Frank Lloyd, Asst. U. S. Atty.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importer.

MARTIN, District Judge. The merchandise in question consisted of certain "earthenware." It was assessed for duty at the rate of 55 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 96, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1633). The relevant portion of that paragraph is as follows:

All other china, porcelain, parian, bisque, earthen, stone, and crockery ware, and manufactures thereof, or of which the same is the component material of chief value, by whatever name known, not specially provided for in this act, \* \* \* if not ornamented or decorated.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The importer protested, claiming said merchandise to be properly dutiable at 25 per cent. ad valorem under paragraph 94 of said act as "common yellow \* \* \* earthenware." The Board of General Appraisers sustained this protest, from which decision the government appeals to this court.

A large amount of evidence has been taken in this court since the board rendered its decision. That evidence shows that the article in question is not "common yellow earthenware," but is earthenware of a superior quality. The evidence also shows that the word "common" is not a commercial designation, but is a descriptive term, and as such does not describe the imported articles of which Exhibits 1 and 2 are samples; they being of too good a quality to come within that description. The evidence further shows that Exhibits 1 and 2 are worth at least twice as much as illustrative Exhibit A, which is a fair sample of "common" earthenware. One of the witnesses for the importer testifies that the value of Exhibits 1 and 2 is at least three or four times that of Exhibit A. An examination of all the evidence in the case, taken before the board and in this court, leads me to the conclusion that the merchandise in question should not be classified as "common yellow earthenware."

The decision of the Board of General Appraisers is reversed, and the assessment of duty by the collector affirmed.

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GARRETT-CROMWELL ENGINEERING CO. et al. v. NEW YORK STATE STEEL CO.

(Circuit Court, W. D. New York. June 20, 1908.)

No. 322, Equity.

**SALES (§ 461\*)—CONDITIONAL SALES—FORM OF INSTRUMENT RESERVING TITLE.**

A reference in a written contract for the sale of boilers to the specifications, "copies of which are attached hereto and form a part of this agreement," made a provision of such specifications reserving title to the boilers in the seller until paid for a part of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1349; Dec. Dig. § 461.\*]

On Exceptions to Report of Special Master.

Edward C. Randall and William Meade Fletcher, for petitioner.

Shire & Jellinek, for receivers.

Cecil B. Wiener, for William S. Humbert.

HAZEL, District Judge. The receivers of the defendant oppose the confirmation of the report of the master on the ground that the specification covering the conditional sale of the boilers furnished and delivered to defendant was in fact not a part of the contract, and that the real contract between the vendor and the defendant did not contain any provision for retaining the title to the boilers in the vendor until paid for. The reference in the written contract to furnish boilers, "as per proposition and specification \* \* \* copies of which

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



are attached hereto and form a part of this agreement," is comprehensive enough to include the clause contained in the specification reserving title to the property. Such clause embodies language from which the intention of the parties that the title should remain in the vendor is clearly ascertainable. For instance, it is provided that "when accepted (the specification) it shall constitute a part of the contract." This would seem to indicate that the provisions contained in the specifications were a part of the contract or additions thereto. Considering the contract in its entirety—and I do not perceive that there are any inconsistent provisions—it may be fairly presumed that the specification and the clause in question were approved by the defendant, inasmuch as the work of installing the boilers went forward after execution of the contract. In such circumstances the defendant cannot now plead ignorance of a conspicuously important provision of a written agreement under which the ten boilers were delivered to it.

The master has correctly decided the issues in controversy, and his report is affirmed.

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CENTRAL TRUST CO. v. NEW AMSTERDAM GAS CO. et al.

(Circuit Court, S. D. New York. February 5, 1909.)

INJUNCTION (§ 163\*)—PRELIMINARY INJUNCTION—VACATION.

Laws N. Y. 1906, p. 235, c. 125, limited the price of gas in the borough of Manhattan to 80 cents per 1,000 feet, and provided that any corporation or person violating the act should forfeit \$1,000 for each offense. The act also contained certain provisions with reference to pressures. The constitutionality of the act having been questioned, a preliminary injunction was granted restraining prosecution of the gas company by repeated actions for penalties and failure to conform to pressure provisions and for asking consumers to pay a higher rate. *Held* that, the Supreme Court having held that the provisions as to pressures and penalties were in violation of the federal Constitution, the purpose of the injunction was fulfilled, and it should therefore be vacated.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 366; Dec. Dig. § 163.\*]

In Equity. On motion to vacate preliminary injunction.

Joline, Larkin & Rathbone, for complainants.

Cortlandt Betts, for defendant New Amsterdam Gas Co.

LACOMBE, Circuit Judge. The nature and extent of this preliminary injunction have been so often misstated, even quite recently by an eminent jurist, that it may be appropriate to refer to Consolidated Gas Co. v. Mayer, 146 Fed. 151, 155 (June 8, 1906), for a correct statement of its exact terms. It enjoined until final hearing the prosecution of the gas company by repeated actions for penalties for failure to conform to pressure provisions and for asking consumers to pay at the \$1 rate. No one was constrained to pay at that rate unless he chose to do so. The Supreme Court has held that these provisions as to pressures and penalties are in violation of the Constitution of

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the United States. That being so, no injunction is needed to protect any rights of the company, since the state courts are quite as careful as are the federal courts to follow and administer the provisions of that Constitution. No prosecution to enforce unconstitutional penalties need be apprehended.

The injunction is vacated, but, in conformity with the opinion of the Supreme Court, without prejudice to any further action which the gas company may be advised to take. A similar disposition will be made of the injunctions in the other cases. Order to be settled on two days' notice.

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POLLITZ v. WABASH R. CO. et al.

(Circuit Court, S. D. New York. February 6, 1909.)

1. RAILROADS (§ 143\*)—RAILROAD COMPANIES—CONSOLIDATED COMPANIES—LAWS GOVERNING.

A consolidated railroad company formed by a consolidation agreement between corporations of different states, which remain in existence, may not disregard the laws of any one of such states, except as to matters to which the consent of the state is necessarily implied from the fact that it authorizes such consolidations.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 448; Dec. Dig. § 143.\*]

2. RAILROADS (§ 15\*)—CORPORATIONS—INCREASE OF PREFERRED STOCK—LAW OF MISSOURI.

Const. Mo. art. 12, § 8 (Ann. St. 1906, p. 304), provides that the stock of a corporation shall not be increased "except in pursuance of general law nor without the consent of the persons holding the larger amount in value of the stock first obtained." Section 10 (Ann. St. 1906, p. 305) provides that "no corporation shall issue preferred stock without the consent of all the stockholders." Rev. St. Mo. 1899, § 962 (Ann. St. 1906, p. 860), provides that "any corporation may increase its capital stock \* \* \* with the consent of the persons holding the larger amount in value of the stock," etc. Section 1050 (Ann. St. 1906, p. 908) permits railroad companies to issue preferred stock with the consent of all the existing stockholders. *Held*, that under such provisions a railroad company which has authorized and issued preferred stock with the consent of all the stockholders may increase the same with the consent of the holders of the majority of the stock, no distinction being made in that respect between common and preferred stock.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 31; Dec. Dig. § 15.\*]

3. CONSTITUTIONAL LAW (§ 15\*)—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—GENERAL RULES.

In construing the provisions of the Constitution of a state, as in construing its statutes, all the provisions on the same subject are to be read together as one whole and given such a meaning as will avoid conflict and at the same time carry out the plain intent and promote the objects for which intended.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 15.\*]

4. RAILROADS (§ 15\*)—CORPORATIONS—INCREASE OF STOCK—VALIDITY.

Defendant railroad company, which was a consolidation of corporations of different states, had an issue of debenture bonds, the interest on which was payable only from net earnings. Shortly after its organization, owing to a large increase of business and competition in the coun-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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try, and to the requirements of national and state laws, it became necessary to the successful operation of its lines to make large and continuous expenditures upon its tracks, equipment, and terminal facilities. As a result of devoting earnings to such purposes, no interest was paid on the debentures, and the holders thereof, who were entitled to vote as stockholders, opposed such use, claiming it to be illegal, and the controversy finally resulted in litigation which threatened a receivership. It also became necessary, to meet the increasing requirements of its business, for the company to obtain a large amount of new capital by increasing its stock and bond issues, which the debentures and the litigation over the same prevented. In such situation the stockholders voted an increased issue of stock and a new issue of bonds, and ratified an agreement with the debenture holders to exchange for their bonds new bonds and common and preferred stock aggregating in amount considerably more than the face value of such bonds. *Held*, that such agreement was not ultra vires and void as in conflict with the provision of Const. Mo. art. 12, § 8 (Ann. St. 1906, p. 304), which was binding on the company, that "no corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void," the proposed new stock and bonds issued for such exchange not being either fictitious nor without adequate consideration.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 31; Dec. Dig. § 15.\*]

5. CORPORATIONS (§ 66\*)—INCREASE OF STOCK—RIGHTS OF STOCKHOLDERS—ESTOPPEL.

A stockholder who placed his objection to an issue of new stock by the corporation on certain specific grounds is estopped to change his position and allege new grounds of objection after the stock has been issued and sold and after he has instituted litigation to have such stock declared illegal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 180; Dec. Dig. § 66.\*]

In Equity.

This, a consolidated action (Law, 7,091, and Law, 27), seeks to enjoin defendants from carrying out an alleged scheme or plan for the retirement of certain debenture bonds amounting to \$30,000,000, issued by the Wabash Railroad Company in July, 1889, and which plan and agreement was entered into about August 15, 1906, by said company and a committee of the bondholders of said company, and completed in October following, and to have same declared illegal, and to have all bonds and common and preferred stock issued and used or applied in execution of such plan or scheme declared illegal, and a restoration, etc., decreed.

Stephen M. Yeaman (Abram J. Rose and Alfred C. Pette, of counsel), for complainant.

Rush Taggart, Lawrence Greer, and F. C. Nicodemus, Jr., for defendant Wabash R. R.

William C. Trull, for defendants Evans, Pomeroy, and Cumming.

Alexander & Green (Wm. W. Green, of counsel), for defendant Mercantile Trust Co.

Davies, Stone & Auerbach, for defendant United States Mortgage & Trust Co.

Pierce & Greer, for defendants Pierce, Otteson, Jeffrey, Terry, Gal-laway, and Hubbard.

Thompson, Vanderpoel & Freedman, for defendant Bowling Green Trust Co.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. The bills of complaint in two actions, amended bills, cross-bill, answers, and replications present a confused mass of allegations and denials; but these with the evidence, and its exhibits in extenso, and extensive briefs, which make little attempt to simplify by pointing out the salient features, may, it seems to me, establish the following facts:

1. The defendant the Wabash Railroad Company is a foreign consolidated corporation existing under the laws of the states of Ohio, Indiana, Illinois, Michigan, and Missouri, and came into existence under the following circumstances and consolidation agreement: In 1889 certain lines of railroad in said states owned by certain corporations which were then passing through receivership and reorganization were conveyed to a purchasing committee, which committee, after acquiring such railroads, caused separate corporations to be formed, one in each of said states and under the laws thereof, and then conveyed to such corporations, respectively, the line or lines of railroad situated in the state in which it was incorporated. Thereupon these five corporations entered into an agreement of consolidation, executed in July, 1889, by the officers of such companies, whereby a new and a consolidated corporation was formed known as "the Wabash Railroad Company." These lines extend from Toledo in the east, to Chicago, St. Louis, Kansas City, and Omaha, and the present system includes some 2,500 miles of main line in a competitive territory.

2. In its essentials such plan and agreement of reorganization provided for: (a) A capital stock of \$52,000,000, of which \$24,000,000 was preferred stock, consisting of 240,000 shares of \$100 each, and \$28,000,000 was common stock, consisting of 280,000 shares of \$100 each. (b) A board of directors of 13 members, which might be increased to any odd number not exceeding 15 by the board with the consent of a majority of the stockholders, with power to appoint a president, first and second vice presidents, and such other officers as might be required, and power to establish and amend by-laws, one of which should fix the time and place of the annual meetings of the stockholders and debenture bondholders of the consolidated corporation. One half of the highest even number of the board was to be nominated by debenture bondholders and the other half by the stockholders, and these, so nominated, were to agree upon the odd member who was to be president of the company, and, they failing to agree, such odd member was to be nominated by the trustee of the debenture mortgage. The by-laws were to fix the manner of making such nominations, and also the manner in which the voting powers of the debenture bondholders should be exercised. These provisions as to the voting powers of debenture bondholders had no application to the first board of directors, as such debenture bonds were not issued. (c) The issue of first-mortgage bonds to the amount of \$34,000,000, secured by mortgage on all the lines of the company. (d) The issue of second-mortgage bonds to the amount of \$14,000,000, secured by mortgage on the lines of the company. And (e) the issue of debenture bonds to the amount of \$30,000,000, bearing interest at 6 per cent. per annum, payable semiannually, and perpetual, but dependent upon the income

for interest, which should not be cumulative, and with voting powers at the rate of one vote for each \$100, and with provisions in said bonds and the mortgages securing same as provided in the agreement of reorganization dated July 15, 1885; and \$3,500,000 of such bonds were preferred as provided in such agreement. The holders of shares of preferred stock were entitled to a dividend of 7 per cent. per annum on their par value from the earnings of the consolidated corporation before any dividend was paid on the common stock; but after the payment of 7 per cent. dividend to the preferred stock, in any one year, the holders of that stock were not to receive anything more from the earnings of the company for that year until a dividend of 7 per cent. on the par value of the shares of common stock had been paid, and after that time all dividends were to be distributed alike to the holders of the preferred and the holders of the common stock.

3. At a meeting of the stockholders of the Wabash Railroad Company held at Toledo, in the state of Ohio, on the 1st day of August, 1889, forms of mortgages to secure the said first, second, and debenture bonds respectively were presented and duly approved, and at such meeting the officers of the company were directed to execute and deliver the mortgages and issue the bonds secured thereby.

4. The mortgages were executed and delivered, and in accordance with the provisions of the debenture mortgage, which was the junior lien, mortgage bonds were issued thereunder to the said amount of \$30,000,000, \$3,500,000 of which were designated as "Series A," and were preferred over the others of that issue with respect to the payment of interest, and \$26,500,000 of which were designated "Series B." The agreement of consolidation, as we have seen, provided for an issue of \$30,000,000 of debenture bonds, \$3,500,000 of which were to be preferred, but it was silent, as was the resolution adopted at Toledo, Ohio, August 1, 1889, as to what particular statute should govern their issue. This debenture mortgage was executed in the city and state of New York, August 15, 1889, to the Mercantile Trust Company, a corporation of the state of New York, and the trustee for the bondholders designated in such mortgage.

5. The agreement of consolidation provided that five originals thereof should be executed, and one filed in each of said states. By-laws were adopted which provided that the regular annual meeting of the stockholders and debenture bondholders for the election of directors should be held in the city of Toledo, state of Ohio, on the second Tuesday of October each year. The by-laws also provided for special meetings, and that these should be held in the said city of Toledo.

6. To carry into effect the provision as to the nomination of directors by the debenture bondholders, section 2 of the by-laws provided that those present in person, or by proxy, at each annual meeting should meet together in such manner as they should adopt and elect six persons to be voted for for directors; that the stockholders should do the same; that the names of such twelve persons so selected should be reported to the annual meeting; that they or a majority of them should thereupon meet together and agree upon the other or thirteenth person to be voted for as a director, but, in case they failed to agree,

that the person designated by the trustee of the debenture bondholders should be reported to the meeting, and that such persons so reported should constitute the regular ticket to be voted for as directors; that if the said thirteenth person so reported was elected he should be president, unless otherwise ordered or voted by a majority of all the members of the board. In case of failure to nominate in the above manner, then the stockholders and debenture bondholders were to nominate thirteen persons for directors, or they might adjourn the meeting to some future day.

7. The first and second mortgage bonds, \$48,000,000, draw interest at the rate of 5 per cent. annually, and are payable 50 years from May 1, 1889, and February 1, 1889, respectively. Each of the debenture bonds acknowledges an indebtedness of \$1,000, and the Wabash Railroad Company thereby promises to pay that sum, with interest thereon at the rate of 6 per cent. per annum, payable semiannually January 1st and July 1st, each year, in the year 1939.

(a) This interest is to be paid "from the net income of said railroad company ascertained and declared by its board of directors to be applicable to such interest payments, as provided by the terms of the mortgage securing payment hereof."

(b) "Such interest shall not be cumulative, and no part thereof unpaid in any year from the income of that year shall be paid from the income of any other year."

(c) "The railroad company gives to the registered holder hereof, and will secure to him, so far as it lawfully may, the right to cast one vote for each one hundred dollars par value hereof, at all meetings of its stockholders."

Each bond also states that the \$3,500,000 of series A "shall be first entitled to interest payments from the income of each year, as aforesaid, and shall so far have a first lien on the earnings of said total issue, and shall also be redeemable by said railroad company at par at any time within twenty years from the date of their issue, after five years from such date," on the publication of a notice of intention to redeem.

Also, "Series B, of the aggregate par value of \$26,500,000, shall be entitled to interest payments from such part of the net income of each year as may be so declared applicable after payment of interest for that year on bonds of series A."

Also, "the holder of any bond of series B may defer payment of the principal by failure to demand the same when due, and interest thereon, as if said bond had not matured, shall then be payable until said principal is paid upon demand."

8. The debenture mortgage contains the following in regard to ascertaining and declaring the amount of net income applicable to the payment of interest on such debenture bonds, viz.:

"The party of the first part, in the months of June and December in each and every year until said bonds are fully paid, shall cause its board of directors to ascertain and declare the amount of net income applicable to the payment of interest on the bonds secured hereby. Such amount shall be ascertained by deducting from the gross earnings of said company all current expenses for operating said railroad and such sums as in the judg-

ment of said board of directors may be necessary to maintain and renew said road and its equipment and appurtenances and to keep the same in good condition and to increase its equipment to such extent as may be commensurate with its business requirements, and to pay taxes, rentals, interest and sinking fund installments accrued or to accrue on any and all mortgages existing on the property hereby conveyed, and to satisfy all liens and charges thereon that are or may be prior in equity to this mortgage.

"From the net income thus ascertained the said board of directors shall first set aside an amount sufficient to pay, on the first day of the month next following, interest at the rate of six per cent. per annum and for a period of six months on all the outstanding debenture bonds of the series 'A' secured hereby. If the said net income shall not be sufficient to pay such interest in full then it shall be wholly applied so soon as it amounts to one per cent. of said bonds toward such interest payment. If said net income shall exceed said amount needed for payment of interest as aforesaid on the outstanding debenture bonds of series 'A,' the said board of directors shall next set aside from the excess an amount sufficient to pay on the first day of the month next following, interest at the rate of six per cent. per annum, and for a period of six months, on all the outstanding debenture bonds of the series 'B,' secured hereby, and if said excess shall not be sufficient to pay such interest in full, then it shall be wholly applied so soon as it amounts to one per cent. of said bonds towards such interest payment."

9. Differences arose between the management of the Wabash Railroad Company and certain of the debenture mortgage bondholders as to the proper construction of the provision for ascertaining and declaring the amount of net income applicable to the payment of interest on the debenture bonds, and such differences to a greater or lesser extent continued down to the time of the execution of the agreement for the retirement of such debenture bonds.

10. As before stated, the lines of railroad owned by the consolidated company, the Wabash Railroad Company, run through rich and highly competitive sections of country, and soon after the organization of said company it was demonstrated that there was in this territory as well as throughout the United States an increased industrial development, constantly growing, which brought unforeseen demands upon this company as well as others for increased trackage and terminal facilities, for modern equipment and other improvements, which demands became more urgent as higher standards of efficiency came to be established and demanded by competing lines and by federal and state legislation. This is matter of common knowledge, and proof is hardly required to establish such facts. Large expenditures of money were required to make these improvements and necessary extensions. The earnings were insufficient to meet all demands for developments and improvements, and only those were made which were most urgent and could be made within the provisions of the debenture mortgage. With the debenture mortgage and debenture mortgage bonds outstanding, it was impossible upon any reasonable terms to raise money upon a security or lien junior to the first, the second, and the debenture mortgages. Attempts were made to interest capitalists in such a security, but these attempts were without successful result. These matters and difficulties were frankly stated in one or more of the annual reports to the stockholders and debenture mortgage bondholders.

11. The holders of the debenture bonds have claimed the right to control the property of the company to the exclusion of the stockhold-

ers; also the right to vote at all meetings of stockholders casting one vote for every \$100 par value of debenture bonds; and also that the debenture bonds of series B are or may be made, at the option of the holders thereof, a perpetual lien upon the surplus or net income of the company.

12. The continued application of the revenues of the company to certain of the purposes hereinbefore mentioned, consisting of necessary improvements, betterments, etc., met with the disapproval of certain holders of debenture mortgage bonds, who claimed and insisted that expenditures for such purposes could not be made out of earnings without violating the provisions of the debenture mortgage to which attention has been called. The greater the demands upon the company for improvements which had to be made, the more acute were the differences between the management and the debenture mortgage bondholders.

13. In 1905, a committee of the holders of the debenture mortgage bonds of series B was formed, and this committee was charged with the duty of demanding an accounting for revenues alleged to have been diverted to improvements not authorized by the debenture mortgage. Negotiations were had, but proved unsuccessful, and the Mercantile Trust Company, as trustee mentioned in the debenture mortgage, commenced a suit for an accounting in the Circuit Court of the United States for the Eastern district of Missouri. Broad and sweeping charges were made in the bill of complaint, and the demand for relief was such that a long and expensive litigation was impending, in which was involved a construction of the provisions of the debenture mortgage and an examination of all the acts of the management of the company. It was apparent that, should the suit be successful and a decree entered in favor of the Mercantile Trust Company for even a substantial part of the revenues of the company applied during the preceding 17 years to betterments and improvements, a receivership would follow and disaster result. To avert this, negotiations were opened with all concerned, and these negotiations for an adjustment of differences resulted in the making of an agreement or the adoption of a plan to which wide publicity was given, and which was substantially as follows: After reciting most of the pertinent facts, the appointment of a committee to represent the debenture mortgage bondholders, and the assent of that committee, and the desires and purposes of the railroad company and its propositions, the agreement or plan dated August 15, 1906, and signed by the Wabash Railroad Company by E. T. Jeffery, chairman of the board, and by Henry Evans, Henry K. Pomeroy, and George M. Cumming, as committee representing the debenture mortgage bondholders, amongst other things, stated:

"Subject to authorization and approval by the stockholders and debenture mortgage bondholders of the railroad company, by appropriate corporate action in accordance with the provisions of law applicable thereto, of this agreement, and of all action herein provided to be taken on the part of the railroad company, the railroad company agrees that, in case not less than 95% face value of said debenture bonds, series B, now outstanding, shall be deposited with the United States Mortgage and Trust Company (hereinafter called the 'Trust Company'), in the city of New York, under this agree-



ment, within sixty days from the date of the publication of the plan of exchange by the committee as provided in article 2 hereof, or such extended or lesser period as may be agreed upon between the committee and the railroad company, it will issue and deliver in exchange therefor the following amounts of new securities upon the issue of the same:

"For each \$1,000 debenture mortgage bonds, series A, of the railroad company, \$775 par value in new bonds, \$500 par value in preferred stock, and \$560 par value in common stock.

"For each \$1,000 par value of debenture bonds, series B, \$700 par value in new bonds, \$500 par value in preferred stock, and \$500 par value in common stock of the railroad company. Scrip will be issued in adjustment of fractional amounts."

This plan or agreement contained other provisions which it is unnecessary to recite, unless it may be incidentally. It had been approved at a meeting of the directors held June 11, 1906.

14. June 29, 1906, the board of directors passed a resolution to increase the preferred capital stock by \$16,500,000, to consist of 165,000 shares of the par value of \$100 each, and to increase the common capital stock by \$81,500,000, to consist of 815,000 shares of the par value of \$100 each, subject to the assent and approval of the stockholders of the company in the manner provided by law, and, upon the increase being made, the proper officers were authorized to issue an amount of the preferred stock not exceeding the amount of said increase, and an amount of the presently authorized but unissued common capital stock, not exceeding the sum of \$16,500,000, "for the purpose of effecting the exchange of the debenture mortgage bonds upon the terms set forth in the agreement and submitted to the meeting and approved by the board."

15. October 22, 1906, the plan was submitted to a meeting of the stockholders and debenture bondholders, held at Toledo, Ohio, and adopted by over 90 per cent. of those present and voting, and the bill of complaint states that this was the most largely attended meeting in the history of the company. At this meeting the following was adopted:

"Resolved, that the agreement dated August 15, 1906, heretofore entered into by this company, with Henry Evans, Henry K. Pomroy and George M. Cumming, as a committee, in the form submitted to this meeting, be, and the same is hereby in all respects, authorized and approved, and the board of directors of this company be, and it is hereby, authorized and empowered to take any and all action thereunder which may be necessary or proper to effect the exchange of the debenture mortgage bonds of the railroad company, as contemplated in said agreement, upon such terms and conditions as may be authorized and approved by said board of directors, with power in said board of directors to enter into any contracts or agreements with bankers for the underwriting of the new securities issuable in exchange for said debenture mortgage bonds, upon such terms and conditions as said board of directors may approve, and to cause such notice to be given of the terms of such exchange, as it may deem necessary, and to determine whether or not the plan for such exchange shall be and become effective."

16. On the 18th day of June, 1906, there was issued to James Politz, the complainant here, and registered in his name June 19, 1906, a certificate for 1,000 shares of the common stock of the Wabash Railroad Company, which shares of stock he says he purchased on the 13th of that month. It is the ownership of this stock that confers

on the complainant his only interest in the questions involved, and he brings this suit as such owner of such common stock of the company.

17. At the said special meeting of the stockholders and debenture bondholders of the Wabash Railroad Company, held at Toledo, Ohio, October 22, 1906, said complainant, by his proxy and attorney, presented and caused to be entered on the minutes of the meeting the following notice, objections, and protest, viz.:

"The Stockholders and Debenture Mortgage Bondholders of the Wabash Railroad Company, in Special Meeting Assembled at Toledo, Ohio, October 22, 1906, Pursuant to a Call Signed by the President and Secretary of Said Company, Dated New York, August 16, 1906—Take Notice:

"The undersigned, the holder of one thousand shares of the common capital stock of the Wabash Railroad Company, hereby protests against any action being taken at this meeting, or any adjournment thereof, by the stockholders or debenture mortgage bondholders of that company, which attempts or purports to authorize, in any manner or to any extent, the carrying out of the plan to issue new four per cent. fifty-year mortgage bonds and preferred and common stock of the company in exchange for the debenture mortgage bonds as set forth in the call for this meeting, and the explanatory circular issued by the president and secretary of said company under date of September 8, 1906, for the following reasons, among others:

"(1) In the circular issued by the said company under date of September 8, 1906, it is proposed to issue to the holders of \$30,000,000 mortgage debenture bonds, upon which interest is payable only if earned, and upon \$26,500,000 of which no interest has ever been paid, \$21,262,500 of the proposed new four per cent. fifty-year mortgage bonds, \$15,210,000 of preferred stock and \$15,210,000 of common stock, or new bonds and stock to the amount of \$51,682,500 to retire the \$30,000,000 of debenture bonds, and to the extent of \$21,682,500 the new stock will be fictitious, without consideration and void.

"(2) The Constitution of the state of Missouri provides that capital stock can only be issued for money paid, labor done or property actually received, and that all fictitious increase of stock is void, and the laws of the other states wherein said company is incorporated, to wit: Ohio, Indiana, Illinois, Michigan and Iowa provide that capital stock can only be issued at par for money or property at its fair value.

"(3) The said proposition alters the position of the present stockholders in the following respects, among others:

"(a) The changing of a noncumulative, nonpaying bond, the principal of which does not become due until 1939, into a bond with a fixed interest charge, which, if not paid, will subject the property to foreclosure and the capital stock to extinguishment.

"(b) It places ahead of the present common stock \$15,210,000 of preferred stock, upon which dividends of seven per cent. must be paid before the common stock may receive anything, and to the extent of \$6,472,500 the proposed issue of preferred stock will be without any consideration, thus diluting that class of stock and depreciating the value of both the preferred and common stock.

"(c) It is proposed to issue \$15,210,000 of common stock without consideration, thereby diluting and making less valuable the present common stock.

"(4) The debenture mortgage bondholders are disqualified to vote upon this proposition, which contemplates their advantage and enrichment to the injury of the present stockholders, and changing the position of the mortgage bonds from a noncumulative, nonpaying security to that of a fore-closable mortgage bond with a definite fixed charge.

"I respectfully request that the foregoing protest be entered in full upon the minutes of this meeting, and it is herewith handed to the secretary for that purpose.

James Pollitz,

"By his Proxy and Attorney,  
Stephen M. Yeaman."

"Toledo, Ohio, October 22, 1906.

18. Thereafter, and on the 26th day of October, 1906, at a meeting of the stockholders and debenture bondholders, the following was adopted:

"Whereas, the capital stock of this company is insufficient and it is necessary that the same be increased to the amount hereinafter stated for the construction of its road, the construction of a second additional track, the extension of its line and the construction of branches thereof, the increase of its machinery, rolling stock or other fixtures, each and all of which has become necessary for the speedy and convenient transaction of its business, and also for the purpose of paying bonds issued or guaranteed by it, or for the liquidating or paying any unfunded or floating debt, or for the purpose of extending its line of railroad and constructing branches thereof, and for each and all of the purposes aforesaid:

"Resolved, that the authorized capital stock of this company be, and the same is hereby, increased by the amount of \$98,000,000, which increase shall consist of 980,000 shares of the par value of \$100 each, of which 165,000 shares shall be preferred stock and 815,000 shares shall be common stock, so that the total authorized capital stock of this company, of all classes, shall be \$200,000,000, consisting of 2,000,000 shares of the par value of \$100 each, and of which capital stock 405,000 shares shall be preferred stock and 1,595,000 shares shall be common stock.

"Further resolved, that the proper officers of this company be, and they are hereby, authorized and empowered to make such certificates and payments and take such other action as may be necessary in order to effect the increase of the authorized capital stock of this company provided for by the foregoing resolution."

On the same day, at a meeting of the board of directors of the Wabash Railroad Company, a resolution was adopted reading as follows:

"Resolved, that the authorized capital stock of the company be, and the same is hereby, declared to be increased to the amount of ninety-eight million dollars (\$98,000,000), such increase consisting of 165,000 shares of preferred stock and 815,000 shares of common stock, making the total authorized capital stock of the company, of all classes, two hundred million dollars (\$200,000,000), par value, consisting of 405,000 shares of the par value of \$100 each of preferred stock and 1,595,000 shares of the par value of \$100 each of common stock."

19. December 22, 1906, at a meeting of the board of directors, a report was made that there had been deposited, under such plan and agreement, of debenture bonds, series A, \$2,824,000, and of series B, \$19,995,000, and promised, \$852,000. Thereupon the promised bonds were accepted, and the plan and agreement was declared operative.

20. The exchange of bonds and securities was to be made through the defendant United States Mortgage & Trust Company, and the defendant Mercantile Trust Company, was to countersign the certificates for capital stock as issued.

21. The defendant George I. Gould, is a director of the Missouri-Pacific Railway Company, and he and said company and its other directors are large holders of said debenture mortgage bonds, and it is alleged that they would be greatly benefited by the proposed exchange.

22. Upon this state of facts, and after proceedings were in motion for carrying into effect the said plan and agreement, Pollitz commenced the first of these consolidated actions in the Supreme Court of the state of New York on the 10th day of November, 1906, whence it was removed to this court, and thereafter, and after the commencement

of the second action in the Supreme Court of the state of New York, for the same cause, with added allegations, about January 15, 1907, which was also removed to this court, such actions were consolidated. About November 26, 1906, Pollitz commenced a similar suit, based on the same facts, in the circuit court of the state of Missouri, in which a motion for an injunction against carrying said plan into execution was asked for and denied. Thereafter that action was dismissed, but not on the merits. A little later a similar suit for the same cause, on the same facts, was commenced in the same court, accompanied by a temporary restraining order, which was subsequently discharged, and that suit is still pending.

23. There was certain correspondence between Pollitz and the officers of the Wabash Railroad Company following the meeting of October 22, 1906, bearing on the good faith of Pollitz, which I have not deemed necessary to set forth here. That may be referred to later. As early as September 20, 1906, Pollitz objected to the plan, and wrote that unless it was abandoned he should institute proceedings. Nor have I gone at length into his purchase of the common stock now standing in his name. It is doubtful that he obtained same for any purpose other than to embarrass and block the execution of such plan. It seems almost incredible that reading the papers containing notices and editorials as to these transactions, as he says he did, he failed to understand the situation and pending propositions and their progress. He says he had money with C. H. Venner & Co.; that C. H. Venner, whose wife is his cousin, purchased the stock for him, representing the company in so doing; that he left the stock with Venner & Co. for safe-keeping, where it has ever since remained, except when taken away for purposes of this suit. The defendants do not admit such ownership by complainant, and demanded strict proof. Pollitz says he saw the stock was low, and his only object in purchasing was he thought it would go up a few points. His recollection as to the delivery, etc., is quite hazy, as is his recollection of what he read in the papers.

24. No interest has ever been paid on the debenture mortgage bonds of series B, and, since 1904, no interest has been paid on those of series A.

25. Since the issue of such first, second, and debenture mortgage bonds, the Wabash Railroad Company has acquired various other railroad properties of great value, and the floating indebtedness of the company has been largely increased.

26. The new proposed mortgage is to cover or include all these new properties, etc.

27. The complainant, of all the stockholders and debenture mortgage bondholders, was the only one who voted against the proposed plan and agreement contemplating the retirement of such debenture bonds. The complainant contends that:

"(10) That the said plan of retiring said debenture bonds was unlawful, unauthorized, and contrary to the laws of the states under which the defendant railroad company was organized, and was ultra vires the corporation, and unjust, inequitable, and injurious to the plaintiff and all other stockholders of said company similarly situated, in that the said debenture mort-

gage bonds were to be paid or retired by the delivery to the holders thereof of \$1,955 par value of new securities for each \$1,000 of bonds, series A, and of \$1,760 of new securities for each \$1,000 of bonds, series B, making a total amount of \$53,482,500 of new bonds and preferred and common stock to be issued for the retirement of, or in exchange for, the \$30,000,000 of debenture bonds, the result being that for \$23,482,500 of its capital stock the defendant railroad company would receive nothing whatsoever.

"(11) That, in addition, \$15,810,000 of preferred stock would be placed ahead of the common stock then outstanding, upon which dividends of 7% must be paid before the common stock could receive anything, and to the extent of \$7,672,500 the proposed issue of preferred stock would be without consideration. That, besides, \$15,810,000 par value of common stock would be issued without any consideration, thereby diluting and making less valuable the common stock outstanding.

"That the proposed plan would result in changing a noncumulative, non-paying bond the principal of which does not mature until 1939 into a bond with a fixed interest charge, which if not paid would subject all the properties of the defendant railroad company to foreclosure and its capital stock to extinguishment.

"That interest at the rate of 4% upon \$21,862,500 new mortgage bonds which would be issued under said plan would, during the next thirty-three years, the life of the debenture mortgage bonds proposed to be retired, amount to \$28,858,500; an amount nearly sufficient to retire and pay at their maturity, in 1939, the \$30,000,000 of outstanding debenture bonds, whereas, if the debenture bonds were allowed to remain outstanding, the requirements of the defendant railroad company for extensions, improvements, new equipment, and betterments, would be met out of the net earnings of the said company, with no obligation to pay interest on the outstanding debenture mortgage bonds unless there should be a surplus of net earnings over and above all the requirements of the company for the purposes aforesaid."

The defendant the Wabash Railroad Company files its cross-bill setting up these and other alleged facts, and demands not only a dismissal of the bill of complaint, but affirmative relief, that its acts and the proposed plan be declared lawful and proper under all the circumstances, and that complainant be enjoined from commencing other and similar actions as vexatious and unfounded, and from further questioning the legality and validity of the proposed action under such agreement.

The Wabash Railroad Company, while a consolidated railroad company recognized in the law, is not an entity in the sense of a company consolidated from one or more companies under the statutes of a single state, and which may, and generally does, become a new company, the old ones passing out of existence. While engaged in interstate commerce, having continuous lines running through or into the several states mentioned, it is not incorporated as "The Wabash Railroad Company," under any federal law or under the law of any one state. It exists as "The Wabash Railroad Company" by virtue of the consolidation agreement, such consolidation being sanctioned by the laws of the states mentioned permitting its corporations to consolidate with those of adjoining states, where they form continuous lines. The several consolidated corporations remain intact, and each is subject to the laws of its creation; but the consolidated company may hold its meetings for the transaction of business, election of directors, etc., in any one of the states, even if the laws of a particular state require the meetings of the corporation to be held within the state, and its acts are legal and binding upon all. The consent of the

state to the consolidation necessarily implies a consent to the doing of such acts as are essential to the life, existence, and carrying on of business by the consolidated company. However, the consolidated company may not disregard the laws of any one of the states except so far as an assent is necessarily implied. It certainly cannot act in violation of the Constitution of either one of such states. See *Muller v. Dows*, 94 U. S. 444, 447, 24 L. Ed. 207; *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773; *Graham et al. v. Boston, H. & E. R. R. Co.*, 118 U. S. 161, 169, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Noyes on Incorporate Relations*, c. 10, §§ 99-105.

The Constitution of the state of Missouri, art. 12, § 8 (Ann. St. 1906, p. 304), provides:

"No corporation shall issue stock and bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving sixty days' public notice as may be provided by law. \* \* \* Section 10 (Ann. St. 1906, p. 305). No corporation shall issue preferred stock without the consent of all the stockholders."

The statutes of the state (sections 962, 963, and 1050, Rev. St. Mo. 1899 [Ann. St. 1906, pp. 860, 861, 908]) provide for and authorize an increase of the capital stock of corporations. Section 962 is general in its nature, and says:

"Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock, which consent to such increase shall be obtained at a meeting of the shareholders called for that purpose, sixty days notice of the time and place of such meeting and of the amount of the proposed increase of stock or bonded indebtedness having been given as hereinafter provided," etc.

The Constitution says that no corporation shall "issue" preferred stock without the consent of "all" the stockholders, while the statute says in effect that once issued any corporation may "increase" its capital stock on the consent of the persons holding the larger amount in value. Section 1050, which relates to the issue of preferred stock is, to me, confusing. So far as pertinent, that section reads:

"Any railroad company organized under the laws of this state may issue a preferred stock for such amount, and upon such terms and conditions, as the board of directors may prescribe. But before any issue of such preferred stock shall be made, the question of issuing the same, together with the terms, conditions and privileges upon which the same is proposed to be issued, shall be submitted to a vote of the stockholders of said company, at a regular annual election for the directors thereof, or at a special meeting of the stockholders of said company called to consider the same, if at such election all the stockholders shall consent. At all elections called to consider the question of issuing preferred stock, as provided in this section, no person shall be permitted to cast any vote as a proxy for the owner of any share or shares of stock without he shall produce written authority, signed by the owner thereof."

Whether the words "if at such election all the stockholders shall consent" refer to the submission of the question of issuing preferred stock at such an "election," in which case, if all stockholders consent-

ed to submit the question, there would be an implied assent to the result of the vote, or to the words, "Any railroad company \* \* \* may issue a preferred stock," etc., in which case the question of the issue of preferred stock would require the affirmative vote of every stockholder voting, is a question. If the first construction prevails, Pollitz assented to the proposition to increase the capital stock and to increase the preferred stock, for he assented to the submission of the question to the meetings referred to, and consented thereby to be bound by its action so far as increasing and thereupon issuing the preferred stock is concerned. If the second is the true construction of the statute, then Pollitz did not consent, and we are brought to the question whether the constitutional and statutory provisions relate to and prohibit increases of preferred stock, the issue of preferred stock having been once authorized by a vote of all the stockholders and such stock issued, or only to the original authorization of the issue of preferred stock and the issue thereof.

It will have been noted that the Wabash Railroad Company in the very beginning of its existence and operations and in the consolidation agreement provided for and issued \$24,000,000 of preferred capital stock, and it is shown and presumed that the consent of all the stockholders was duly given to the issue of preferred capital stock, and to this amount at least. The issue of preferred stock was thus authorized by the consent of all the stockholders. The constitutional provision, section 8, quoted, specifically speaks of and permits increases of the capital stock, the issue of which is once authorized, as do the statutory provisions referred to and in part quoted. In speaking of and specifically authorizing increases or an "increase" of capital stock, neither the Constitution nor the statute in terms limits such increases or increase to common stock, but presumably refers to all the capital stock theretofore authorized and issued, and hence expressly permits an increase of any and all capital stock theretofore authorized and issued, whether preferred or common, on "the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose." I think it was the purpose of the people and of the Legislature of Missouri in adopting these provisions to restrict corporations in adopting the policy of issuing preferred stock by making the assent of all the stockholders a prerequisite, but that it was not their intent to so limit the increase of such stock, the policy having been duly adopted by the corporation. This seems to have been the interpretation put upon the Constitution by the Legislature of the state, for it said, in section 962, "Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock," etc., and did not limit such increase so made on such consent to common, or non-preferred, stock, nor does the Constitution itself. Had the intent been to so limit the increase of capital stock, I think the section would have read, may increase its "nonpreferred capital stock" or "its capital stock not preferred," or "common stock."

In construing the provisions of the Constitution of a state, as in construing its statutes, we are to read all the provisions on the same subject together as one whole, and give such a meaning as will avoid

conflict and at the same time carry out the plain intent—promote the objects for which intended. We are not to adopt either a loose or an unduly strict construction, or one that we would give to a private contract, but a reasonable one, having in mind the grounds sought to be covered, and the evils, if any, sought to be remedied, and the objects sought to be attained. *Legal Tender Case* (opinion by Mr. Justice Gray) 110 U. S. 421, 439, et seq., 4 Sup. Ct. 122, 28 L. Ed. 204; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; 8 Cyc. 729, 730, and numerous cases there cited.

We come, then, to consider whether or not this agreement or plan was ultra vires the company and void because in violation of the provisions that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increases of stock or indebtedness shall be void." Of the justice and wisdom of this provision there can be no question. This company has largely increased or extended its lines, its trackage, its terminal facilities, its rolling stock, etc., and has vastly improved those it had at an expense of millions of dollars, all of which has added to the value of its property. Much of this was compulsory and inevitable, growing out of general industrial growth, national and state prosperity, demands for increased and improved facilities, competition which the company must meet, and added requirements demanded by both state and national laws. These have not come gradually, keeping pace with the increased earnings of the road. They spring up suddenly, sometimes on every hand, and required and require vast outlays of money. Stock or shares of stock represent the capital invested in the enterprise—its property, and property rights and franchises. In the beginning almost, and in the midst of all this, this company found itself confronted by, and, so to speak, incumbered with, its first and second mortgage bonds, and incumbered and hampered and embarrassed in all its financial dealings by these debenture mortgage bonds, the existence of which was a constant source of annoyance and dispute, and of threatened, and at one time actual, litigation. The plan in question here was evolved and agreed upon as a way, if not the way, out of difficulties. I find no suggestion in the record or basis for a claim that there is or was any proposition to issue and give away either stock or bonds. There is to be an exchange, or both sales and exchange. As shown by the minutes of the meeting of the stockholders and debenture mortgage bondholders, held at Toledo, October 22, 1906, the scheme and plan entire was: (1) Because of the insufficiency of the capital stock and of the necessity for an increase thereof to provide for construction of its road, a second track, the extension of its line, and the construction of branches thereof, the increase of its machinery, rolling stock and other fixtures, the payment of bonds issued or guaranteed by the company, the payment of unfunded or floating debt, and the extension of the line of the road and the construction of branches thereof, and to provide for all such purposes, that the company increase the capital stock as before stated. (2) To make provision for refunding and retiring all its outstanding indebtedness and obligations secured by liens upon any part of its property, and for paying its promissory notes and equipment obligations, including



the exchange of its debenture mortgage bonds, and for the refunding and retirement of bonds of other companies, the payment whereof had been assumed by the Wabash Railroad Company, and to provide for the permanent betterment, improvement, equipment, development, and extensions of the lines of railroad and property, and for suitable and adequate terminals and terminal facilities in connection with its road and properties, and other lawful corporate purposes, that the company create an issue of 50-year 4 per cent. bonds, describing them, in the total sum of \$200,000,000, all to be equally secured and to be disposed of as set forth in the mortgage or deed of trust covering all the railroads and property of the company, and that thereafter acquired through the use of such bonds or their proceeds. And, (3) in order to retire the said debenture mortgage bonds, to make the exchange hereinbefore more specifically set forth. All these objects and purposes would seem to be legitimate and proper, and not contrary to any law, or rule of public, or state, or national policy as enunciated in the state or national Constitutions or laws.

The objection is that there is embraced in this general scheme or plan, in addition to the issue of preferred stock, which has been considered, an illegal and unwarranted proposition to give in exchange for \$30,000,000 of debenture mortgage bonds, as follows:

For each bond of series A.....	\$ 1,000 00
The following at par value:	
New bonds, 4 per cent.....	\$775 00
Preferred stock.....	500 00
Common stock.....	560 00
	<hr/>
Excess at par values.....	\$ 835 00
For each bond of series B.....	1,000 00
The following:	
New bonds at par.....	\$700 00
Preferred stock.....	500 00
Common stock.....	500 00
	<hr/>
Excess at par values.....	\$ 700 00
Making on preferred debenture bonds.....	2,922,500 00
On other debenture bonds.....	18,550,000 00
	<hr/>
Total .....	\$21,472,500 00

—making substantially a gift, in stock and new bonds, it is claimed, of that amount. This, at par values, would be giving in exchange for \$30,000,000 debenture mortgage bonds, \$22,125,000 of new 4 per cent. bonds, and \$30,900,000 of preferred and common stock, making \$53,025,000 in all. This in the exchange would reduce the estimated value of the stock to about \$26 per share, counting the debenture bonds and the new bonds as each worth 100 cents on the dollar.

There is nothing "fictitious" in this proposed increase of indebtedness or stock. And I know of no objection to the retirement by a railroad company of its outstanding obligations, due or not due, by the payment of cash, or new bonds, or stock therefor. The question is, is the exchange, when an exchange is made, fair and reasonable under all the circumstances of the case, and for a consideration not grossly below the fair value of the stock or bonds given by the com-

pany to retire its outstanding obligations? *Memphis & Little Rock Railroad v. Dow*, 120 U. S. 287, 297, 298, 7 Sup. Ct. 482, 30 L. Ed. 595, cited, approved and followed in passing on similar provisions in other state laws; *Sioux City, O. & W. R. Co. v. Manhattan Trust Co.*, 92 Fed. 428, 433, 34 C. C. A. 431; *Toledo, St. L. & K. B. C. Co. v. Continental Trust Co.*, 95 Fed. 497, 517, 36 C. C. A. 155; *Lake St. El. R. Co. v. Ziegler et al.*, 99 Fed. 114, 126, 39 C. C. A. 431; *Grant et al. v. East & West R. Co. of Alabama*, 54 Fed. 569, 575, 4 C. C. A. 511, distinguished *Altenberg v. Grant*, 85 Fed. 345, 347, 29 C. C. A. 185.

In *Memphis, etc., v. Dow*, *supra*, the entire assets of the appellant, the Memphis & Little Rock Railroad Company, consisted of the property, rights, and privileges purchased by P. D. & M. trustees at a foreclosure sale of the railroad property, and by them conveyed to the appellant on condition that the beneficial owners should receive therefor \$1,300,000 in stock of the company and \$2,600,000 bonds. The Constitution of the state of Arkansas provided that:

"No private corporation shall issue stock or bonds except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void."

It was admitted that "the full value of the property, rights and privileges conveyed to appellant did not exceed \$1,300,000, the amount at which the capital stock was fixed," and, said the court:

"Consequently, it is argued, the \$2,600,000, of bonds were issued without any consideration received in money, property, or labor, and represented a fictitious indebtedness. In other words, appellants' vendors were fully compensated for their interests by taking to themselves its entire stock."

The court, after having said:

"That amount in the stock and bonds of the appellant was the valuation placed by such owners upon their interests, after taking into account, as well the amount previously expended in the construction and maintenance of the road, as the probable value in the future of the stock and bonds to be given for a surrender of those interests"—

continued:

"We do not concur in this view of the case. It does not, we think, rest upon a sound interpretation of the state Constitution. The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value. In reference to a provision in the Constitution of Illinois, adopted in 1870, containing a prohibition as to railroad corporations, similar to that imposed by the Arkansas Constitution upon all private corporations, the Supreme Court of the former state, in *Peoria & Springfield Railroad Co. v. Thompson*, 103 Ill. 187, 201, said: "The latter part of the clause of the Constitution in question, which declares that "all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void," we think, clearly points out the chief object which the constitutional convention sought to accomplish in adopting it; and to this we must look, in a large degree, for a solution of the language which precedes it. The object was, doubtless, to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraud-

ulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious. \* \* \* Under this provision of the Constitution, railroad companies have no right to lend, give away, or sell on credit their bonds or stock, nor have they the right to dispose of either except for a present consideration and for a corporate purpose.'

"Recurring to the language employed in the Arkansas Constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. \* \* \* The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders."

In *Altenberg v. Grant*, *supra*, the statute of Kentucky expressly provided that:

"And neither labor nor property shall be received in payment of stock or bonds at a greater value than the market price at the time when the said labor was done or property delivered."

We have no such provision in the statutes or Constitution of either of the states here involved.

In *Lake St. El. R. Co. v. Ziegler*, at page 126 of 99 Fed., at page 443 of 39 C. C. A., the court said, speaking of the Illinois statute:

"No such corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was organized. All stock dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall be void."

"This clause of the Constitution has received construction by the Supreme Court of the state in *Railroad Co. v. Thompson*, 103 Ill. 187. It was there held that the object of the provision 'was to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad, or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or in expectancy; the stock or bonds in such case being entirely fictitious. But it was not intended by that provision to interfere with the usual and customary methods of raising funds by railroad companies by the issue of their stock or bonds for the purpose of building their roads, or of accomplishing other legitimate corporate purposes.' This construction was approved by the Supreme Court of the United States in *Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595, where a similar constitutional provision of the state of Arkansas was considered."

In *Sioux City, etc., v. Manhattan Trust Co.*, *supra*, it was held:

"Stock and bonds of a railroad company, issued in exchange for the stock and bonds of a former company, not shown to have been invalid, in pursuance of a reorganization scheme, which, so far as appears, was entered into in good faith by the issuing company, are not invalid, under Const. Neb. art. 11, § 5 (Consol. St. Neb. 1891, p. 72), which provides that a railroad company shall not issue stock or bonds except for money, labor, or property actually received, and that fictitious issues of stock or bonds shall be void, because at the time of the exchange the cash value of the physical property and franchises acquired by the reorganized company was not equal to the par value of its securities."

In the case now before the court the holders of the debenture mortgage bonds were not required to measure the value thereof, neither is the defendant company nor this court, by the par, or even the market,

value. We must consider not only the cash value but the voting and controlling power over the road and its management conferred thereby, and we must also consider the value and importance to the Wabash Railroad Company of having them retired, especially in view of the annoyance and litigation and disputes to which they had given rise. If these debenture bonds stood as a bar to the raising of funds for the further improvement of the road, the payment of its floating indebtedness, etc., then it was of paramount importance that they be retired. Here, as in *Memphis, etc., v. Dow*, supra, after continued disputes and negotiations, the stock and bonds which the owners of these debenture mortgage bonds consented and agreed to receive from the Wabash Railroad Company in exchange therefor "was the valuation placed by such owners upon their interests," not only in the money value of the debenture bonds and thereby agreed to be paid, but in the voting power and control of the railroad conferred thereby, "after taking into account as well the amount previously expended in the construction and maintenance of the road, as the probable value in the future of the stock and bonds to be given for a surrender of those interests." In view of all the facts and evidence as to this road, its indebtedness, extent, necessities, etc., the probable value of the stock and bonds and the debenture mortgage bonds, I am satisfied that the exchange was not in violation of the Constitution or laws of either of the states mentioned.

But irrespective of these considerations, by reference to the obligations of Pollitz made in writing, and which must be considered as his objection to the proposed plan, and from which the conclusion is drawn that he made no others and therefore assented to the proposed action except in so far as he objected, it is seen that he did not object to the proposed increase of the capital stock of the corporation, either preferred or common, or to the proposed issue of new bonds. He did object to such stock and bonds being issued "in exchange for the debenture mortgage bonds as set forth in the call" for the meeting, on the ground that if issued in exchange, as proposed, "to the extent of \$21,682,500 the new stock will be fictitious, without consideration and void," and upon the grounds that the proposed issues and exchange would alter the position of the stockholders in that it would put certain preferred stock ahead of common stock, and that to the amount of \$6,472,500 the preferred stock would be without consideration and void, and thus depreciate both the preferred and common stock; that \$15,210,000 of the common stock would be without consideration and void, and thus depreciate the value of the common stock; that the debenture mortgage bondholders were disqualified to vote on the proposition which contemplated their enrichment at the expense of the present stockholders and the substitution of a foreclosable mortgage bond with a definite fixed charge for a noncumulative, noninterest paying security. It was not objected that there was no power to increase the preferred stock, and there was no objection to its increase or issue for the purposes contemplated outside of the exchange thereof for the debenture mortgage bonds. But there was no affirmative assent to the increase, and the proposition as a whole, which included the increase, met with about 1,000 negative votes out of about 8,000

cast. In the first of these consolidated actions Pollitz did not claim want of power to increase the preferred stock; that question was first presented in the complaint in the second suit. It is contended that under these circumstances Pollitz is estopped from questioning in this action the power to vote the increase of preferred stock. He voted against this proposed increase on the grounds stated, and hence it did not receive the affirmative assent of all the stockholders present and voting.

In *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693, the court held:

"(4) The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail, where it would defeat the ends of justice or work a legal wrong.

"(5) Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct upon another and different consideration."

In the opinion, the court said:

"The question made by the company upon the Sunday law of West Virginia does not, in our view, arise in this case. We have already shown that the defendant proved upon the trial that it was impossible to forward the cattle on Sunday for want of cars. And it is fairly to be presumed that no other reason was given for the refusal at that time. It does not appear that anything was then said as to the illegality of such a shipment on the Sabbath. This point was an afterthought, suggested by the pressure and exigencies of the case.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

This was approved. *Davis v. Wakelee*, 156 U. S. 690, 691, 15 Sup. Ct. 559 (39 L. Ed. 578). It is immaterial that the complainant here has not received a consideration; the railroad company has proceeded on the basis of the position taken by Pollitz and the objections made by him as the only ones, and stock and bonds have been actually issued, and many persons have changed their position.

It well may be said that having asserted the increase and issue of the stock in exchange for the debenture bonds was unauthorized because without adequate consideration, and the parties having proceeded and acted on the theory that the proposed exchange only was objected to, and having increased the stock accordingly, the complainant cannot now change his position, and, after commencing litigation, assert that the increase was *ultra vires* because in contravention of the Constitution of the state of Missouri.

And this court must not be understood as assenting to the proposition that the validity of this transaction or plan is determined by the laws of the state of Ohio, under which laws there can be no question that it is valid. This company, the Wabash Railroad Company, existing by virtue of the consolidation agreement sanctioned by the laws of the several states named, cannot do any act incumbering the entire property owned by it which violates the statutes or Constitution of either one of such states. It is settled law that the property of a cor-

poration is held by the directors as trustees, in a sense, for its creditors, and they are bound to manage the affairs of the corporation in the interests of creditors and stockholders, but, in the case of a public service corporation, the interests of the general public are to be considered also.

I do not find that the defendant the Wabash Railroad Company has done or is proposing to do anything that it should be restrained from doing at the suit of the complainant, and therefore the consolidated bill should be dismissed, with costs. And, it seems to me, the whole question can be settled in this suit, and that defendant railroad company is entitled to a decree that, as to the complainant, Pollitz, the plan or agreement referred to is valid and may be lawfully carried out, and also restraining him from commencing or prosecuting any other action or actions to prevent its execution. Clearly a succession of suits is unnecessary, and is detrimental to the prosperity of the road, and injurious to the stockholders and the credit of the road.

There will be a decree accordingly.

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MAHOPOULUS v. CHICAGO, R. I. & P. RY. CO. et al.

(Circuit Court, W. D. Missouri, W. D. December 23, 1908. On Rehearing, March 8, 1909.)

No. 3,419.

1. REMOVAL OF CAUSES (§ 11\*)—RIGHT OF REMOVAL—ORIGINAL JURISDICTION OF FEDERAL COURT.

No suit or action is removable from a state to a federal court unless it be one that the plaintiff could originally have brought in the Circuit Court to which the removal is sought.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.\*]

2. REMOVAL OF CAUSES (§ 11\*)—RIGHT OF REMOVAL—SUIT BY ALIEN AGAINST NONRESIDENT CORPORATION.

An action by an alien who is a nonresident of the United States against a corporation, brought in a court of another state than that of defendant's incorporation, but in which it is doing business and for that reason under its laws subject to service and suit in the state courts, where there is no other ground of federal jurisdiction except diversity of citizenship, is not removable by the defendant unless plaintiff consents or waives objection.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.\*]

On Motion to Remand to State Court.

Rosenberger & Reed, for plaintiff.

Sebree, Conrad & Wendorff, for defendant Chicago, R. I. & P. Ry. Co.

Warner, Dean, McLeod & Timmonds, for defendant Chicago, B. & Q. R. Co.

POLLOCK, District Judge. The plaintiff in this action, an alien, citizen, subject, inhabitant, and resident of the kingdom of Greece, on

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

September 17, 1908, commenced this action in the circuit court of Jackson county, this state, against the Chicago, Rock Island & Pacific Railway Company, a corporate citizen of the states of Illinois and Iowa, the Chicago, Burlington & Quincy Railroad Company, a corporate citizen of the state of Illinois, and Harvey Smith and James J. Harrington, natural citizens of this state, and, respectively, train conductor and engineer in the employ of defendant the Chicago, Rock Island & Pacific Railway Company, to recover damages for the death of her husband, Nick Mahopoulus, alleged to have been caused by the wrongful, joint, negligent acts of defendants, under the terms and provisions of the laws of this state wherein the injury was done and the death occurred. Within due time defendants, the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, filed their joint petition and bond for removal of the cause into this court on the ground of a separable controversy existing between plaintiff and the removing defendants. An order of removal was made and entered by the state court, and the transcript duly lodged in this court. Thereafter plaintiff, without having taken any step in this court which may be deemed or construed as a waiver of her consent to the exercise of jurisdiction of this court over her person or cause of action, filed herein her motion to remand the cause to the state court for want of jurisdiction in this court. This motion has been submitted in oral argument and on briefs of counsel for decision.

At the oral argument it was admitted and conceded by counsel for plaintiff in open court, under the statutory law of this state creating and governing this cause of action for damages for death by wrongful act, a separable controversy exists between the plaintiff and the removing defendants, as alleged in their petition for removal. But it was then contended, and is now insisted, admitting the existence of such separable controversy, yet this separable controversy is in its very nature such that this court did not acquire and cannot maintain jurisdiction by the removal taken without the consent of, or some act amounting to a waiver of consent on the part of, the plaintiff.

The question presented here is as to the soundness of this contention. Section 1 of article 3 of the national Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of article 3 provides the extent of judicial power possessed by the national courts, as follows:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, to all cases affecting ambassadors, other public ministers, and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

From these constitutional provisions it is seen the Supreme Court alone derives jurisdiction and power direct from the Constitution; that

this court possesses only such jurisdiction and power as may be expressly conferred upon it by Congress within the limits fixed by the Constitution. *United States v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259; *McIntire v. Wood*, 7 Cranch, 504, 3 L. Ed. 420; *Turner v. Bank of North America*, 4 Dall. 8, 1 L. Ed. 718; *Sheldon et al. v. Sill*, 8 How. 441, 12 L. Ed. 1147; *Stevenson v. Fain*, 195 U. S. 165, 25 Sup. Ct. 6, 49 L. Ed. 142; *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. That is to say, the jurisdiction and power of the Circuit Courts of the United States created by Congress under authority of the Constitution has a twofold limitation: First, it is limited by, and must be confined to, the bounds fixed by the Constitution on the power of Congress to legislate at all. Second, it must be limited to the exercise of such power and jurisdiction alone as the Congress, in its wisdom, sees fit to confer. If either limitation be exceeded, the acts of the court are void and of no effect. Therefore, in any given case, resort must be had by the court to the acts of Congress conferring jurisdiction and power on the court to determine whether it possesses power to proceed in the case. And as this present case reached this court, not through the exercise of its original jurisdiction, but through the power conferred by Congress on parties litigant to withdraw their controversy from a lawful exercise of judicial power conferred by a sovereign state on its judicial tribunal and to bring such controversy within the absolute control of this court, it is manifest the controversy must be such in its very nature as this court can receive and determine between the parties under its grant of original jurisdiction and power, and also the controversy must be such by its nature as the Congress under constitutional authority has expressly authorized parties litigant to withdraw from the jurisdiction of the state court and place within the jurisdiction, power, and control of this court, to the ultimate exclusion of the state tribunal.

Section 1 of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), confers original jurisdiction of controversies therein named on this court, as follows:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds exclusive of interest and costs, the sum or value aforesaid; \* \* \* But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

As has been seen, the plaintiff in this action being an alien citizen, subject of the kingdom of Greece, an inhabitant and resident of that foreign state at the time this action was brought, and defendants be-



ing citizens of states of this country, there can be no doubt but that the separable controversy here presented, had it been originally brought by plaintiff in the proper circuit court of Illinois, that court would have had jurisdiction under the express terms of the act. Or, had it been brought in any other Circuit Court of the United States, either by express consent of defendants, or when brought by plaintiff in any such court had defendants in any manner by appearing to the merits of the controversy impliedly consented to such jurisdiction, such other national court would undoubtedly have possessed full jurisdiction, power, and control of the controversy and the parties litigant thereof, and this notwithstanding the language employed in the opinion in *Ex parte Wisner*, *supra*; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; *Western Loan Co. v. Butte & Boston Min. Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1136. It is thus made entirely clear the separable controversy here presented between plaintiff and the removing defendants by reason of the alienage of the plaintiff and the citizenship of the defendants is of that class falling within the general original jurisdiction of this court.

However, the question remains, is it of that class over which this court may by the act of removal receive and retain jurisdiction to the exclusion of the original jurisdiction obtained by the state court by the act of the plaintiff in bringing the action in that court without the consent or some act done by plaintiff in this court amounting to a waiver of such consent? The ground of jurisdiction in this case arises from diverse citizenship of the parties litigant to the separable controversy. The general original jurisdiction and power of the Circuit Courts of the United States over the subject-matter of the separable controversy presented being established, it only remains to consider whether the Congress in the exercise of its constitutional power has provided this case may be removed into this court. If any such provision be found, it is binding on the parties litigant to this controversy, the state court, this court, and all others alike. For, of the limited power granted to Congress to legislate, it may exercise so much or so little as it may be disposed. The power granted by Congress to a party litigant to either bring in or remove to a Circuit Court of the United States his controversy is in no sense a constitutional or vested right of the party litigant. It is a mere privilege which Congress may grant or withhold at will, and when granted at all it is upon such terms, conditions, and limitations stated in the grant as Congress may deem fit and proper, so long as within constitutional bounds, and being the grant of a mere privilege the grantor may withdraw any or all of the rights conferred thereby at any time, at its pleasure. Therefore, defendants here have precisely such right of removal in this case as the Congress has provided by its act. That act provides:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made or which shall be made, under their authority, or which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given

jurisdiction by the preceding section, and which are now pending or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." Section 2, 24 Stat. 552, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509).

Whatever may have been thought the true construction of this act before the decision by the Supreme Court in *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, it is now conclusively settled no suit or action is removable from a state court to a federal Circuit Court unless it be one that plaintiff could originally have brought in the Circuit Court. At the common law there was no possible method by which the plaintiff could have brought the removing defendants before this court and required them to answer personally to her action because they are corporate citizens of a foreign state. Neither at the common law was there any procedure by which they could have been compelled by plaintiff to come before the courts of this state and there answer her action. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Carpenter v. Willard Case Lumber Co. (C. C.)* 158 Fed. 697. The lawmaking power of this state has provided a method by which the plaintiff can and did require defendants to come personally into the state court from which this action was removed to answer to her demand against them, because defendants first came into this jurisdiction and owned or leased and operated long lines of railway, in charge of its officers, agents, and employes here present; in other words, was doing business within this jurisdiction. But while the lawmaking power of the state by virtue of the process so provided could and did compel defendants to respond to that process issued from out the state courts without the consent of defendants, yet it could not compel defendants to respond to like process of its creation issued from this court without the authority of Congress, and Congress has in the act above quoted withheld its authority unless on condition the defendants consent thereto or waive the privilege therein conferred upon them of refusing to respond to the demands of plaintiff, an alien, in any other Circuit Court than that of the federal district of which they are inhabitants. This proposition is firmly settled by numerous decisions of the Supreme Court. *Southern Pacific R. Company v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *Mexican Central Railway v. Pinkney*, 149 U. S. 207, 13 Sup. Ct. 859, 37 L. Ed. 699; *Galveston, etc., Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248.

The question here presented, however, does not relate to the right of the defendants to consent to litigate with plaintiff her demand in this court. This the laws of the state required them to do in the form sought by plaintiff from which defendants seeks by removal to escape, and by the petition and bond for removal to this court, which is the established process by which actions originally instituted in a state court are brought into this (*Kinney v. Columbia Savings, etc., Ass'n*, 191 U. S.

78, 24 Sup. Ct. 30, 48 L. Ed. 103), they have irrevocably consented to the jurisdiction of this court.

But the question here presented is, did the plaintiff, by seeking the state court to litigate her controversy with defendants, impliedly agree, if defendants should by seeking a removal of the controversy to this court, thereby consenting to the jurisdiction of this forum, she would also give her consent thereto? The affirmative of this proposition has been sustained by certain decisions of the federal courts. *Morris v. Construction Co.* (C. C.) 140 Fed. 756; *In re Aspinwall* (C. C.) 83 Fed. 851; and in other cases.

Again, under the authority of *In re Hohorst*, Petitioner, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, had defendants, corporate citizens of a state of this country, a justiciable controversy against plaintiff sufficient in value, they might have proceeded against her in any Circuit Court of the United States in any district in which they could have procured valid personal service on her, regardless of her consent thereto. But this decision arose from the necessity of the case and the inapplicability of the present law to such a state of facts. For it is self-evident, as a nonresident alien is an inhabitant of no federal district of this country, such alien could either be brought before the Circuit Court of any district wherein personal service could be obtained on her, or she could not be required to appear before any federal court in this country, and it was not thought Congress had conferred jurisdiction on the courts of the nation over a class of controversies and excluded the courts entirely from cognizance of such class.

This construction of the judiciary act grants the same privilege to an alien to proceed against a citizen of this country as it grants to one citizen to proceed against another, and the right of a citizen to proceed against an alien in any jurisdiction in which such alien may be found. The doctrine of the *Hohorst* Case is, however, applicable only to that class of cases wherein an alien is defendant, not where an alien is plaintiff. As said by Mr. Justice Brown, delivering the opinion of the court in *Galveston, etc., Railway Co. v. Gonzales*, *supra*:

"Neither this case nor any other to which our attention has been called makes any distinction between cases where citizens and aliens are plaintiffs, though in the *Hohorst* Case, to prevent a manifest failure of justice in the inability to sue any foreign corporation whatever, it was held that where an alien corporation was defendant it might be sued in any district wherein it might be found."

The language of the judiciary act is prohibitive in terms. It reads:

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant. But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is conclusively settled by authority controlling here that a domestic corporation is both a citizen and an inhabitant of that state in which it is incorporated. *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Southern Pacific Co. v. Denton*, *supra*; *Galveston, etc., Railway v. Gonzales*, *supra*. Therefore, as removing

defendants are domestic corporate citizens of the state of Illinois, Congress has expressly prohibited the process of this court from running against them to bring them in here, although they may under state laws be brought before the courts of this state, and notwithstanding the further fact that they finding a suit here pending against them, in its nature such as this court has general, original jurisdiction to consider, they may waive the personal exemption conferred on them by the act and come in and litigate here.

By the express provisions of the removal act all but a certain clearly defined class are precluded from invoking the privilege thereby conferred. And, as has been seen, it expressly limits the right of removal by any defendant to that class of cases which might have been originally brought in the court to which the cause is attempted to be removed. That is to say, as related to this present controversy, before the right of removal shall obtain to defendants at all it must appear plaintiff could have originally brought her action in this court had she so desired. As has been seen, the privilege of plaintiff to have brought her action originally in this court is coupled with a condition that defendants should consent thereto. Over this condition plaintiff has no control, and this court no power. Beyond question, had she attempted to so have done, removing defendants by the simple act of disobeying the process of this court in her cause could have forever put it beyond the power of this court to proceed with her case against them, because this court is prohibited from causing such process to issue. In view of this condition of the law, she sought the state forum where she could, under its forms, compel attendance by defendants and compliance with its mandates. Defendants being thus pursued in a forum where they must appear, and the orders of which they must obey, by the petition and bond for removal filed therein have invited plaintiff to litigate her cause with them in this forum, in which she could not have compelled their attendance. To this invitation she declines her consent, preferring, as shown by her motion to remand, to proceed with her controversy where she began it. This, I think, she may do.

It may be contended the conclusion reached will preclude the removal of any action brought by an alien in any state court into a federal court for trial. This may be conceded to be true. For, as has been so often said by the Supreme Court, construing the present judiciary act, "The whole purport and effect of that act was not to enlarge, but to restrict and distribute, jurisdiction." *Shaw v. Min. Co.*, *supra*. And, as said before, Congress under constitutional power created all federal courts inferior to the Supreme Court, and conferred on such courts their jurisdiction and power. Within the constitutional limitation it may grant the exercise to such courts of just so much or so little judicial power as in its wisdom it may deem fit.

It follows, the motion to remand must be sustained. It is so ordered.

#### On Rehearing.

Rosenberger & Reed and Reinhardt & Schibsby, for plaintiff.

M. A. Low, O. M. Spencer, Paul E. Walker, F. P. Seabee, and Warner, Dean, McLeod & Timmonds, for defendants.

POLLOCK, District Judge. This case again comes before the court on motion for rehearing of matters decided on motion to remand to the state court. In passing on this motion for rehearing I deem it proper to state I am neither unmindful of the importance of the ruling made nor of the fact that the only known reported case decided since the opinion in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, was announced, identical in principle and point of fact, holds to a contrary doctrine than that expressed in the opinion on the motion to remand heretofore filed in this case. I refer to *Barlow v. C. & N. W. R. R. Co.* (C. C.) 164 Fed. 765. However, I think it well to bear in mind, also, in any given case, no matter how large in importance, how sweeping in result, or how lasting in consequence, unless compelled thereto by controlling decisions, there is but one result possible, that which commends itself to the intelligent judgment of the court. Such judgment may be wrong in principle or declared erroneous in law by the exercise of a reviewing power, but none the less it is the only thinkable or possible judgment which may be announced by a court of first instance.

From a careful reading and consideration of the briefs of counsel filed on this motion, I find I must overrule it, and adhere to my original opinion on the motion to remand, for the reason I still believe the original opinion states the law, and is firmly based on certain fundamental and well-settled principles announced in various decisions of the Supreme Court touching the question at issue. As was stated in the original opinion, the judicial power exercised by this court, whether it be in its nature original or such as is obtained by the exercise of the power of removal, must be limited to that granted by Congress, and no more. The acts of Congress granting judicial power to this court mean precisely what the Supreme Court by its decisions declare, for the power which made the grant and the power which construed and limited it are each in their appropriate spheres supreme.

By the decisions of that court certain propositions, to my mind determinative of this matter, are settled beyond the power of argument to disturb. In *Galveston, etc., Railway v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, it was held an alien could not bring and maintain an action against a corporate citizen of a state of this country in a judicial district of which such corporation was not a resident or inhabitant, without consent of defendant, although the defendant in the case might undoubtedly have been proceeded against by the alien plaintiff in a state court under state laws in the judicial district wherein the action was brought; and for the very reason the action was not brought against the corporation defendant in the judicial district of which the defendant was a resident or inhabitant the judgment obtained by the plaintiff in the federal trial court was reversed. The authority of that case has not to my mind been questioned, but, on the contrary, has been many times followed by the Supreme Court. Therefore the plaintiff in this case could not have originally brought and maintained her action in this court without the consent of defendants. In *Cochran v. Montgomery Co.*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, it was expressly ruled no case

can be removed from a state court into a Circuit Court of the United States unless it be such a case as could have been originally brought by the plaintiff in such federal Circuit Court.

In *Ex parte Wisner*, *supra*, it is held, where a case is brought in a state court of a state of which neither party is a citizen, it cannot be removed into a Circuit Court of the United States sitting in such state wherein the action is brought, although both parties to the action consent thereto or take such steps in the federal court after a removal as will be construed as a waiver of objection to the jurisdiction of the court. However, the authority of that case was partly denied by the Supreme Court in the case of *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, and it was there held, where a corporate citizen of this country is proceeded against in a state court of a state of which neither party is a citizen, and the corporate citizen removes the case into the federal Circuit Court, and the plaintiff after removal acquiesces in the jurisdiction of that court by taking such steps therein after removal as will be construed as a consent to the exercise of jurisdiction over the person in such case, the federal court, having jurisdiction over the subject-matter because of the diverse citizenship of the parties and over the person of the defendant by the act of removal taken by it, obtains full and complete jurisdiction of both the subject-matter and the parties thereto by the implied consent given by the plaintiff by the steps taken therein after removal without objection. In that case but two questions were raised for decision, as stated by Mr. Justice Brewer delivering the opinion of the court, after stating the facts, as follows:

"This brings up two questions: First, whether both parties did consent to accept the jurisdiction of the United States court; and, second, if they did, what effect such consent had upon the jurisdiction of the United States court."

It was found in that case both parties had consented to the exercise of the jurisdiction of the federal court over their controversy, and notwithstanding the doctrine of the *Wisner Case*, as the court had jurisdiction over the subject-matter of the controversy by reason of the diverse citizenship of the parties, the consent to the exercise of its jurisdiction over the persons of both parties made the jurisdiction of the court full and complete. However, in this case the plaintiff has given no consent to the exercise of jurisdiction by this court over her person, and has taken no step in this case since the removal taken by defendants which has not been by her expressly and intentionally opposed to the exercise of jurisdiction by this court over her person. How, then, can she be said to have given her consent, which, as has been said, is essential to the obtaining of full and complete jurisdiction over both the subject-matter and the parties to the action. She did consent to the exercise of jurisdiction by the state court in which she brought her action over both her person and her controversy, but she had no choice of forums. She could not have commenced her action in this court without consent of defendants. How it can be held her resort to a court of this state, the only one in the state to which she could resort, is tantamount to a consent to the exercise of jurisdiction over her person by this court, a court to which she could

not have resorted in the first instance of her own will, had she felt so inclined, without consent of defendants, is beyond my comprehension, and to my mind such reasoning is both illogical and unsound.

It follows that the motion for rehearing will be denied.

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IRVINE v. PUTNAM.

(Circuit Court, S. D. California, S. D. January 9, 1909.)

No. 1,400.

1. CORPORATIONS (§ 253\*)—STOCKHOLDER'S LIABILITY—SUIT TO ENFORCE—CONCLUSIVENESS OF DECREE IN PROCEEDING AGAINST CORPORATION.

Rev. St. Ohio 1908, §§ 3260c-3260f, authorizing proceedings against a corporation where its property is insufficient to pay a judgment recovered against it, in which its indebtedness shall be ascertained, and, if necessary, the double liability of the stockholders, imposed by section 3258, enforced by means of an assessment to be collected by a receiver and distributed by the court, contemplate as one of the ultimate objects the winding up of the affairs of the corporation as an insolvent, and in such proceeding each stockholder is represented by the corporation and is bound by the findings and decree therein, although he may be a non-resident of the state and not served with process.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1024-1026; Dec. Dig. § 253.\*

Effect of judgment against corporation in action to enforce stockholders' liability, see note to *American Nat. Bank v. Supple*, 52 C. C. A. 305.]

2. CORPORATIONS (§ 264\*)—STATUTORY LIABILITY OF STOCKHOLDERS—ACTION TO ENFORCE—LIMITATION.

Under Rev. St. Ohio 1908, § 3260d, which authorizes the court in a creditors' suit against an insolvent corporation to adjudge the amount payable by each stockholder under the double liability provided for by section 3258, and to appoint a receiver to collect the same, who shall have authority to maintain actions therefor against stockholders in other jurisdictions, limitation does not begin to run against such an action until the entry of the decree fixing the amount of the assessment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1090; Dec. Dig. § 264.\*

Stockholders' liability to creditors in equity, see notes to *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.]

At Law. On demurrer to complaint.

The complaint is as follows (omitting formal parts):

Comes now the above-named plaintiff, and, for cause of action against the defendant, alleges:

(1) That on the 22d day of August, A. D. 1895, the Columbus, Sandusky & Hocking Railroad Company was duly incorporated under the laws of the state of Ohio; that ever since said date said corporation has been, and now is, a body corporate, organized, created, and existing under and by virtue of the Constitution and laws of the state of Ohio; that said corporation is now, and at all times since its incorporation has been, a citizen and resident of the state of Ohio; that the plaintiff, Ellsworth C. Irvine, is a citizen of the state of Ohio; that the defendant, Henry W. Putnam, is a citizen of the state of California, and is a resident of the city of San Diego, in the Southern division of the Southern district of California; that the matter in controversy in this

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

action exceeds, exclusive of interest and costs, the sum of two thousand dollars (\$2,000).

(2) Prior to January 14, 1899, said the Columbus, Sandusky & Hocking Railroad Company was indebted to F. M. Marriott in the sum of one thousand dollars (\$1,000), with interest at the rate of seven per cent. (7%) per annum, and to the E. A. Kinsey Company, a corporation organized and existing under the laws of the state of Ohio, in the sum of twelve thousand eight hundred and sixty dollars and fifty-three cents (\$12,860.53), with interest from the 15th day of March, 1897, on two hundred and fifty-two dollars and seventy-six cents (\$252.76) at seven per cent. (7%) per annum; with interest on one thousand seven hundred and seventy-five dollars and eighty-one cents (\$1,775.81) from June 21, 1897, at six per cent. (6%) per annum; with interest on one thousand seven hundred and eighty dollars and seven cents (\$1,780.07) from July 8, 1897, at six per cent. (6%) per annum; with interest on four hundred and ninety-four dollars and fifty-six cents (\$494.56) from April 15, 1897, at seven per cent. (7%) per annum; with interest on one thousand two hundred and fifty-five dollars and forty-eight cents (\$1,255.48) from May 15, 1897, at seven per cent. (7%) per annum; with interest on three thousand three hundred and sixteen dollars and eighty-four cents (\$3,316.84) from June 2, 1897, at six per cent. (6%) per annum; with interest on one thousand and twenty-four dollars and seventeen cents (\$1,024.17) from May 28, 1897, at seven per cent. (7%) per annum; with interest on one thousand and twenty-four dollars and eighteen cents (\$1,024.18) from May 28, 1897, at seven per cent. (7%) per annum; with interest on one thousand and twenty-four dollars and eighteen cents (\$1,024.18) from May 25, 1897, at seven per cent. (7%) per annum. At said time said the Columbus, Sandusky & Hocking Railroad Company was insolvent, and had no property of any kind or nature which could be in any manner applied to the satisfaction of said debts due the said F. M. Marriott and said the E. A. Kinsey Company.

(3) On January 14, 1899, in the court of common pleas of Franklin county, Ohio, a court of general jurisdiction, the said F. M. Marriott filed his petition on his own behalf, as well as on behalf of all the creditors of said the Columbus, Sandusky & Hocking Railroad Company, alleging in substance that said railroad company was incorporated with a capital stock of eleven million, six hundred thousand dollars (\$11,600,000), divided into one hundred and sixteen thousand (116,000) shares, each of the par value of one hundred dollars (\$100); that on October 3, 1898, in the court of common pleas of said Franklin county, Ohio, said F. M. Marriott recovered a judgment against said railroad company for the sum of one thousand and thirty-five dollars and seventy cents (\$1,035.70), with interest from October 3, 1898, at the rate of seven per cent. (7%) per annum, and costs taxed at seven dollars (\$7); that said judgment, at the time of filing said petition on January 14, 1899, was in full force, unreversed, and unsatisfied; that on October 3, 1898, said railroad company was wholly insolvent, and had been insolvent for two years prior thereto, its property and all property rights and franchises then being in the hands of a receiver and not being of sufficient value to satisfy its bonded indebtedness; that it had no property, real or personal, whereon to levy, out of which any part of said judgment could have been made upon execution, and that said railroad company at said time did not have any property from which the judgment could be satisfied.

In said petition in said cause, the said F. M. Marriott further alleged that the said railroad company had numerous stockholders, whose names and residences were to him unknown; that the number of shares of stock held by each stockholder was to him unknown, and that said stockholders were liable for all the debts of said railroad company. Said F. M. Marriott in said petition prayed that said railroad company be compelled to disclose the names of persons who were then or who had been its stockholders, and to set forth the amounts due from each of said persons, if anything, on their stock, and that said persons when discovered be made defendants in said action in said court of common pleas, and that the names of the creditors of said railroad company be ascertained, together with the amounts due each, in such manner as the



court might direct, and that all stockholders in arrears for subscription for said stock be required to pay the balance due from them, and that each stockholder be required to pay his ratable proportion of any deficit remaining, after the application of the said assets to said debts, in proportion to the amount of stock held by each of said persons.

A summons was issued upon the filing of said petition in said court to the sheriff of Franklin county, Ohio, and the same was served upon the Columbus, Sandusky & Hocking Railroad Company according to law.

Thereafter, on the 22d day of December, 1899, the E. A. Kinsey Company, a corporation duly organized and existing under the laws of the state of Ohio, with its principal place of business in Cincinnati, of said state, duly filed its petition in the court of common pleas of Franklin county, Ohio, against the said the Columbus, Sandusky & Hocking Railroad Company, and others, stockholders in said railroad company, said petition being filed on behalf of the said the E. A. Kinsey Company and all other creditors of the said railroad company. In said petition the said plaintiff, the E. A. Kinsey Company, alleged that the said the Columbus, Sandusky & Hocking Railroad Company was a corporation duly organized on the 22d day of August, 1895, under the laws of the state of Ohio. In said petition the said the E. A. Kinsey Company further alleged that the said railroad company was indebted to it in the sum of twelve thousand eight hundred and sixty dollars and fifty-three cents (\$12,860.53) as aforesaid, with interest on said sum as aforesaid, and that said indebtedness at said time was unpaid and long past due; that on the 2d day of June, 1897, in a certain suit filed in the said United States Circuit Court for the Southern District of Ohio, Eastern Division, wherein the Mercantile Trust Company of New York, as trustee, was complainant and the said railroad company was defendant, a receiver was duly appointed by said United States Circuit Court of all and singular the assets and property of the said railroad company; that said defendant had ceased to do business, and had no property of any kind with which to do business or out of which the claim of the said the E. A. Kinsey Company could be paid, and that it was necessary for the payment of the creditors of said company that the stockholders thereof should be assessed under the laws of the state of Ohio for the full amount of their statutory liability; that said suit by the said the E. A. Kinsey Company was filed to assess the individual and statutory liability upon the said stockholders, and that the names of all of the said stockholders were not known to the said the E. A. Kinsey Company. The said the E. A. Kinsey Company, plaintiff in said action, prayed that the court would ascertain and cause to be made parties defendant in said case all of the stockholders of said railroad company; that the total debts and liabilities of said company, and the amount of each, and the time when each of said debts was contracted, might be ascertained and determined; that the number of shares of stock held by each of said stockholders, and the time during which each of said stockholders respectively owned and held said stock, should likewise be ascertained and determined, and the amount of the assessment necessary and proper to be made to satisfy the said debts and liabilities of the said railroad company should be ascertained, and that, after such ascertainment of the debts and liabilities of the stockholders and entering of proper judgments and assessments, a receiver should be appointed to collect the said judgments and assessments and to distribute the same among the creditors of the said defendant company as the same should be entitled thereto; and that the said plaintiff should have all other and further relief as the circumstances of the case might require, and to which the plaintiff might be found entitled.

Said petition filed by the said F. M. Marriott was numbered upon the dockets of the said common pleas court of Franklin county, Ohio, 39,457, and said petition filed by the said the E. A. Kinsey Company was numbered upon the dockets of the said common pleas court of Franklin county, Ohio, 40,859.

After the filing of the said petition in case No. 40,859, a summons was duly issued to the sheriff of Franklin county, Ohio, and served upon the defendant, the said the Columbus, Sandusky & Hocking Railroad Company, and the other defendants, according to law.

Thereafter, on March 31, 1902, the said court of common pleas of Franklin county, Ohio, on motion duly filed therewith, found, determined, ordered, and

adjudged that said cases No. 39,457 and No. 40,859 had the same object and should be consolidated, and that the same be consolidated and thereafter proceed under the name and style of "Case No. 39,457, F. M. Marriott, Plaintiff, v. The Columbus, Sandusky & Hocking Railroad Company et al., Defendants," and that all rights theretofore accruing in said action be enforced and full relief granted under the name and style aforesaid, and that any further pleadings which might be filed in either of said cases should be docketed under the style and number of said case No. 39,457. Said order and judgment of March 31, 1902, was not appealed from, and remains in full force and virtue in law and altogether unreversed.

In said cause the defendant, Henry W. Putnam, together with all the other stockholders of the said the Columbus, Sandusky & Hocking Railroad Company, were made parties defendant, and all of such defendants as resided in the state of Ohio were served with summons, and all other defendants residing outside of the state of Ohio were duly served by publication, in accordance with the statute of the state of Ohio in such cases made and provided.

At the April term of said court of common pleas of said Franklin county, Ohio, for the year 1902, it was ordered and decreed by said court that said consolidated cause No. 39,457 be and the same was thereby referred to Ellsworth C. Irvine, one of the master commissioners of said court, who was thereby ordered to proceed according to law to determine what persons, firms, and corporations (other than these already parties thereto) should be made parties therein, to ascertain the address and residence of each of such stockholders in the defendant corporation, the Columbus, Sandusky & Hocking Railroad Company; to determine what transfers of stock had been made not of record, and those which had been made which were of record, and the dates of each; to determine the solvency and insolvency of the various stockholders, the amount of stock held by each, the indebtedness of said corporation, the names and addresses of its creditors, in such manner as is provided by law, and do all other things necessary, proper, and lawful to enforce the liability of stockholders of said defendant corporation, and to report to said court his findings of fact and his conclusions of law thereon.

In obedience to said order and judgment of said court said master commissioner proceeded to carry out all and singular the directions of said court, and thereafter on the 17th day of March, 1905, said master commissioner duly filed his report containing his conclusions of law and findings of fact, all in accordance with the order and judgment of said court.

Thereafter said cause came on to be heard by said court of common pleas of Franklin county, Ohio, upon the report of said master commissioner, upon the exceptions thereto, and the motion to confirm the same; and at such time the court ordered, adjudged, and decreed that said report be in some respects modified, and as modified confirmed, and duly entered judgments and assessments in favor of the plaintiff and against the several defendants in said cause.

Thereafter, on the 22d day of December, 1906, the plaintiff duly appealed said cause to the circuit court of Franklin county, Ohio, a court of general jurisdiction, and having jurisdiction of said cause on appeal, said cause being numbered 2,503 on the docket of said court; and in said court said cause was duly heard on the 7th day of December, 1907, and it was found, ordered, adjudged, and decreed by said court, among other things, that the shares of stock of said railroad company were of the par value of one hundred dollars (\$100) each; that said railroad company, at the time of filing said action in said court of common pleas, was insolvent, and had no assets of any kind with which to pay its debts, and was on December 7, 1907, insolvent, having no assets of any kind with which to pay its debts; that the unpaid, valid, and subsisting debts of said the Columbus, Sandusky & Hocking Railroad Company, as found by the report of said master commissioner, which was duly confirmed by said court, amounted to the sum of seven hundred and forty-seven thousand eight hundred and ninety-four dollars and eighty-two cents (\$747,894.82), including interest to March 1, 1905; that by reason of the insolvency of said railroad company and the insolvency of many of its stockholders, it was necessary, in order to pay said indebtedness and the costs in said case, to make an assessment against each of the stockholders of said railroad company in

a sum of money equal to fifty per cent. (50%) of the par value of the total number of shares of said stock owned by each of the stockholders of said company; that the defendant herein is the owner of four thousand three hundred and twenty-seven and sixty-six hundredths (4,327.66) shares of the capital stock of said company, and that there is due from said defendant, Henry W. Putnam, as such stockholder, to the creditors of said railroad company, the sum of two hundred and sixteen thousand three hundred and eighty-three dollars (\$216,383); that at the time of filing said action said defendant was a stockholder in said the Columbus, Sandusky & Hocking Railroad Company, and was the owner of four thousand three hundred and twenty-seven and sixty-six hundredths (4,327.66) shares of the capital stock of said company. Said court at said date further ordered, adjudged, and decreed that said Ellsworth C. Irvine, the plaintiff herein, be appointed receiver in said cause, under the statutes of Ohio in such case made and provided, to collect from the various defendant stockholders in said action, including this defendant, the several sums of money found due from said stockholders respectively, and this defendant and all other stockholders of said company were ordered to pay to said receiver, on or before the 1st day of January, 1908, the various amounts found due and assessed against them and each of them, the amount assessed against this defendant being the sum of two hundred and sixteen thousand three hundred and eighty-three dollars (\$216,383), and upon payment of said judgments and assessments said receiver was authorized and directed to give full and proper receipts and acquittances to the defendant herein and to all other stockholders defendant in said case. It was further ordered, adjudged, and decreed in said cause and at said time that said receiver be empowered, and said receiver was authorized, empowered, and directed, to institute and prosecute in his own name as receiver, under the statutes of Ohio in such case made and provided, such action or actions or other proceedings, including the action and proceeding against the defendant herein, in any court of competent jurisdiction, whether in the state of Ohio or elsewhere, which said receiver may deem necessary or proper for the recovery of the amount found due from said defendant and the other stockholders of said railroad company; and said receiver was further authorized and empowered to commence and prosecute such actions against such stockholders, whether the same resided in the state of Ohio or elsewhere, or whether they or either of them were served with process by publication or otherwise; and said receiver was authorized and empowered to commence and prosecute such actions against the defendant herein and all other defendant stockholders in said circuit court of Franklin county, Ohio, who were during the pendency of said action nonresidents of the state of Ohio. And it was further ordered, adjudged, and decreed by said circuit court that the said Ellsworth C. Irvine, as receiver, be and he was invested with the title and ownership, in trust for the creditors of said railroad company, of all and singular the assets, both real and personal, of said the Columbus, Sandusky & Hocking Railroad Company, and of the rights of the creditors of said railroad company against the stockholders thereof, wherever situated or held including the several sums found by said circuit court to be due from the stockholders of said railroad company, including the sum found due from this defendant, as aforesaid; and said receiver was authorized, empowered, and directed to proceed to collect by suit in any court of competent jurisdiction in his name as such receiver, or otherwise, the said sum found due from the defendant herein, and all other sums found due from said defendant stockholders, and any and all debts due and owing said railroad company, and do any and all acts which said the Columbus, Sandusky & Hocking Railroad Company could do, or could have done, for the purpose of recovering any debts due said corporation or properly belonging to it.

Said Ellsworth C. Irvine, as said receiver, duly qualified according to the laws of the state of Ohio, by taking an oath and by giving a bond as required by said court, and thereafter entered upon the discharge of his duties as receiver, and the said Ellsworth C. Irvine is now the duly acting and qualified receiver under and by the order of said court for the purposes aforesaid, his said bond having been duly approved by the clerk of said court.

A true copy of said judgment of said circuit court of said Franklin county,

Ohio, entered on said December 7, 1907, is hereto attached and marked "Exhibit A," and hereby referred to and made a part hereof, as fully as if set up at length herein, and said last-mentioned order and decree have never been in any manner reversed, modified, or set aside.

At the time of the organization and incorporation of said the Columbus, Sandusky & Hocking Railroad Company, and at all times thereafter during its corporate existence, and at the time when the said defendant Henry W. Putnam became a stockholder in said railroad company, as hereinbefore alleged and as determined by said circuit court, it was provided in and by the Constitution of the state of Ohio, pursuant to which the said railroad company was organized and incorporated, that:

"Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Article 13, § 3.

At the time of the organization and incorporation of said the Columbus, Sandusky & Hocking Railroad Company, and at the time when said defendant, Henry W. Putnam, became a stockholder of said railroad company, and at the time of the commencement of the actions in the court of common pleas of Franklin county, Ohio, by F. M. Marriott against the Columbus, Sandusky & Hocking Railroad Company et al., cause No. 39,457, and by the E. A. Kinsey Company against said the Columbus, Sandusky & Hocking Railroad Company et al., cause No. 40,859, as hereinbefore alleged, it was provided under the laws of Ohio that:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation to secure the payment of the debts and liabilities of the corporation." Rev. St. Ohio, § 3258.

That under said Constitution and general statutes, and the decisions of the courts of the state of Ohio construing and interpreting the same, said agreement and undertaking on the part of the said stockholders is and was at the time herein mentioned, and at the time this defendant became a stockholder of said company, contractual, and runs to and is enforceable for the corporate creditors by the receiver appointed for that purpose, and that the same is enforceable by said receiver in any jurisdiction wherever jurisdiction of stockholders may be obtained; and that said contract and agreement on the part of stockholders grows out of and follows the subscription to or acquisition of the said corporate stock, wherein and whereby each stockholder guarantees the payment of all corporate indebtedness contracted, created, or existing while such stock is held by him, and to the amount of his stock in addition, as aforesaid. And the defendant herein, Henry W. Putnam, when he accepted the stock of said railroad company now owned and held by him, and owned and held by him in accordance with such judgment of said circuit court, accepted the said provisions of the Constitution and laws of the state of Ohio in relation thereto, and agreed to assume and pay the indebtedness of said corporation to the extent of any amount unpaid on his stock, and to a further sum equal in amount to the par value of the said stock owned or held by him therein, or so much thereof as might be necessary for the payment of such indebtedness. Under the said Constitution and laws of the state of Ohio the liability of the said defendant, Henry W. Putnam, upon his agreement aforesaid, was and is a trust fund for the benefit of the creditors of said railroad company.

At the time of the filing of the petitions in said court of common pleas in said cases No. 39,457 and No. 40,859, and for a long time prior thereto, and while the provisions of the said Constitution and laws of the state of Ohio, as aforesaid, were in full force and effect, the defendant herein became and was the lawful owner and holder and had duly and lawfully acquired, subject to the liability and agreement aforesaid, four thousand three hundred and twenty-seven and sixty-six hundredths (4,327.66) shares of the capital stock of the said the Columbus, Sandusky & Hocking Railroad Company, of the ag-

gregate par value of the sum of four hundred and thirty-two thousand seven hundred and sixty-six dollars (\$432,766), and that the said shares of stock were duly and lawfully issued to and received and accepted by the said defendant, Henry W. Putnam, and that said defendant has never parted with or transferred any portion of said stock, but has at all times since the issue thereof to him, as aforesaid, continued to be, as he now is, the owner and holder of the same and of all thereof.

At the said time when the said defendant, Henry W. Putnam, so became the owner and holder of said shares of capital stock of the said the Columbus, Sandusky & Hocking Railroad Company, the provisions of the said Constitution and laws of the said state of Ohio were in full force and effect, and became a part of the contract of the said defendant in purchasing and acquiring the ownership of the said shares of stock. And the said defendant, in and by the purchase and ownership and holding of the said shares of the said stock of the said railroad company, duly contracted and agreed, for a valuable consideration, that he would be and remain responsible with the other stockholders of the said railroad company for all of the contracts, debts, and engagements of the said company, while he remained such stockholder, to the amount of his stock therein, at the par value thereof, to wit, to the amount of four hundred and thirty-two thousand seven hundred and sixty-six dollars (\$432,766).

That it is, and was during all of the time herein mentioned provided by the laws of the state of Ohio, Revised Statutes, as follows:

"Sec. 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of a corporation, or the stockholders thereof, on account of any liability, created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability.

"Sec. 3260a. The court shall proceed thereon, as in other cases, and when necessary, shall cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers.

"Sec. 3260b. If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers and stockholders, and enforce the same by its judgment, as in other cases.

"Sec. 3260c. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall give notice to non-resident stockholders as provided in sections 5048, 5049, 5050, 5051 or 5052 of the Revised Statutes, and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"Sec. 3260d. If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder.

"Sec. 3260e. Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

"Sec. 3260f. Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property

and assets of such corporation or the proceeds thereof to be made among its creditors."

The said circuit court of Franklin county, Ohio, in its judgment of December 7, 1907, in cause No. 2,503 on the docket of said court, duly found, ascertained, adjudged, and decreed that said defendant, Henry W. Putnam, was duly served with process in said cause No. 39,457 by publication, in accordance with the laws of the state of Ohio in such case made and provided.

This plaintiff, by virtue of the laws of the state of Ohio and his appointment and qualification as receiver in said cause No. 2,503, as hereinbefore alleged, became and now is the representative of all the creditors of said railroad company, and is vested with the title to all and singular the rights of action possessed by said railroad company, including the aforesaid liability of its stockholders and the liability of this defendant to the creditors of said company, as hereinbefore alleged, and is duly authorized to maintain this action against the defendant herein to recover the sum aforesaid assessed against him, and that he was adjudged to be liable by said circuit court of Franklin county, Ohio.

The plaintiff herein, as such receiver, has demanded of the defendant, Henry W. Putnam, that he pay to said receiver the said sum of two hundred and sixteen thousand three hundred and eighty-three dollars (\$216,383), but said defendant has wholly neglected and refused to pay said sum or any part thereof, and under and by virtue of the order and decree of said circuit court of Franklin county, Ohio, in said cause No. 2,503, and of the Constitution and laws of the state of Ohio and the United States of America, there is due and owing from said defendant, Henry W. Putnam, to the plaintiff, as said receiver, the sum of two hundred and sixteen thousand three hundred and eighty-three dollars (\$216,383), with interest thereon provided by the laws of the state of Ohio at the rate of six per cent. (6%) per annum from the 7th day of December, 1907, no part of which has been paid.

Wherefore said plaintiff, as said receiver, prays judgment against said defendant Henry W. Putnam for the sum of two hundred and sixteen thousand three hundred and eighty-three dollars (\$216,383), with interest at the rate of 6 per cent. per annum from the 7th day of December, 1907, and for the costs of this action.

Defendant interposed the following demurrer:

Comes now the above-named defendant, Henry W. Putnam, and demurs to the complaint of the above-named plaintiff, on file herein, and for grounds of demurrer thereto says:

- (1) That the court has no jurisdiction of the subject of the action.
- (2) That the plaintiff has no legal capacity to sue.
- (3) That the complaint does not state facts sufficient to constitute a cause of action.
- (4) That the cause of action attempted to be set up in said complaint of said plaintiff is barred by the provisions of section 338 of the Code of Civil Procedure of the state of California.
- (5) That the cause of action attempted to be set up in said plaintiff's complaint is barred by the provisions of subdivision 1 of section 338 of the said Code of Civil Procedure of the state of California.
- (6) That the cause of action attempted to be set up in said plaintiff's complaint is barred by the provisions of section 339 of the Code of Civil Procedure of the state of California.
- (7) That the cause of action attempted to be set up in said plaintiff's complaint is barred by the provisions of subdivision 1 of said section 339 of the Code of Civil Procedure of the state of California.
- (8) That the cause of action attempted to be set up in said plaintiff's complaint is barred by the provisions of section 361 of the Code of Civil Procedure of the state of California.
- (9) That the cause of action attempted to be set up in said plaintiff's complaint is barred by the provisions of section 4981 of the Revised Statutes of Ohio.

Wherefore defendant prays that plaintiff take nothing by his said action, and that said action be dismissed.

Lawler, Allen, Van Dyke & Jutten (Stewart & Stewart, Fred C. Rector, and T. E. Powell, of counsel), for plaintiff.  
Stearns & Sweet, for defendant.

Conclusions of the Court on Demurrer to Complaint.

WELLBORN, District Judge. Defendant's contention that the doctrine of representation does not apply to this case, because, under the decisions of the Supreme Court of Ohio, the individual, or, as otherwise called, superadded liability of the stockholder, is not an asset of the corporation, but a security provided by law for the exclusive benefit of creditors, over which the corporate authorities have no control, and which contention is the groundwork of defendant's argument in support of his demurrer, it seems to me, is disposed of by the following language of the Supreme Court in *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163:

"And it has been held in cases in this court that, when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 336, 16 Sup. Ct. 810, 40 L. Ed. 986.

"Nor can we see any substantial difference in this respect between a liability to be ascertained for the benefit of creditors upon a stock subscription and the liability for the same purpose which is entailed by becoming a member of a corporation through the purchase of stock whereby a contract is implied in favor of creditors. The object of the enforcement of both liabilities is for the benefit of creditors, and while it is true that one promise is directly to the corporation, and the other does not belong to the corporation but is for the benefit of its creditors, either liability may be enforced under the orders of a court in winding up the corporation in case of its insolvency."

While one object of the Ohio statute is to enforce the stockholder's individual liability, yet sections 3260c-3260f also contemplate and provide for the winding up of the affairs of the corporation.

Section 3260c directs that, if the property of the corporation is insufficient to discharge its debts, the court shall, in the first place, collect unpaid subscriptions, "or so much thereof as is necessary to satisfy the debts of the company." The particular method of collecting these subscriptions is not prescribed, but manifestly it is by assessments.

The next section, 3260d, provides that, if the unpaid subscriptions are not sufficient to pay off the debts of the corporation, the court shall ascertain and adjudge the individual liabilities of the stockholders, and and may authorize and direct its receiver to enforce such liabilities in other jurisdictions.

The next section, 3260e, provides for the bringing into the action of all the creditors of the corporation, which would be wholly unnecessary if the act did not look to a full settlement of corporate affairs.

The last section, 3260f, directs that:

"Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation, or the proceeds thereof to be made among its creditors."

This hurried analysis of the statute shows that it contemplates, as one of its ultimate objects, the winding up of the affairs of the corporation, and a comprehensive and efficient plan is by the statute provided for the accomplishment of said object.

Furthermore, one of the grounds, and a ground sufficient in itself, to support the doctrine of representation, is that, by becoming a stockholder, a person contracts with reference to the remedies which are or may be provided for the enforcement of individual liabilities, as well as the collection of unpaid subscriptions, or, quoting from the fourth paragraph of the syllabus in *Bernheimer v. Converse*, supra,

"One who becomes a member of a corporation assumes the liability attaching to such membership, and becomes subject to such regulations as the state may lawfully make to render the liability effectual."

The contract, therefore, by which the defendant in the case at bar acquired his stock was made with reference to the statute of Ohio above referred to, and said statute becomes a part of his contract of membership in the corporation, and its provisions as to the enforcement of individual liability are as binding upon the defendant as those relating to the collection of unpaid subscriptions.

Besides, if there were any difficulty growing out of the fact that in Ohio the individual liability is not, strictly speaking, a corporate asset, it would be purely technical, and to withhold the doctrine of representation in cases of individual liability, and yet apply it to unpaid subscriptions, because of such difficulty, would be in direct conflict with the spirit of the enunciation of the Supreme Court in *Bernheimer v. Converse*, supra, as follows, quoting from the third paragraph of the syllabus (underscoring mine):

"An act intended to make effectual a liability which is incurred by stockholders under the Constitution of the state, and which operates equally upon all stockholders and assesses all by a uniform rule, should not, in the absence of *substantial* reasons be rendered nugatory. \* \* \*"

The action is not barred by the statute of limitations. *Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 202, in my opinion, correctly interprets and applies *Bernheimer v. Converse*, supra, and it is sufficient to say that, on the authority of these two cases, without reviewing here in detail the large number of other cases cited in the respective briefs of the parties, the demurrer must be overruled.



## THE WILLIAMSPORT.

## THE PLYMOUTH.

(District Court, E. D. Pennsylvania. February 3, 1909.)

No. 30.

## COLLISION (§ 61\*)—STEAM VESSELS WITH TOWS MEETING—FAILURE TO ALLOW SUFFICIENT ROOM FOR PASSING TOW.

A collision occurred at night in the channel east of Pollock Rip Shoal off the coast of Massachusetts between the steamer Williamsport, going north with a tow, both loaded with coal, and the second one of three empty barges bound south in tow of the tug Plymouth. The tug Piedmont, also with three tows, was in advance of the Plymouth and a little to the eastward. Each vessel saw the lights of the others, and when the Williamsport reached the north and south channel from the west at Pollock Rip Lightship, nearly a mile south of where the collision occurred, she received a signal from the Piedmont to pass starboard to starboard, which she accepted, and kept as close to the west side of the channel as she safely could. In this arrangement the Plymouth apparently acquiesced and passed to the eastward of the Williamsport, as did her first tow, but the second, apparently influenced by the ebb tide, which set strongly to the westward, swung across the course of the steamer and struck her port bow. *Held*, that the Williamsport was not in fault in taking the left side of the channel under the circumstances, but that the collision was due solely to the fault of the Plymouth in failing to give sufficient room to allow for the effect of the tide on her tow, which was 3,800 feet long; and especially in view of the fact that after the collision, which parted her towline, instead of standing by to give assistance, she proceeded 11 miles before anchoring her one remaining tow, which was wholly unnecessary, and then returned to the place of collision after the Williamsport had sunk and her tow had stranded, which, under Act Sept. 4, 1890, c. 875, § 1, 26 Stat. 425 (U. S. Comp. St. 1901, p. 2902), raised a presumption that her fault caused the collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 61.\*]

In Admiralty. Suit for collision. On final hearing.

James F. Campbell, for libellant.

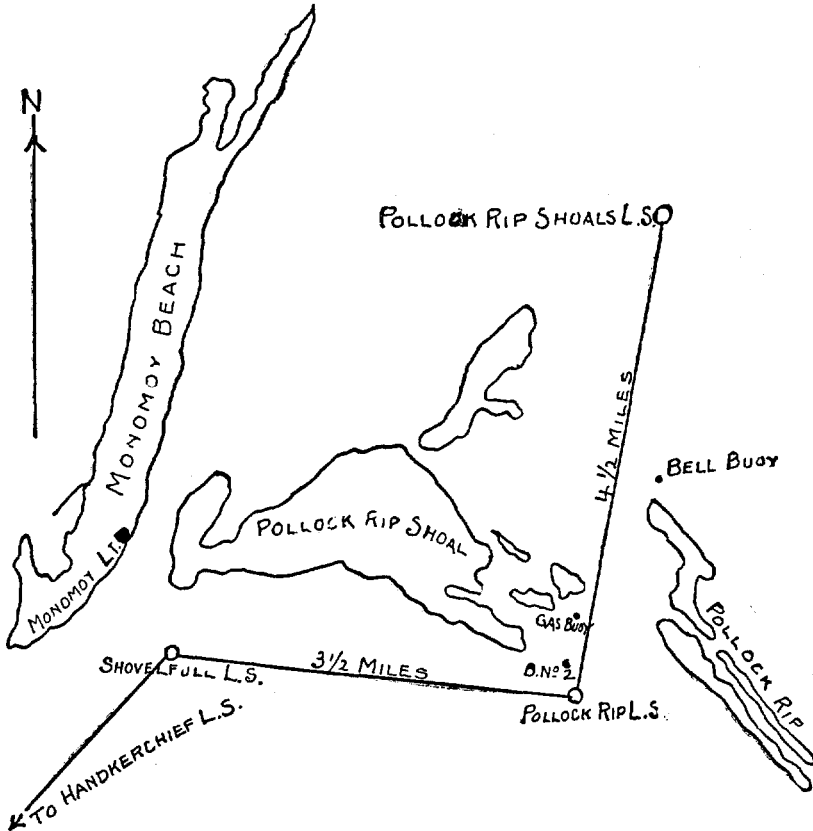
James J. Macklin and De Langel Berrier, for respondent.

J. B. McPHERSON, District Judge. This is a libel to recover damages for a collision which occurred about 20 minutes before 1 o'clock in the early morning of April 11, 1902, between the steamship Williamsport, of which the Philadelphia & Reading Railway Company was the permanent charterer, and the middle barge in a string of three that were being towed by the tug Plymouth, of which the Central Railroad of New Jersey is the owner and claimant. The facts are as follows:

The Williamsport is a steamship of about 910 tons register, hailing from the port of Philadelphia. Upon the night in question she was bound north on a voyage from Philadelphia to Portland, Me., and had in tow the Paxinos, a barge of 1,550 tons capacity, on a hawser 900 feet long. Both the Williamsport and the barge were loaded with coal, the steamship carrying 1,454 tons and drawing about 16½

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

feet, and the barge carrying a full cargo and drawing as much water as the steamship. The Plymouth is a large steam tug, 135 feet long and 27 feet beam, and was bound from Boston to Pt. Johnson, N. J. She was towing three empty barges in tandem fashion, barge No. 10 being next to the tug, No. 8 second in line, and No. 7 in the rear. The total length of the tug and tow was about 3,800 feet, or nearly three-fourths of a mile. The collision occurred to the east of Pollock Rip Shoal, off the coast of Massachusetts, and the surroundings will appear by inspection of the accompanying diagram, which is taken from Eldridge's Chart C, published in 1902:



The vessels came together at the Gas buoy, and the blow was delivered by the starboard bow of barge No. 8 upon the port bow of the Williamsport, about 20 feet abaft of the stem, making a hole 6 to 8 feet long, which extended below the water line. There is little, if any, dispute concerning the maneuvers of the vessels, except just before the collision. The night was dark and cloudy, but there was no difficulty in seeing lights, and it is certain that the Williamsport and Plymouth were aware of each other's presence before the Plymouth had reached Pollock Rip Shoals lightship, and while the Williamsport

was several miles distant at Shovelfull lightship. Each was displaying towing lights that indicated (in accordance with article 3 of the Inland Rules) that the length of the tow exceeded 600 feet. There was another tug and tow in the immediate neighborhood, whose presence and maneuvers are of the utmost importance in this controversy. This was the Piedmont, which was bound south for Baltimore, towing a string of three barges, of which the length was about equal to the Plymouth's string, and also displaying the proper towing lights. The Piedmont was in front of the Plymouth at some distance to the southeastward, the space between the Plymouth and the rear barge of the Piedmont's tow being probably a quarter of a mile. The presence of the Piedmont and her tow was well and seasonably known both to the Williamsport and to the Plymouth. There is no dispute concerning the efficiency of the lookouts or the adequacy of the crews upon any of the vessels. As will be seen upon the diagram, the three tows were approaching each other nearly at right angles, the apex of the angle being Pollock Rip lightship. (In reading the testimony, this is to be distinguished from Pollock Rip Shoals lightship, which is  $4\frac{1}{2}$  miles to the north.) The Williamsport reached the apex first, and changed her course at that point, rounding buoy No. 2 and leaving the lightship on her starboard side. Her red light had been seen by the Plymouth along the course from Shovelfull lightship, but now, as the Williamsport turned to the north, the latter vessel first showed both lights, and after a short interval shut out the red and showed the green light alone. This necessarily meant that she was proceeding up the western side of the channel, or slue, which at this point for vessels of her draft is about three-fourths of a mile in width. Under ordinary circumstances she would have been taking the wrong side of the channel, and the Williamsport, recognizing that she is called upon to justify her position, offers the following explanation, which in my opinion is fully established by the evidence: As she changed her course at the Pollock Rip lightship, or very soon afterwards, she saw the red and green lights both of the Piedmont and of the Plymouth. The Piedmont was directly ahead, and the Plymouth was a little farther to the westward. In the darkness it was impossible to tell with accuracy how distant the last barge of the Piedmont's tow was from the Plymouth's bow, and I see no reason to doubt the truthfulness of the statement made by the Williamsport's master, that the Piedmont's last barge seemed to him to be nearly abreast of the Plymouth. Neither do I see any reason to doubt the testimony of the Plymouth's master, that the distance between his tug and the last barge of the Piedmont's tow was in fact about a quarter of a mile toward the southeastward, although I do not think that the discrepancy between the two statements is of vital importance. When the Williamsport changed her course to the north, the Plymouth must have been at least two miles away. The collision took place at the Gas buoy, which, according to the scale on the chart, is three-fourths of a mile north of the lightship, and the ebb tide was running at about two knots toward the southwest. The tide was therefore with the Plymouth, and her speed was no doubt several knots more than two, while the speed of the Williamsport and her barge, both

being heavily loaded and having the tide against them, probably did not exceed two knots over the bottom. As the Williamsport had passed the Gas buoy before she was struck, going certainly not half as fast as the Plymouth, the distance between them when the Williamsport turned north at the Pollock Rip lightship could not have been less than two miles, and was probably more.

It is here—at or shortly after the Williamsport's turn—that the action of the Piedmont becomes so important. She was the foremost of the two tows that were bound south, and naturally took the initiative in signaling to the approaching vessel. The signal she gave was two blasts, perhaps repeated once or twice, but at all events the signal was distinctly given and was heard both by the Plymouth and by the Williamsport. Now, if it be true, as the master of the Plymouth testified, that he was well over on the western side of the slue—he says that he passed about 550 feet east of the Gas buoy, but the distance was clearly much less—he must have known that if the Piedmont's signal was accepted the Williamsport would be forced to the extreme western edge, unless he himself went to the eastward, so as to give her as much room as possible. It may perhaps be true that the master of the Williamsport was not absolutely bound to accept the Piedmont's proposition to pass to starboard; but it cannot be doubted that if he did not accept it, if he crossed the signal, he would take the risk of what might happen afterwards, and would almost certainly be adjudged at fault if a collision should occur. The Piedmont's motive in taking the initial step and offering to pass to starboard can only be conjectured. No one from that vessel was called as a witness, and there is therefore no direct testimony on the subject; but it does not seem unlikely, with the tide setting toward Pollock Rip, that she preferred to have the Williamsport take the risk of the western position, rather than to take it herself. At all events, whatever her reason may have been, she did force the Williamsport to that side of the slue, and the Plymouth acquiesced in the maneuver. The Williamsport accepted the Piedmont's signal promptly, as she was bound to do, and she was justified in assuming that the Plymouth agreed to the proposition, for she received no contrary signal from that vessel. If, as the Plymouth's master now says, there was abundant room between his tug and the last barge of the Piedmont's tow to admit of the Williamsport crossing his bow after she had passed the Piedmont's tow, he should have signaled the Williamsport to that effect, proposing that he and the Williamsport should pass port to port. But he made no such signal, and I think it can hardly be doubted that such a maneuver would have been extrahazardous, and that he can hardly be serious in suggesting it as an easily feasible course. In my opinion, therefore, the Williamsport was practically compelled to accept the Piedmont's proposition to pass to starboard, and was justified in believing that the Plymouth was also in accord upon this subject. She was also justified in expecting that both the approaching tows would bear to the eastward, so as to give her as much room as possible on the western side of the channel, especially as there was plenty of water to the east, and as the tide was setting strongly to the west and was thus increasing her danger of running

upon the Rip. She carried out her part of the maneuver to the best of her ability; she starboarded her helm promptly and repeatedly, and changed her course to the westward until she was as far over as it was prudent to go. She passed the Piedmont and her tow safely, and also passed safely by the Plymouth and her first barge, but the second barge, No. 8, was carried by the tide, aided perhaps by a sheer of the barge, so far over toward the edge of the slue that the Williamsport struck the hawser between the two barges, thereby swinging her own head and the head of the second barge somewhat to the eastward before the hawser parted, and exposing herself to the blow from which the damage resulted.

The Plymouth's theory is that the Williamsport suddenly sheered to starboard after passing the first barge, and that this sheer was the sole cause of the disaster. To my mind the theory is not credible. It requires the court to believe that a heavily loaded vessel, towing a heavily loaded barge, and moving slowly against the tide, would suddenly sheer a considerable distance while moving less than 1,000 feet. I say while moving less than 1,000 feet, because of course the Plymouth's barges were also moving to meet her with comparative rapidity, and the second barge must therefore have inflicted the blow before the Williamsport had gone more than 500 or 600 feet at the most beyond the point where she passed barge No. 10. It seems to me much easier to believe, and it accords quite as well with the testimony, that an empty barge, going at a higher speed and acted upon by a westerly tide, should inevitably tend still further in that direction, and might easily get out of line in the darkness without her deviation being accurately observed. This, of itself, would account for the collision. If she sheered also, the explanation is even more satisfactory. I think, therefore, that the Plymouth was solely at fault because she failed to give the Williamsport sufficient room to execute the maneuver of passing starboard to starboard, to which the Plymouth herself agreed. There is no doubt in my mind that there was plenty of space and depth for the Plymouth to have gone sufficiently to the eastward to have allowed the Williamsport to pass with safety; and the fact that she did not do so is, I think, to be attributed to a disinclination to take the necessary trouble, and to a willingness that the Williamsport should encounter the risk of the shoal. I do not mean that she deliberately and willfully crowded the Williamsport to the point where the collision occurred; but I do mean that, as she had ample notice that the tows were to pass starboard to starboard, and as she could easily have given more room to the approaching vessel to execute the maneuver in safety, she was at fault for not doing her part to afford the proper margin. She was bound to take account of the facts that her barges were light, and that the tide was setting strongly to the westward; these reasons only made it more imperative that she should do all that lay in her power to diminish the risk to which the Williamsport was undoubtedly exposed, even under the most favorable circumstances. To say the least, the Plymouth was negligent, and it may also be that she only made way grudgingly, instead of co-operating willingly toward the success of the maneuver to which she was herself committed.

I see nothing in the conduct of the Williamsport that was blameworthy. It is urged that she was at fault for disregarding article 25:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

If this slue is to be considered a narrow channel, it may be that if the Williamsport had originally proposed to pass in contravention of the rule (as was the case in *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751) she would have been to blame, but she did not make the proposition. This came from the *Piedmont*, was acquiesced in by the *Plymouth*, and, if passing to starboard was a fault, the *Plymouth* was equally to blame with the other vessels. But the Williamsport was confronted with a difficult situation. On the one hand, she was asked to accept the risk of a starboard course, and upon the other she was certain to be held at fault if she crossed the *Piedmont's* signal and disaster should result. It was so held in *The Clifton* (D. C.) 14 Fed. 586, and in *The Orange*, 64 Fed. 141, 13 C. C. A. 680, affirmed in 69 Fed. 848, 13 C. C. A. 680. Other cases throwing some light on the present controversy are *The Garden City* (D. C.) 19 Fed. 529; *The Saunders* (D. C.) 19 Fed. 118; *The George L. Garlick* (D. C.) 91 Fed. 920; *The Nutmeg State*, 67 Fed. 556, 14 C. C. A. 525; and *The James Bowen* (D. C.) 52 Fed. 510. The distance that separated the approaching tows from the Williamsport seemed to be ample to permit the proposed maneuver to be executed safely, and the distance was ample if the *Plymouth* had done her part and had taken her barges a few yards further to the eastward. She had a long and unwieldy tow, and was bound to use extreme care in order to avoid collision. *The Samuel Dillaway*, 98 Fed. 138, 38 C. C. A. 675; *The Admiral Schley*, 131 Fed. 433, 65 C. C. A. 417, affirming (D. C.) 115 Fed. 378. Such care she failed to exercise, I think, and the result is chargeable to her negligence. The special circumstances are sufficient, in my opinion, to exonerate the Williamsport from blame.

The conclusion that the collision was solely due to the *Plymouth's* fault is re-enforced by another consideration. It appears by the uncontradicted evidence that, although the master of the *Plymouth* knew that the collision had taken place, he deliberately disobeyed the rule laid down by Act Sept. 4, 1890, c. 875, § 1, 26 Stat. 425 (U. S. Comp. St. 1901, p. 2902):

"In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound.

"If he fails so to do and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default."

Instead of standing by the Williamsport, the master of the Plymouth proceeded without stopping and took his remaining barge to a point three miles northwest of the Handkerchief lightship—which is nearly five miles southwest of the Shovelfull lightship—and anchored her there, returning afterwards to the scene of the disaster. This, I think, was extraordinary conduct. The chart shows distinctly that there was plenty of suitable anchorage ground in the immediate vicinity of Pollock Rip lightship, where the barge would have been entirely out of the course of other vessels. This ground could have been reached in a short time, and the Plymouth would then have been free to discharge her statutory duty. But she chose to take the unusual step of towing the barge a distance of about 11 miles before bringing her to anchor, without any reasonable cause for such a proceeding. She did not return until daylight, several hours after the collision, and by that time the Williamsport had drifted to the northwest of the Gas buoy, and had sunk. Her crew had taken to the boats, and were on board the Pollock Rip lightship, while the Paxinos was aground on the shoals some distance away. It may be that the Plymouth would not have been able to render much assistance if she had stayed in the neighborhood of the distressed vessels, but this is not a sufficient excuse for her failure to perform a clear duty. She did not know what help might be needed, and did not make the slightest effort to discover. For all she knew, the lives of a crew might be in peril, but she deliberately left them to take their chances, while she pursued a leisurely voyage to a distant anchorage. It is not easy to explain the master's conduct except upon the theory that he desired to use up the hours until daylight should come, and should thus put his own safety beyond doubt.

Of course, as was said in *Boston Towboat Co. v. Winslow*, 76 Fed. 597, 22 C. C. A. 329:

"The duty of the master to stand by and to do the other things named in the statute is a qualified obligation. 'If and so far as he can do so without serious danger to his own vessel, crew and passengers' is the chief condition."

The court goes on to declare that the master—

"must, as well as he can in the emergency, regard and weigh existing conditions, and ought not to be held culpable for an error of judgment. The court's duty is to ascertain and consider the state of affairs under which he acted. It will not accept the excuse that, in his judgment at the time, the safety of his vessel and crew and passengers forbade his standing by, if the evidence shows that he hastily and recklessly, or without apparent necessity, slipped away, or willfully concealed facts he was bound to disclose. He must act with the coolness and courage demanded by his position and rank, and must be inspired with an active sympathy for those who are in peril and distress. If he has shown proper care and spirit in forming his judgment, he ought not to be condemned because another would have acted differently, or because later developments show that he was too cautious."

So, also, in *The Hercules*, 80 Fed. 1001, 26 C. C. A. 304, the Court of Appeals of the Fourth Circuit held as follows:

"We construe this statute to mean that, if a master of a vessel that has been in collision with another fails to stay by her and shows no reasonable cause for such failure, the law will presume that the collision was caused by some negligent act or omission on his part, and, in the absence of proof to

the contrary, will fasten upon him the responsibility of the collision. It puts upon him the burden of showing that he was free from fault. It assumes that one who fails to offer assistance to those whose distress is caused by him is presumably at fault in the act which caused the distress, and it denounces pains and penalties against his inhumanity, and holds his ship responsible for the pecuniary fine; but it does not condemn without a hearing. The obligation imposed is not unqualified; it is carefully guarded by conditions; it permits presumptions to be rebutted by proofs, and it is 'only in the absence of proof to the contrary' that his responsibility is made absolute."

In other words, the presumption of fault arises where there is an unexplained failure to stand by. But this presumption is not conclusive; it may be rebutted by sufficient proof to the contrary, although it shifts the burden to the offender, and in a doubtful case is sufficient to determine the controversy. In the present situation, the presumption is not needed; the evidence shows, I think, that the Plymouth was at fault; but the correctness of this conclusion is certainly strengthened by the unreasonable conduct of her master.

A decree may be entered in favor of the libellant, with costs.

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STARK v. NORTHWESTERN NAT. LIFE INS. CO.

(Circuit Court, D. Minnesota, Fourth Division. February 20, 1909.)

INSURANCE (§ 678\*)—REINSURANCE—RIGHTS OF POLICY HOLDERS REINSURED.

A contract of reinsurance between two life insurance companies was expressly conditioned to be subject to the articles of incorporation and by-laws of the reinsuring company, as they then existed or might thereafter be amended. Thereafter the reinsuring company duly enacted a by-law reducing the benefits to be paid on a certain class of policies to the amount of insurance actually paid for according to standard tables, and at once notified all policy holders affected by this by-law of its enactment and effect. *Held*, that a policy holder of the reinsured company, who accepted the reinsurance and after notice of the by-law continued to make premium payments to the reinsuring company without dissent, was bound by this by-law, and the benefits recoverable under her contract were limited to the amount fixed by the by-law.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 678.\*]

(Syllabus by the Court.)

At Law.

This is an action instituted by L. J. Stark (as assignee of beneficiaries in a life insurance policy) against the defendant to recover on a policy of insurance issued in April, 1901, by the Northwestern National Life Insurance Company, of Madison, Wis. The Wisconsin company was then organized and existing under chapter 270, p. 460, Laws Wis. 1899, and the policy was issued expressly subject to the provisions of that law. In June, 1901, the defendant company was reincorporated under the provisions of chapter 178, p. 233, of the Laws of Minnesota of 1901, to do business on the stipulated premium plan, with power to reinsure the members and risks of other companies, and by its articles of incorporation its board of directors was authorized to assume and reinsure the risks and members of other companies and to "make and amend such by-laws as they may deem necessary and adopt rules for its own government." By the terms of the by-laws of defendant which were in force prior to August, 1901, and continuously thereafter, it was provided that the defendant had power "to adjust or readjust rates of assessment or premiums of insured members, paying a net rate of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



less than the rate indicated by the table of rates for a policy of the same kind or class, based upon the American Experience Tables of Mortality and 4 per cent. interest, at any age or time, so that each member shall be required to pay, and shall pay, his equitable share of death claims, expenses, and other liabilities," and, further, "to fix the amount and rate of premiums upon contracts hereafter issued or heretofore issued or assumed by the company, and especially to make such amendments to the by-laws as may be needed to enable the company to carry out contracts heretofore issued or assumed by it." The by-law further provided that all policies and certificates issued or assumed by defendant should be construed and governed only by the laws of the state of Minnesota. Chapter 178, p. 233, Laws of Minnesota for 1901, under which defendant operated, required a valuation of its policies upon the basis of the reserve required by the American Experience Tables of Mortality and 4 per cent. interest, or Combined Experience Tables and same rate of interest, and required defendant to have and maintain the standard of solvency provided and required by those tables.

On August 29, 1901, an agreement was entered into between the Wisconsin company and the defendant, by the terms of which it was agreed that defendant should reinsure the members of the Wisconsin company upon the terms and conditions provided in such agreement; defendant being designated in the agreement as "first party" and the Wisconsin company "second party." This agreement contained the following clause: "Now, therefore, the party of the first part, for a good and valuable consideration by it received, and in consideration of the execution hereof by the party of the second part, and the fulfillment by the party of the second part of the terms and conditions herein provided, and upon the terms and conditions herein provided, and not otherwise, doth hereby agree to receive, and doth hereby receive, into its membership as of this date all the living members, policy holders, and certificate holders of the party of the second part, who upon this date are, and by the books of the party of the second part appear to be, members thereof in good standing, \* \* \* and doth hereby assume each and every of the present certificates and policies of the party of the second part issued by it, \* \* \* subject, however, in each case, to the terms and conditions of the particular contract of each member, and upon the terms, conditions, stipulations, and agreements herein contained, and not otherwise; \* \* \* and the assuming of each policy or certificate by the party of the first part is expressly subject to the provisions of the articles of incorporation and the by-laws of the party of the first part as the same now exist, or as they may hereafter be amended, and also subject to the laws of the state of Minnesota as they now exist or as may hereafter be amended, all whereof constitute and form a part of each certificate and policy hereby assumed."

On September 2, 1901, defendant company issued a circular letter advising the members of the Wisconsin company of the agreement for reinsurance. That letter contained the following statement: "Under the provisions of this contract the Northwestern National Life Insurance Company of Minneapolis, Minn., assumes your policy or certificate of insurance, subject to its terms and provisions in all respects, thereby constituting you a member of this company, subject to its articles of incorporation, by-laws, and the laws of the state of Minnesota." On September 3, 1901, defendant sent to the insured under the policy here in suit the following certificate: "This is to certify that the Northwestern National Life Insurance Company of Minneapolis, Minn., did, upon the 29th day of August, 1901, by a contract of consolidation or reinsurance, receive into its membership as members, and did reinsure, all living members of the Northwestern National Life Insurance Company of Madison, Wis., who upon said date appeared upon the books of said last-named company to be, and who actually were, members in good standing thereof and therein, including policy No. H4295 on the life of Mary R. Stark, Johnson's Creek, Wis., subject to their several policies or certificates issued by said company, of Madison, Wis., and to the terms and conditions of said contract of reinsurance, it being expressly stipulated that all of said contracts are to be construed as contracts of the state of Minnesota, and in accordance with the laws of said state, and are assumed subject to the by-laws and articles of incorporation of the reinsuring company as they now or hereafter

exist, and to the laws of the state of Minnesota, and especially to chapter 178 of the Laws of 1901."

At the time of reinsurance with the defendant, the insured was paying bimonthly on her "H" policy, issued by the Wisconsin company, \$12.30, which payment was continued up to the death of the insured. On November 13, 1902, the defendant passed a by-law by the terms of which it was provided, in substance, that each policy issued by the Northwestern National Life Insurance Company of Madison, Wis., and designated by said company as an "H" policy, which provided for annual renewable term insurance, requiring payment of an annual, semiannual, quarterly, or bimonthly premium of a less amount than was required by the Combined Experience Tables of Mortality with 4 per cent. interest for annual renewable term insurance was re-rated and required to pay a larger premium than specified in the policy, and provided specifically the amounts at attained age rate which should be paid on January 1, 1903, and each year thereafter. The by-law further provided that the insured would be allowed to make payments according to the terms of his policy, but that in such case his policy would be proportionately commuted and his insurance proportionately decreased, and that any policy upon which premium payments were not made as required thereby should become null and void, and all payments made thereon forfeited to the defendant; that the adoption of the by-law was for the purpose of perfecting an equitable adjustment of premium payments among the policy holders, and to enable the company to preserve and maintain its standard of solvency and to fully meet its reserve and liability under the law. A table of rates made applicable to each policy was set out in the by-law, and provision made therein for the giving of notice to each policy holder affected by the by-law.

On January 1, 1903, a printed copy of this by-law was mailed to the deceased and all others of the policy holders carrying this class of policies. Again, on February 4, 1903, defendant wrote to deceased, explaining in detail the operation and application of the by-law to all policies affected by it. These letters gave full explanation of the effect of the by-law, and called attention to the laws of Wisconsin and Minnesota respecting the matter, and the duty of defendant to maintain its reserve, and the necessity of passing the by-law in order to do the same, and further explained that the insured had the privilege of paying the rate specified in his policy and having the same scaled down, or the larger rate specified in the notice and by-law. Full explanation was made as to the effect of each payment. Again, in June, 1903, defendant wrote to deceased a personal letter, advising her in detail as to the application of the by-law to her policy, and the amount of insurance for which she was actually paying, and the amount which would be paid in case of her death. The insured received these communications, and made no objection, and continued to pay the premiums specified in her "H" policy with the Wisconsin company up to the time of her death in April, 1907. The payments required by the by-law of November, 1902, conformed to the payments fixed by standard tables plus a reasonable expense loading.

Plaintiff sued to recover \$2,500, the face of the certificate. Defendant, resting upon the provisions in the certificate of reinsurance and the amended by-law and the acceptance thereof by the deceased, admitted a liability to plaintiff of only \$1,005.13. The facts were undisputed. At the close of the evidence plaintiff moved for a directed verdict of \$2,500. Defendant conceded a liability for, and that plaintiff was entitled to a verdict for \$1,005.13, that being such a proportionate part of the face of the policy as the premium paid by the deceased in 1907 bore to the premium required by the by-law aforementioned to be paid during that year at attained age rate.

Grant Van Sant and George C. Rogers, for plaintiff.  
John T. Baxter and William A. Kerr, for defendant.

PURDY, District Judge (charging the jury, the facts being as above stated). When you were chosen as jurors in this case you and each of you took an oath to try the case according to the evidence and the law as it should be given to you by the court. In the trial of jury

cases it is the province of the jury to pass upon all questions of fact, while it is the duty of the court to pass upon all questions of law which may arise during the progress of the trial. Now it not infrequently happens that the evidence produced by the respective parties to an action at law presents no disputed question of fact for the jury to pass upon. In such a case it becomes the duty of the court to withdraw the case from the consideration of the jury, and to direct a verdict for either the plaintiff or the defendant, according as the law of the case may be with one or the other of the parties to the suit. Now, gentlemen of the jury, the court has with you heard the evidence, and has reached the conclusion that there exists no substantial dispute as to the facts in this case, and that a verdict must be directed in favor of the plaintiff, though not for the full amount which he seeks to recover. The court assumes the full responsibility for its action in withdrawing this case from your consideration, and, if the court is in error in its conclusion respecting the character of the evidence submitted, either party feeling aggrieved thereby is at liberty to have such error corrected by the Circuit Court of Appeals upon a writ of error prosecuted to that court. In my judgment, this case is ruled by the principles of law enunciated in the case of *Northwestern National Life Insurance Company v. Gray*, 161 Fed. 448, 88 C. C. A. 430, and other similar cases which have been cited by counsel for defendant. The plaintiff, as a matter of law, is bound by the terms of the contract of reinsurance upon which he brings this action, as well as by the terms and conditions of the by-laws of the defendant company passed on the 13th of November, 1902.

You are accordingly directed to return a verdict in favor of the plaintiff and against the defendant for the amount which the defendant concedes to be due and owing to the plaintiff under the contract of reinsurance, namely, \$1,005.13.

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#### THE HATHOR.

(District Court, S. D. New York. September 24, 1908.)†

#### **COLLISION (§ 115\*)—CHARTERED VESSEL—LIABILITY OF CHARTERER—NEGLIGENCE OF PILOT.**

Where a chartered vessel is being operated by the owner on the charterer's business, and she is under the temporary command of a Sandy Hook pilot, provided and paid by the charterer under the agreement, but the navigation of the vessel being under the general control of the owner, in case of collision, the latter is not entitled to have the charterer brought in under the rule to respond for the damages. If the vessel was negligent while under the charge of a compulsory pilot, she would be in fault but that rule does not extend to personal actions. In such cases a compulsory pilot cannot be deemed the agent of either the owner or of the charterer.

[Ed. Note.—For other cases, see *Colliston*, Cent. Dig. §§ 244-247; Dec. Dig. § 115.\*]

(Syllabus by the Judge.)

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Received for publication January 16, 1909.

Wallace, Butler & Brown, for libellant.  
 Convers & Kirlin, for the Hathor.  
 Wheeler, Cortis & Haight, for Munson Line,

ADAMS, District Judge. This action was brought by George L. Hammond & Company, as owners of the barge Lillie C. Hart to recover the damages she received through a collision with the steamship Hathor in the East River on July 18, 1905. The claimants of the Hathor filed an answer denying liability and a petition to bring in the Munson Steamship Line, alleging that the charter party contained the following provisions:

"1. That the owner shall provide and pay for all provisions, wages, and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine room, and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

2. That the Charterers shall provide and pay for all the Coals, Fuel, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the captain, officers or crew), and all other Charges whatsoever, except those before stated."

The petition further alleged:

"Fifth: By the terms of the said charter party the Munson Steamship Line undertook to provide and pay for all pilotages and towage.

Sixth: Under the above mentioned charter party the Munson Steamship Line determined the ports and places to which the steamship Hathor should proceed to discharge her cargo.

Seventh: After the arrival of the steamship Hathor at the port of New York, on the occasion in question, pursuant to the terms of the charter party the Munson Steamship Line assumed the direction and control of the discharge of her cargo, and on the 18th of July the steamship Hathor which had been anchored near the Statue of Liberty, was ordered by the Munson Steamship Line to proceed to Long Island City to discharge her cargo.

Eighth: The Munson Steamship Line on the date aforesaid sent on board the Hathor a pilot who took entire charge of the navigation of the steamship Hathor from her said place of anchorage to her said discharging berth."

The Munson Line excepted to the petition as follows:

"First: In that it does not set forth a cause of action against the said Munson Steamship Line.

Second: In that it does not allege facts sufficient to show that the Munson Steamship Line was responsible for the acts or defaults of the pilot, mentioned in the petition.

Third: In that it does not allege facts sufficient to show that said pilot was the agent of the Munson Steamship Line, or that the Munson Steamship Line was responsible for negligence on the part of said pilot in navigating the Steamship Hathor."

The question presented by the exceptions is whether, under the provisions of the charter, the employer of the pilot, if the vessel was in fault, is responsible for the effects of the collision.

The principal contention of the steamship is that as this court has held a charter of this character to be a demise (*Golcar Steamship Co. v. Tweedie Co.* [D. C.] 146 Fed. 563) it follows, that while it remains the duty of the owner to navigate the vessel between ports generally, business of handling the vessel in port from the time the pilot comes on board until he leaves when she goes out, is that of the time

charterer and he is consequently responsible for any negligence of the pilot.

With respect to the Golcar Case, in the commissioner's report, which was approved by the court, it was said (page 569):

"By the weight of American authority, it seems to me that the charter in this case operated as a demise of the ship, but with a continued responsibility on the part of the owner for her proper navigation and maintenance."

It is also provided in this form of charter:

"8. That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the Charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide."

On the question of agency, it would be anomalous if the pilot, under the circumstances, should be deemed the agent of the charterer so as to make it responsible for the defective navigation of the vessel. The case seems to be covered by the language of Judge Hough in *The Santona* (D. C.) 152 Fed. 516, 518, a charter similar in form, where he said:

"Under the very ordinary form of time charter involved in this cause, it shocks knowledge common to all men acquainted with maritime business to say that the owner has surrendered the possession or control or command or navigation of his ship."

I agree with this, but in my view a stronger reason for rejecting the claim lies in the fact that the pilot was compulsorily employed.

It is said by the parties that the effect of such pilotage is not involved here because the case is not strictly within the statute, as these services of the pilot were not rendered while the vessel was coming in from sea, that is, he was not piloting "to or from the port of New York by way of Sandy Hook," but I have no doubt if any further facts were necessary than those contained in the petition to establish that the vessel was legally in charge of a pilot, they would be made to appear by the testimony and presumption arising therefrom. It is fairly well understood that pilots in rendering their services do not leave the vessels when they first anchor but remain on them until their wharves are reached.

The pilotage laws of New York of 1854 and 1857, re-enacted in the statute of 1882 (Laws 1882, p. 512, c. 410, § 2120), provide as follows, viz.:

"Any person not holding a license as pilot under this act, or under the laws of the State of New Jersey, who shall pilot or offer to pilot any ship or vessel to or from the port of New York by the way of Sandy Hook, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the board of commissioners of pilots the sum of one hundred dollars."

These statutes have been authoritatively held to be compulsory and that in an action at common law, a shipowner is not liable for injuries inflicted exclusively by the negligence of a pilot so employed on his

vessel—*Homer Ramsdell Co. v. Comp. Gen. Trans.*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155. In the opinion it was said:

"In *The China*, affirming the decision of the Circuit Court in admiralty, the liability of a vessel in rem for a collision from the fault of a compulsory pilot was put upon the maritime law, the court saying: 'The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law.' 'According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings.' 'The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien.' 7 Wall. 68, 19 L. Ed. 67.

Such was the view of the case taken by the whole court in *Ralli v. Troop*, in which the majority of the judges said of it: 'That decision proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as to the representative of the owners of the ship and cargo;' 'but upon a distinct principle of the maritime law, namely, that the vessel in whosoever hands she lawfully is, is herself considered as the wrongdoer liable for the tort, and subject to a maritime lien for the damages.' 157 U. S. 402, 15 Sup. Ct. 657, 39 L. Ed. 742. And the dissenting judges said that in *The China* 'this court held, contrary to the English, but conformably to the continental authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, although it was admitted that, if the action had been at common law against the owner, and probably also in personam in admiralty, there could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner.' 157 U. S. 423, 15 Sup. Ct. 671, 39 L. Ed. 757.

In none of the cases in which actions at law have been maintained against the owner of a ship for the fault of a pilot was the owner compelled to employ the pilot."

It is established that an ordinary pilot may proceed in rem against the vessel or in personam against the owner or master (*Benedict's Admiralty*, 162) but in the latter case, it necessarily proceeds upon the theory of agency and does not apply in cases of compulsory pilotage where no agency exists between the parties.

In actions in rem, no difficulty occurs because a faulty colliding vessel is liable for the results of her negligence but it seems that in a case where she is in charge of a pilot compulsorily employed, the owner can not be held. If that is so in the case of an owner, how can it be otherwise if the pilot is in the employ of the charterer? The latter was certainly in no nearer relation to the pilot than an owner would ordinarily have been and I think it should not be called upon to meet this claim for damages.

Upon either theory herein outlined the result is the same.

The exceptions are sustained and the petition dismissed as to the *Munson Line*.

## UNITED STATES v. WHEELING &amp; L. E. R. CO.

(District Court, N. D. Ohio, E. D. June 16, 1908.)

## 1. STATUTES (§ 143\*)—AMENDMENT—VALIDITY.

Where an amendatory act merely extends the operation of the original act to additional subjects, the amendatory act, though unconstitutional in part, does not affect the validity of the original act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 211; Dec. Dig. § 143.\*]

## 2. STATUTES (§ 143\*)—AMENDMENT.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), regulating interstate railroad equipment, in so far as it effected equipment, used in intrastate commerce in connection with that used in interstate commerce, was not rendered invalid by the fact that Amendatory Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), construing and applying the act of 1893, was unconstitutional in part.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 211; Dec. Dig. § 143.\*]

## 3. CARRIERS (§ 37\*)—INTERSTATE COMMERCE—REGULATION—EQUIPMENT.

In an action against a railroad company for moving a car in connection with interstate commerce in violation of Safety Appliance Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), it is no defense that the coupling became defective or the grab iron was lost so recently before the time mentioned in the petition as to make it impossible in the exercise of ordinary care to replace or repair it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.\*]

## 4. CARRIERS (§ 37\*)—SAFETY APPLIANCE ACT—CARS NOT BEARING INTERSTATE COMMERCE.

Where a railroad car is regularly used in the movement of interstate commerce, but at the time when a defect constituting a violation of the safety appliance act (Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174] as amended by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), is discovered is empty and not being used for interstate commerce, but is being hauled in a train containing a car loaded with interstate commerce, such car and every car in the train is impressed so far as the requirements of the act are concerned with an interstate character and must be equipped as provided by such act.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.\*]

William L. Day, U. S. Atty., Thomas H. Garry, Asst. U. S. Atty., and Luther M. Walter, Sp. Asst. U. S. Atty.

Squire, Sanders & Dempsey, for defendant.

TAYLER, District Judge. The petition in this case in 23 causes of action seeks to recover from the defendant penalties for alleged failures to equip certain cars with couplings and grab irons as required by what is known as the "Safety Appliance Act." The jurisdictional facts alleged in order to bring the cars referred to within the embrace of the federal act are: (1) That the car was itself at the time used in interstate commerce, being loaded with some kind of freight originating outside of the state of Ohio, and being carried within it or being destined to some point outside of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the state; or (2) that it was a car which, being one regularly used in the movement of interstate commerce, was at the time of the violation being hauled in a train containing interstate commerce, one car in the train with it, as for example, Illinois Central 35572, containing baled hay consigned to a point within the state of West Virginia. In the counts referred to by this second proposition, some of the cars are described as being empty and some as being loaded, but it is not charged that the loaded cars contained interstate traffic. I see no distinction, so far as this case is concerned, between the two.

It is objected: (1) That the act is unconstitutional under the rule laid down in the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. (2) That assuming that the cars were originally provided with the safety appliances which the law requires, it does not appear that the condition in which they were at the times named in the petition, respectively, was due to any want of ordinary care. (3) That in the case of empty cars, or cars not loaded with interstate commerce, it does not appear that they were at the time of the existence of the defects being used in interstate commerce. These objections will be taken up in their order.

The law was originally passed March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), and, with an amendment or two later adopted and unimportant, so far as this question is concerned, an amendment was passed on the 2d of March, 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), which provided that the act of 1893, with its amendments, should "be held to apply to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type" and "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles, used on any railroad engaged in interstate commerce." It is claimed that, since the act of 1903 undertakes to make the act of 1893 apply to trains, locomotives, and so forth used on any railroad engaged in interstate commerce, it extends the operation of the act to subjects over which Congress has no control, and that this is exactly the effect of the decision of the Supreme Court in the Employers' Liability Cases. Many answers suggest themselves to this claim. If the act of 1903 had been incorporated in the original act of 1893, and if it be true that the scope which the act covered was larger than that which Congress had power to legislate upon, and in consequence of that the act should be held unconstitutional because of the impossibility of separation of the unconstitutional part from the constitutional part, still the contention of counsel would not be effective in this case. We have here the act of 1893 in full force and effect with its provisions in no wise diminished or curtailed by the act of 1903. That act of 1903 is as the Supreme Court of the United States declared in *Johnson v. Railroad Company*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, affirmative and declaratory, and, in effect, only construes and applies the former act. Now, if the former act is construed and applied by a later act (which, of course, involves the proposition that it remains unrepealed), and the later act is unconstitutional,



in that it undertakes to give the former act a wider application than Congress had power to give to it, by what sort of reasoning can it be contended that the former act falls to the ground because it has had plastered upon it by Congress an unconstitutional construction and application? The mere statement of this proposition carries with it its answer and exhibits its unreasonableness.

But much more may be said in favor of the propriety of this legislation, having in view the decision of the Supreme Court in the Employers' Liability Cases. It is true that the Supreme Court in that case held the employers' liability act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]) unconstitutional because it made the railroad company liable to any of its employés, without restricting the liability to those who were engaged in interstate commerce; but a parity of reasoning would not require that we should say the same thing of the safety appliance act because it refers to all cars used on any railroad engaged in interstate commerce. It seems to me that in the respect complained of there is no analogy between the decision of the Supreme Court in the Employers' Liability Cases and the theory of the defendant's counsel as to the constitutionality of the safety appliance act. An employ   of a railroad company engaged in interstate commerce does not merely because he is such employ   sustain the same relation to interstate commerce as a car used on a railroad engaged in interstate commerce sustains to interstate commerce on that road. Certainly the federal government owes no duty to, and has no authority over, an employ   of a railroad which is engaged in interstate commerce, if the employ   himself is not engaged in the work of interstate commerce. That employ   is subject in respect to his relations with the railroad company to the laws of the state in which the service is performed. There is no reason why the power of the state should not be sufficient for his protection, or why the federal government should interfere with respect to that or any other matter relating to that employ   in respect to his work with the railroad company, so long as it does not relate to the interstate commerce of the company. But this is not true of a car used by a railroad engaged in interstate commerce. All of the cars used by a railroad engaged in interstate commerce in the natural course of their use are instrumentalities of interstate commerce. Whether they carry interstate traffic themselves or are hauled in a train which contains interstate traffic the effect is the same. They stand in a certain and important relation to that interstate commerce over which Congress has control; and it is quite apparent that Congress in undertaking to determine the manner in which interstate commerce shall be carried on, and especially in making effective the useful and beneficent purpose of providing for the safety of employ  s, would necessarily have a regard for the cars which the interstate commerce railroad had in use. And thus, discovering a very marked and practical distinction between a car used by an interstate commerce railroad and a person in the employ of an interstate commerce railroad, we see how one in the nature of things becomes properly the subject of federal legislation, while the other, depending upon the character of his work, may

or may not become properly the subject of federal legislation. After all, on this subject of the constitutionality of the act, it seems to me that that question has been fully answered by the determination of the Supreme Court in *Johnson v. Railroad Company*, *supra*, wherein it is declared that this act of 1903 only construes and applies the act of 1893, and does not add any new affirmative provision.

As to the second objection, whatever may be the right of the railroad company to defend against the claim made in a suit of this kind by saying that the coupling became defective or the grab iron lost so recently before the time named in the petition as to make it impossible in the exercise of ordinary care to replace or repair, that is purely a matter of defense if it ever can be asserted at all. It cannot be urged in support of a demurrer to the cause of action. If it were not so, it would be practically impossible for proof to be made in any case of a violation of the law. There are approximately two million cars in use by railroads in this country, and, if the contention referred to is sound, it would be necessary in order to sustain a cause of action in cases under this act that proof be made that the appliance was in a condition of unrepair at one time, that it continued to be in that condition of unrepair or in a developing condition of greater unrepair up to another time, the lapse of the intervening time being so great as to show a want of ordinary care on the part of the railroad company. In the meantime the very thing to prevent which the law was passed might occur, to wit, the injury of an employé. The practical administration of justice would be denied, and the real enforcement of the law be impossible if the construction contended for was sound. But it has been held in several cases that, even as a defense on the merits no degree of care, no absence of negligence can excuse for the failure to perform a duty unqualifiedly imposed by statute. And in the recent case of *Railway Company v. Taylor*, Adm'x (decided May 16th of the present year by the Supreme Court) 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, the court very pointedly lays the unqualified responsibility upon the railroad for such a condition of unrepair.

As to the third objection: What shall we do in the case of a car which is regularly used in the movement of interstate traffic but at the time when the defect is known to exist is itself not being used for carrying interstate commerce, but is being hauled in a train containing a car loaded with interstate commerce? What is the purpose of the law? Here is a train which is engaged—at least part of it—in interstate commerce, and so long as that is true every car in the train is impressed, so far as the requirements of this act are concerned, with an interstate character. It is a part of the current. The interstate car cannot move except with relation to the empty car. The empty car may at any moment be coupled to the interstate car. A brakeman engaged in performing some duty in respect to the interstate car may be compelled to pass over or use a grab iron on the empty car or couple the empty car to the interstate car. Endless confusion would arise if any distinction was made under such conditions between a car loaded with interstate traffic and an empty car regularly used in the movement of interstate traffic, but at the time unloaded and coupled

to another car actually in use in the movement of interstate traffic. Of course, the same thing must be said of the loaded car, whatever the character of the freight it carries, if it is a car regularly used in the movement of interstate traffic.

It seems to me that from every point of view the objections raised to the several causes of action are not well grounded.

The demurrer is overruled.

NORTON et al. v. COLUSA PARROT MINING & SMELTING CO. et al.

(Circuit Court, D. Montana. October 12, 1908.)

No. 262.

1. WATERS AND WATER COURSES (§ 75\*)—POLLUTION OF STREAM—INJUNCTION—PARTIES.

Where several persons who own several interests in property suffer injury of like character from the illegal pollution of the stream from which all take water, they may unite in a suit in equity to obtain an abatement of the nuisance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 66; Dec. Dig. § 75.\*

Pollution of water courses, see note to Travis Placer Mining Co. v. Mills, 37 C. C. A. 538.]

2. NUISANCE (§ 30\*)—ABATEMENT—INJUNCTION—DEFENDANTS.

Where several persons are alleged to have contributed and are continuing to contribute to the same nuisance on account of which plaintiffs suffer, all such contributing persons may be joined as defendants in a suit to restrain the continuance thereof.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 30.\*]

3. WATERS AND WATER COURSES (§ 75\*)—POLLUTION—INJUNCTION—DAMAGES.

In a suit in federal courts by several riparian proprietors to enjoin the pollution of the stream as a nuisance, complainants could not in addition recover damages for past injury to their land, having a complete and adequate remedy at law therefor.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 75.\*

Restraining pollution of water courses, see note to Travis Placer Mining Co. v. Mills, 37 C. C. A. 544.]

In Equity. On demurrer to bill.

Complainants, owners in severalty of divers parcels of farming land, together with the water rights belonging thereto, seek to enjoin the defendants, engaged in the operation of smelting plants for the treatment and reduction of ores, from impregnating, polluting, and poisoning the waters of certain tributaries of the Deer Lodge river, from which stream complainants obtain water for the irrigation of their farms and for domestic purposes. In their bill, complainants also pray for damages for injury alleged to have been done to their lands in the past by the pollution of the water of the stream as a consequence of the smelter operations of the defendants.

Separate demurrers to the bill were interposed by each of the three defendant companies on the following grounds among others: (1) That there is a misjoinder of parties complainant, in that the interests of the respective complainants are separate and independent, and not common or joint. (2) That there is a misjoinder of parties defendant, in that the acts alleged to have been committed by the defendants were not committed, or claimed to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have been committed, in common or jointly by the defendants, but were separate and independent acts committed by each defendant. (3) That the said bill is multifarious, in that it attempts to unite legal and equitable causes of action.

John A. Shelton and T. J. Walsh, for complainants.

W. M. Bickford & Geo. F. Shelton for defendant Colusa Parrot Mining & Smelting Co.

C. F. Kelley and Forbis & Evans, for defendants Colorado Smelting & Mining Co. and Butte & Boston Consol. Mining Co.

HUNT, District Judge (after stating the facts as above). After study of the questions presented by defendants' demurrers, my opinion is that the principles which must control are these: Where several persons who own several interests in property suffer injury of like character from one and the same nuisance, say the illegal polluting of a stream from which all take water, they may unite in an action in equity. Such persons have a community interest in obtaining the abatement of the alleged nuisance. In the many well-considered opinions upon the subject, I find the doctrine succinctly stated by Justice Pigott in *Beach v. Spokane R. & W. Co.*, 25 Mont. 379, 65 Pac. 111. Further, it is an established rule of equity that where several persons are alleged to have contributed, and are continuing to contribute, to the same general nuisance, on account of which complainants suffer, all such contributing persons may be joined as defendants. The clear reasoning of Judge Sawyer in the *Debris Case* (C. C.) 16 Fed. 25, satisfies me that this rule is sound and just. See, also, *Story's Equity Practice*, § 271, note. From these views it follows that these several complainants can properly unite in a suit against the several defendants to abate the nuisance which they allege exists, and, in so far as they have done so, their bill states ground for equitable relief.

But, in their same bill, they also ask for damages for past injury done by the past maintenance of the nuisance, and thus have proceeded upon the theory that in the federal courts, where one sues to enjoin the maintenance of a nuisance, for example, polluting a stream so as to injure the lands of farmers below the point of pollution, he may, in the same suit in equity, also recover damages for the past injury done to his land. As this contention is vigorously challenged by the several defendants who have interposed separate demurrers, the court must needs decide a question which is of very high importance to the profession, and upon which there is neither a positive ruling by the Supreme Court of the United States, nor complete uniformity of view among the courts of England or among the courts or text-writers in America.

Undoubtedly, it has been held by many of the courts of the states that it is permissible in equity for the court exercising original jurisdiction to entertain a bill for the abatement of an alleged nuisance, and to go on and grant not only the relief of abating the nuisance, if proven to exist, and to be of a continuing nature, but also to award satisfaction for what has been done, or, in other words, to award damages. These decisions are, for the most part, placed upon the argu-

ment that there is but one cause of action—the nuisance—and that equity, in order to avoid a multiplicity of suits, will regard the award of damages as incidental, and so give two forms of relief, even though one kind is legal in character, to which the sufferer from the nuisance may be entitled. *Yolo County v. Sacramento*, 36 Cal. 193; *Astill v. South Yuba Water Co.*, 146 Cal. 55, 79 Pac. 594. An elaborate discussion will be found in *Pomeroy's Equity Jurisprudence*, § 181 et seq.; *Brickner, etc., Mills v. Henry*, 73 Wis. 229, 40 N. W. 809; *McCarthy v. Gaston Min. Co.*, 144 Cal. 542, 78 Pac. 7; *Lynch v. Met. Railway Company*, 129 N. Y. 274, 29 N. E. 315, 15 L. R. A. 287, 26 Am. St. Rep. 523; *Henderson v. N. Y. C. Railroad Co.*, 78 N. Y. 425.

But after carefully considering the question and the various decisions, my judgment is that it is by no means accurate to say that recovery of damages in such actions for past injury done is merely or properly incidental to the abatement of the primary wrong, the maintenance of the nuisance. Damages for a past overflow seem to me wholly separate from the injunctive relief asked, and for them the law affords a perfectly plain and adequate remedy, in a different jurisdiction. This being so, the fundamental principle that if the remedy sought be a legal one, and is plain and complete, a jury is essential unless waived, controls. As was held in *Basey v. Gallagher*, 87 U. S. 670, 22 L. Ed. 452:

"The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory."

Distinctions prevail, as in suits where equity alone can grant relief, as where injunction to prevent a continuance of a wrong is sought, and an account of profits is asked. But in such cases, equity does not award compensation by assessing damages for the tort, but does require an account of profits, on the theory that if profits have been made, it is equitable that the wrongdoer should refund them. This doctrine is discussed in *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975, where the court reviews a number of the English cases, after premising its discussion by saying:

"Indeed, it is the settled doctrine of this court that this distinction of jurisdiction, between law and equity, is constitutional, to the extent to which the seventh amendment forbids any infringement of the right of trial by jury, as fixed by the common law."

And, again, says Justice Mathews:

"It is the fundamental characteristic and limit of the question of jurisdiction in equity that it cannot give relief when there is a plain and adequate and complete remedy at law; and hence it had no original, independent, and inherent power to afford redress for breaches of contract or torts by awarding damages, for to do that was the very office of proceedings at law."

In *Andrews v. Brown*, 3 Cush. (Mass.) 130, the Supreme Court of Massachusetts approves of Judge Story's opinion:

"That the jurisdiction for compensation or damages does not ordinarily attach in equity, except as ancillary to a specific performance, or to some other

relief, and that, if it does attach in any other cases, it must be under special circumstances and peculiar equities; as, for instance, in cases of fraud, or where the party has disabled himself by matter post facto from a specific performance."

Nor is the question of jurisdiction in our country affected by St. 21 & 22 Vict. c. 27, § 2, which is the act called the "Hugh Cairns Act," whereby the English Chancery Courts were expressly authorized to award damages when there is jurisdiction to entertain an application for an injunction against a breach of a covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for specific performance (Daniell's Ch. Pl. & Pr. § 1081; Bispham's Principles of Equity, § 477), for the question must find determination upon the authorities in the English High Courts of Chancery, as they existed prior to the adoption of the Constitution of the United States, and the precedents of the decisions of the Supreme Court of the United States.

In *Scott v. Neely* (decided in 1890) 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, the Supreme Court said:

"The sixteenth section of the judiciary act of September 24, 1789, 1 Stat. 82, enacted that such suits 'shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law'; and this prohibition is carried into the Revised Statutes. Section 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate, and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity. *Hipp v. Babin*, 19 How. 271, 278, 15 L. Ed. 633; *Lewis v. Cocks*, 23 Wall. 466, 470, 23 L. Ed. 70; *Killian v. Ebbinghaus*, 110 U. S. 563, 573, 4 Sup. Ct. 232, 28 L. Ed. 246; *Buzard v. Houston*, 119 U. S. 347, 351, 7 Sup. Ct. 249, 30 L. Ed. 451. All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States."

In *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804, the court, through Chief Justice Fuller, said that in the practice of the courts of the United States the distinction between law and equity is "matter of substance, and not merely of form or procedure." It is to this matter of substance that these demurrers go.

One who reads the many utterances of the Justices of the Supreme Court of the United States, whether necessarily made in decision or in the elaboration of their views upon questions pertinent to questions being decided, must be impressed by the steady tenacity with which they uphold the right to a jury trial of common-law questions of fact, and the student can but observe how they cast out from equity suits issues of damages that belong purely to the common-law courts.

Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837; American Publishing Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079.

Guided by the reasoning which convinces me that the question must be determined upon a fundamental principle of the defendants' constitutional right to a jury trial for damages, it follows from what has been said that the bill is multifarious. The separate demurrers will be sustained on this ground. Crane et al. v. Winsor et al., 2 Utah, 248; Enc. Plead. & Practice, vol. 10, p. 973; Story's Eq. Pl. & Pr. § 271; Mitford & Tyler's Pleading & Practice in Equity, pp. 271, 272. If complainants wish to amend, they may do so within 20 days.

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### NELSON v. WOOD PLACER MINING CO.

(Circuit Court, D. Montana. November 4, 1908.)

No. 230.

#### 1. MINES AND MINERALS (§ 54\*)—CONVEYANCE OF MINING CLAIMS—OPTION CONTRACTS—CONSTRUCTION.

A bond executed by defendant for the conveyance to complainant, on the making by him of certain payments, of certain specified placer mining ground, described a portion as patented, and a portion as mineral entries for which receiver's receipts had been issued, "patent not yet issued, but to be issued." Complainant was put in possession in accordance with the contract, and a deed was made and deposited in escrow at the same time, in which the property was described as in the bond, to be delivered on the making of the deferred payments. *Held*, that the contract must be construed as one by defendant to convey such title to the several claims, legal or equitable, as it then had, which was fully understood by the parties; that the words "patent not yet issued, but to be issued," were merely descriptive and not words of covenant, and did not bind defendant to convey a patent title.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 54.\*]

#### 2. MINES AND MINERALS (§ 54\*)—CONTRACT FOR SALE OF MINING CLAIMS—RIGHT OF RESCISSION.

Where complainant's possession and enjoyment of the property under such contract was not disturbed nor threatened, and defendant's title was that described in the contract, the fact that patents for the unpatented claims had not been issued at the time complainant was to make final payment and receive the deed did not afford ground for rescission by him.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 54.\*]

#### In Equity. On final hearing.

Complainant alleges that on October 20, 1902, the defendant covenanted and agreed to sell to complainant on or before January 1, 1904, for the sum of \$100,000, six placer mining claims, to all of which claims defendant represented that it had title; that the complainant, believing the representations of the defendant as to the title to said claims, paid to the defendant \$10,000 on the purchase price of said claims; that the complainant, on June 1, 1903, still believing the representations of defendant, paid to the defendant \$30,000 on the said purchase price; that the complainant, during the mining season

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of 1903, and before he discovered that the representations of the defendant as to its title to two of said claims were not true, placed upon the said mining claims improvements of the value of \$32,000; that the complainant, after he had paid \$40,000 to defendant, and expended \$32,000 in permanent improvements upon said claims, and before January 1, 1904, the date fixed for the final payment of \$60,000 upon said purchase price, discovered that the defendant had no title to two of said mining claims; that the applications of the defendant for patent to said two claims had been denied and entry thereof held for cancellation by the Secretary of the Interior on July 16, 1903; that complainant, upon discovering that the defendant did not and could not have title to said two claims, on January 1, 1904, gave notice in writing to the defendant that he would and did rescind the said contract of sale and purchase, that he surrendered the possession of all of said property to the defendant, and demanded that the defendant repay to him the sum of \$40,000 theretofore paid by him upon the purchase price of said claims, and also pay to him the sum of \$32,000, the value of the permanent improvements placed by him upon said claims; that the defendant has not now, and never had, title to said two claims; that the contract is an entire contract, and that said two claims are a valuable part of the property agreed to be conveyed to the complainant, and are a necessary and material part thereof, and without them the other claims are of small value; and that defendant has never paid to complainant any part of the sum of \$72,000. A copy of the contract was attached to the bill, and made a part thereof, and so much of it as is material reads as follows:

"Know All Men by These Presents, that we, the Wood Placer Mining Company, \* \* \* are held and firmly bound unto J. A. Nelson \* \* \* in the sum of \$150,000.00, to be paid to the said J. A. Nelson, his executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our executors and assigns, firmly by these presents.

"The conditions of the above obligation are such that if the above bounden obligor, shall on or before the 1st day of January, 1904, make, execute and deliver to the said J. A. Nelson, or to his assigns, (provided the said J. A. Nelson shall have on or before said date paid to the said obligor the sum of \$100,000.00, in the manner and at the time following, to wit, the sum of \$10,000.00 on or before the execution and delivery of these presents; the sum of \$30,000.00 on or before the 1st day of June, 1903, and the balance, the sum of \$60,000.00, on or before the 1st day of January, 1904, the price by the said J. A. Nelson agreed to be paid for the hereinafter described property if the said Nelson shall purchase this bond, option and agreement) a good and sufficient deed conveying to the said J. A. Nelson, free from all incumbrances, except taxes levied or assessed against the said property for the year 1903, with the usual covenants, all of the hereinafter described placer mining claims and property situated in Hughes Creek (unorganized) Mining District Ravalli county, Montana: That certain placer mining claim for which patent was issued by the government of the United States to the said party of the first part, which said patent was dated on the 3d day of October, 1901, being General Land Office Certificate #34486, and Mineral Certificate #80, which said placer mining claim is survey #5881, and known, called and designated 'The Mountain Guide'; survey #5883, known, called and designated 'The Camis,' and survey #5883, known, called and designated 'The Jim'; the three above mentioned placer claims containing in the aggregate, fifty-eight and  $\frac{99}{100}$  acres of land; also that certain other placer mining claim patented by the United States to the party of the first part, by patent dated on the 3d day of October, 1901, being General Land Office Certificate #34485 and Mineral Certificate #79, and being survey #5884, known, called and designated 'The Hamilton' placer mining claim, which said claim contains in the aggregate, 157.5 acres; also that certain other placer mining claim, being survey #5885, and known, called and designated 'The Discovery' placer mining claim, and 'The Annex' placer mining claim, being survey #6000, and being mineral entry #94 and for which receiver's receipt was issued to the party of the first part August 2d, 1901; said two claims containing, in the aggregate, 99.64 acres; patent not yet issued but to be issued; \* \* \*



"It is expressly covenanted that it is intended hereby to convey any and all right, title and interest, and estate which may have been acquired, or may hereafter be acquired, to the said premises, or any part thereof, by virtue of any patent which may have been issued, or which may hereafter be issued by the United States government to said placer mining claims or any part thereof; all of the said placer mining claims hereinabove described containing, in the aggregate, 316.13 acres. \* \* \*

"It is further covenanted, understood and agreed, that the said J. A. Nelson shall immediately enter into and take possession of all the mining claims, water rights, tools, appliances, etc., hereinabove described, and run, use and operate the same as to him shall seem meet and proper, and continue in possession thereof, unless he shall fail to make the payments as hereinabove provided, and if the said J. A. Nelson shall fail to make such payments in the manner and at the time hereinabove provided, he shall quit, and surrender the possession of said property with its appurtenances, unto the said party of the first part, free from all incumbrances and liens of every nature and kind, and all payments that shall have been made by the said J. A. Nelson, and all the improvements made on the said property or any part thereof shall be taken, held and considered by the said party of the first part as payment for the use and occupation of the said property, by the said J. A. Nelson, for such time or times as he shall have been in possession of and have had the use and occupation of the same, and that the same shall be accepted by the said party of the first part, in full settlement of any claim, or demand, damage or penalty for or against the said J. A. Nelson, on account of said failure to purchase said property in the manner herein provided.

"And the said party of the first part, in consideration of the premises, further covenants, promises and agrees that it will this day make, execute and deposit in the First National Bank of Missoula, its deed of conveyance, as hereinabove provided, accompanied by an escrow direction and agreement to the cashier of said bank, directing and requiring him to hold the said deed and deliver the same to the said J. A. Nelson, his heirs or assigns, upon the payment to the said cashier of the said bank, to the credit of the party of the first part, its agents or trustees named in said escrow agreement, the sum of \$90,000.00, to be paid as follows, to-wit: \$30,000.00 on or before the 1st day of June, 1903, and \$60,000 on or before the 1st day of January, 1904, and further providing that if the said J. A. Nelson shall fail to make such payments to the cashier of the said bank, at the times and in the manner hereinabove provided, that the said bank shall hold said deed subject to the order and direction only of the said party of the first part; but if the said payments shall be made as in said escrow direction provided, then the said bank is ordered and directed to deliver the said deed to the said J. A. Nelson, and hold the funds so paid subject to the order and direction of the said party of the first part."

Complainant prays for a decree awarding him the sum of \$72,000, with interest, and that a lien be fixed upon the placer claims, that the property be sold, and for general relief.

The defendant, by its answer, admits the contract as set forth in the bill; pleads that, in accordance with the terms of the agreement, an escrow contract was entered into, and denies that there was any other understanding than as shown by the contract; and denies that it represented to complainant any other than the true condition of its title to each and all of said placer claims. Defendant avers that the complainant well knew and understood the condition of defendant's title to each and all of said placer claims, and alleges that the complainant well knew that defendant's title to all of the premises agreed to be conveyed was a good, valid, and sufficient title, and that the attempt on the part of complainant to rescind the said contract was not because complainant was desirous of purchasing the property under the said option, but because he was unable to make the final payment on the purchase price, and was unable to perform his part of said contract. The defendant attached to its answer, as a part thereof, a copy of the deed, referred to in the answer, which was placed in escrow in the First

National Bank of Missoula, in which deed the claims are described in the same language as in the contract.

Complainant filed a formal replication.

Thereafter the case was referred to the master in chancery to take the testimony, and the same was reported to the court.

Marshall & Stiff, for plaintiff.

Forbis & Evans, F. H. Woody, and R. A. O'Hara, for defendant.

HUNT, District Judge (after stating the facts as above). Examination of the record shows that the contract and option of October 20, 1902, between complainant and defendant, bound defendant to convey to complainant at or before the time stated, January 1, 1904, by good and sufficient deed with the usual covenants, certain specified placer mining ground, portion of which was described in detail as patented, but portion of which was specially described as a mineral entry, for which receiver's receipt had been issued on August 2, 1901, "patent not yet issued, but to be issued." This language, together with the terms of the whole instrument, must be taken as evidence that when the contract was made the complainant, as well as defendant, knew that the title of defendant to the two claims known as "Discovery" and "Annex" was not a patent title proper, but was whatsoever interest, right, and title the defendant was vested with pursuant to the statutes of the United States, and the decisions of the Supreme Court defining the rights of one who has a receiver's receipt for a placer mineral entry.

That such was the intent of the contract is also clear by the further covenant:

"That it is intended hereby to convey any and all right, title and interest and estate which may have been acquired, or may hereafter be acquired to the said premises or any part thereof, by virtue of any patent which may have been issued, or which may hereafter be issued by the United States government to said placer mining claims or any part thereof, all of the said placer mining claims hereinabove described containing in the aggregate three hundred and sixteen and  $\frac{13}{100}$  acres."

The deed in escrow, containing clause of warranty, dated October 20, 1902, also described the property exactly as it had been described in the contract and bond, and contained exactly the same covenant that the estate and title conveyed were all the right, title, and interest and estate of the defendant that had been acquired, or might thereafter be acquired, by patent already issued, or which might thereafter be issued to the placer claims described, or any part thereof.

There is, therefore, perfect harmony between the contract and the deed in escrow, so that an understanding of the whole evidence is much simplified. Both instruments expressly state that the purchaser was to acquire all the rights of the Wood Placer Company to the property described that that company had under patents already issued, or that might thereafter issue; and both prove the knowledge of the parties as to the kind of title transferred, because both expressly recite that for two of the claims no patent had been issued, but was to be issued.

The transaction, as it appears by the writings and the testimony of the witnesses, is to be regarded as not an uncommon one; for there is nothing at all unusual in the purchase and sale of a mining claim

where the vendor is in possession with a receiver's receipt, as the evidence of his title and right to a patent. The evidence proves that complainant knew exactly what he was buying, and was satisfied with the status of the title and deed in escrow. He knew that patents had not issued, and, fraud by defendant not having been proven, complainant must be held to the knowledge that patents might possibly be delayed or even withheld by the United States for noncompliance with the law or the regulations of the Land Department. That is to say, complainant knew that, until consummation of the title by patent, the defendant acquired an equity—a right subject to examination by the Department of the Interior. There were, however, no adverse claims pending against the Annex or Discovery locations; there were, in fact, no defects in the essentials of the right to the two claims not patented; complainant was put in exclusive possession and right of enjoyment, and could not have been successfully molested by any one. Possession of patents for the two claims would, of course, have added to the security of the title of the vendee; yet, having knowingly taken title with application for patent pending, and being in exclusive possession under claim of exclusive right, he acquired a very high property ownership, such a one as is daily recognized in the practice of conveying mining claims, and as is consistently upheld by the courts in their adjudications. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; *Clipper Mining Co. v. Eli M. & L. Co.*, 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944.

The words "patent not yet issued, but to be issued," as used in the contract and option, are merely descriptive of the status of the title to the Annex and Discovery claims. They are not to be construed as words of covenant on the part of the vendor that patents would issue for the claims, or, as already indicated, that any higher title was conveyed than that which was vested in defendant by virtue of the receiver's certificates, and any rights antecedent thereto. *Bash v. Cascade Mining Co.*, 29 Wash. 50, 69 Pac. 402, 70 Pac. 487. Were the case one where third parties had interrupted the possession and enjoyment of complainant, and had made claim, or where the evidence showed that actual misrepresentation or fraud on defendant's part had entered into the transaction, different propositions would demand consideration.

The testimony is conclusive of the view that complainant has no equity in his case. He has received the property he purchased, has had every right of undisturbed enjoyment of it, he has been secure in his possession, and never has been molested or threatened in the title. The doctrine of *Ankeny v. Clark*, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. Ed. 475, does not appear to me to affect this case. There the court held that a quitclaim deed to the land involved was not a good title under the contract which Clark had made with Ankeny. But in this case, the conveyance passed precisely what title the contract called for. The evidence here shows, too, that complainant can now strengthen his title by accepting the patents which it appears have been issued since January, 1904, and thus he may acquire the very title that he has contended for.

Finally, I can find no excuse that can be based upon any correct principle of right for his claim of rescission upon the ground of a failure of title.

The bill must, therefore, be dismissed.

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UNITED STATES v. HAAS.

(District Court, S. D. New York. May 9, 1906.)

No. 202.

**1. CRIMINAL LAW (§ 242\*)—PROCEEDINGS FOR REMOVAL OF ACCUSED FROM ONE FEDERAL DISTRICT TO ANOTHER—SUCCESSIVE APPLICATIONS.**

The decision of a United States commissioner refusing to commit a prisoner for removal to another federal district for trial on a criminal charge does not render the question of the right to such removal res judicata, but ordinarily, in the absence of special circumstances, it should be held conclusive on the same facts.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 242.\*]

**2. CONSPIRACY (§ 23\*)—CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES—CONSTRUCTION OF STATUTE.**

Assuming that the common law as it existed in Maryland when the District of Columbia was ceded exists in the District, and that it makes misconduct in office a criminal offense, it is not an offense against the United States as a distinct sovereign in such sense that an indictment will lie under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for conspiracy to commit such offense in the District, especially against a person who is not a resident thereof.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 23.\*]

**3. UNITED STATES (§ 35\*)—PUBLIC OFFICER OF UNITED STATES—OFFICER OR EMPLOYÉ.**

A person engaged in the Department of Agriculture as an assistant statistician is not a public officer of the United States.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 35.\*]

**4. UNITED STATES (§ 52\*)—OFFICERS—OFFENSES AGAINST UNITED STATES.**

The giving out of information by a clerk or employé of a department of the United States government in respect to a matter which it was understood should be kept secret, although for private gain, is not a crime against the United States unless made so by law.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 52.\*]

**5. CONSPIRACY (§ 33\*)—"CONSPIRACY TO DEFRAUD UNITED STATES"—ELEMENTS OF OFFENSE.**

An agreement between a clerk or employé in the Department of Agriculture and others pursuant to which such clerk furnished to the others advance information of the contents of a report to be afterward made public by the department regarding the condition of the cotton crop, based on which information the outsiders speculated in the market for the benefit of all parties to the agreement, does not constitute a conspiracy to defraud the United States within the meaning of Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676).

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 33.\*]

Henry L. Stimson, U. S. Atty. (Morgan H. Beach, Sp. Asst. to Atty. Gen., of counsel), for the United States.

Rockwood & Salisbury (Thomas E. Rush and Charles W. Ridgway, of counsel), for defendant.

HOLT, District Judge. This is an application under section 1014 of the Revised Statutes of the United States for the commitment and removal to the District of Columbia for trial of the defendant Moses Haas.

On October 2, 1905, the grand jury of the Supreme Court of the District of Columbia indicted Edwin S. Holmes, Jr., Frederick A. Peckham, and the defendant Moses Haas. Holmes resided in Washington, D. C., and Peckham and Haas resided in New York. A bench warrant was issued by the Supreme Court of the District of Columbia for the apprehension of the defendants, upon which an application was made to me under section 1014 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 716) for the commitment and removal of the defendant Haas to the District of Columbia. A similar previous application was made to Commissioner Ridgway, a commissioner of this court, under which a warrant was issued, Haas arrested, and hearing had. The government put in evidence the indictment and proved the prisoner's identity; thereupon the prisoner's counsel moved to discharge the prisoner upon the ground that the indictment showed upon its face that no offense had been committed. Commissioner Ridgway, after an elaborate argument, rendered his decision, in which he held that the indictment did not allege that any offense had been committed, and discharged the prisoner. Thereafter this application was made to me. The government's counsel represented that an important and novel question of law was involved, and that, as no appeal by the government was authorized from the decision of the commissioner, it was desired to submit the question again for consideration.

The defendant's counsel claims that the decision of Commissioner Ridgway should be held to be conclusive. He admits that such a decision is not technically *res adjudicata*, and the authorities so hold. The decision of a committing magistrate refusing to hold a prisoner for trial or removal, like the grand jury's decision in refusing to find an indictment, is not *res adjudicata*, and another application can be made upon the same facts. In *re Martin*, 5 Blatch. 307, Fed. Cas. No. 9,151; *Cooley's Const. Lim.* 404; 1 Bish. New Cr. Law, § 1014, par. 2; *Com. v. Hamilton*, 129 Mass. 479. But ordinarily, in the absence of special circumstances, the decision of any judicial officer having jurisdiction should be held to be conclusive on the same set of facts. In this application I sit as a committing magistrate, with exactly similar jurisdiction as that of the commissioner. The evidence submitted is precisely the same in both cases, and it would be entirely proper in this case to discharge the prisoner upon the ground that he has already been discharged by the judicial decision of another magistrate having concurrent jurisdiction. Moreover, I have read the very elaborate and able opinion of Mr. Commissioner Ridgway, and concur entirely in his conclusions and in the grounds upon which he bases them. But as the question involved is a novel and important one and has been argued very elaborately by counsel upon both sides, I will add a few suggestions, in addition to those contained in the

opinion of Mr. Commissioner Ridgway, which seem to me to have weight.

The indictment charges the defendant with the crime of conspiracy under section 5440, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3676). That section provides that:

"If two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty."

The indictment, which is very long, alleges in substance that the Department of Agriculture at Washington, D. C., is required by law to collect information about the crops and to make monthly crop reports, including reports upon the cotton crop; that Holmes was an associate statistician in said department; that it was the duty of all the officers and employes of the department, including Holmes, not to divulge the information embodied in the crop reports before the reports were promulgated by the Secretary of Agriculture; that Holmes, Peckham, and Haas entered into a conspiracy under which Holmes was to furnish to Peckham and Haas information of what the crop reports were to be before they were published, in reliance upon which Peckham and Haas were to conduct speculations in cotton and divide the profits among the three defendants; that Holmes furnished such information, and Peckham and Haas carried on such speculations, and that large profits were divided between them. The indictment contains two counts. The first count alleges that by reason of these facts the parties indicted were guilty of a conspiracy to commit an offense against the United States, and the second count alleges a conspiracy, by reason of the same facts, to defraud the United States. Counsel for the defendant bases his motion to discharge the prisoner on the proposition that the facts stated do not show that the defendants conspired either to commit an offense against the United States or to defraud the United States.

The counsel for the government concedes that there is no statute of the United States which makes such acts as are alleged in the indictment an offense, and that there are no written rules or regulations which the Department of Agriculture has adopted, pursuant to any statute or otherwise, prohibiting such transactions. He admits that such acts would not constitute an offense anywhere in the United States, except in the District of Columbia. His claim is that the law of Maryland, as it existed at the time of the cession by that state to the general government of the District of Columbia, was continued and still exists in the District of Columbia; that the common law was a part of the law of Maryland at that time; that it is therefore now a part of the law of the District of Columbia; that misconduct in office is an offense at common law; that Holmes was guilty of misconduct in office; that the defendants conspired to have Holmes do acts which amounted to misconduct in office; and that the defendants, therefore, are guilty of a conspiracy to commit an offense against the United States.

In the first place, it seems to me that whatever law exists in the District of Columbia which is based on the law of Maryland, or the common law as distinguished from the statute law of the United States, is analogous to and is to be deemed precisely similar to the state law in the rest of the United States. It is just as though the state of Maryland had never ceded any district to the government, and the capital had been established in the state of Maryland. In such a case no one would pretend that an offense against the law of Maryland was an offense against the United States. In my opinion, section 5440, relating to a conspiracy to commit an offense against the United States, only relates to such offenses as are offenses against the United States as a distinct sovereign. Nothing is better settled than that there are no common-law offenses against the United States. *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, and cases cited. Therefore, in my opinion, assuming that Holmes could be indicted for misconduct in office in the District of Columbia, no person can be indicted in the federal courts for a conspiracy to commit misconduct in office, especially a person who does not reside in the District of Columbia.

In the next place, the question is whether, on the facts alleged in the indictment, Holmes has been guilty of misconduct in office in the sense of the common law. No one would pretend that every form of misconduct in office in the ordinary sense is a crime. Bishop substantially defines misconduct in office in its penal sense as any act or omission in breach of a duty of public concern by one who has accepted public office, provided his act is willful and corrupt and is not judicial. Bishop's *New Crim. Law*, §§ 459, 460. In my opinion, on the facts alleged, it is doubtful whether Holmes was a public officer. He is described in the indictment as an "associate statistician" in the Bureau of Statistics of the Agricultural Department. The act of July 14, 1890, c. 707, 26 Stat. 288 (U. S. Comp. St. 1901, p. 286), enumerates the persons engaged in the Department of Agriculture under the special title of "Clerks and Employés." This list includes a statistician; there is no mention in it of such a person as an "associate statistician." But, as the statistician is put under the list of clerks and employés, the presumption is that an associate statistician is a clerk, and not a public officer, within the meaning of the law and in a legal sense. A mere clerk in a public office is not a public officer. *United States v. Smith*, 124 U. S. 525, 8 Sup. Ct. 525, 31 L. Ed. 534.

In the next place, the duty violated in misconduct in office must be a legal duty. The indictment alleges that Holmes was charged with the duty of keeping secret the cotton crop reports, but the indictment contains no allegation showing how he was charged or by what authority he was charged. In *The King v. Everett*, 8 Barnewell & Cresswell's Reports, 114, the defendant was indicted for soliciting a customs officer to permit goods to be imported without paying duty. The defendant was convicted. A motion was made in arrest of judgment, on the ground that the indictment did not allege the fact from which the duty arose. Lord Tenterden said:

"The allegation that Hooper was a person employed in the service of the customs is an allegation of fact. The allegation that it was his duty to seize goods which upon importation were forfeited is an allegation of matter of law. That being so, the fact from which that duty arose ought to have been stated in the count."

A fair inference from the language of this indictment is, and the counsel for the government admits, that there had been no formal rule promulgated imposing a duty upon the employes of the Agricultural Department to keep the crop information secret before it was published. It may be assumed that it was understood in the office that it should be kept secret, and that it was a dishonorable act on the part of Holmes to publish it; but we are dealing with a question of crime. Unfaithful, dishonorable, or treacherous conduct, however censurable morally, is not a crime, unless made so by law. If Holmes, under this indictment, can be convicted of crime, the secretary of a judge who reveals the contents of a judge's opinion before it is handed down, or an attorney who betrays the confidence of his client, or a senator who tells what had taken place in executive session, could be convicted of crime, without any statute on the subject.

The government relies particularly upon the case of *Tyner v. United States*, 23 App. D. C. 324. That case arose upon a demurrer to an indictment against Tyner and another for conspiracy. Tyner was an assistant attorney in the Post Office Department and an officer of the department. He was required by the regulations of the department to perform a certain duty, and it was alleged that he had entered into a corrupt conspiracy not to perform that duty. I regard the Tyner Case as an extreme case, but the facts in it are very much stronger than in this case. With the highest respect for the distinguished court which rendered the decision, I am not able to consider it as controlling in this case.

The second count of the complaint charges that the acts in question defrauded the government of the United States, but it seems to me that this claim is entirely untenable. Perhaps it is not necessary that in all cases the United States be deprived of money or property in order to be defrauded. It was held in *United States v. Bunting* (D. C.) 82 Fed. 883, that two persons were guilty of a conspiracy to defraud the United States when one of them, an applicant for a government position, obtained an appointment by having the other assume his name and pass the civil service examination. But, in that case, the fraud upon the United States was alleged under section 5418 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 3666), which provides that any person who utters or presents to any officer of the United States a false writing for the purpose of defrauding the United States is guilty of a crime. The United States by that proceeding was deceived and defrauded into appointing a person to a public position who presumably was not fit for it; but I cannot see that cases of this kind have any bearing upon the question whether Holmes, in divulging information to one person which had been collected by the government for the purpose of being divulged to the public generally, defrauded the United States of anything by enabling the person to whom he divulged it to speculate and make money on the informa-



tion. The United States was not defrauded of anything. One citizen simply received information before others which was intended to be given to all the citizens, and which was collected for the purpose of being ultimately furnished to all.

In removal cases the magistrate undoubtedly should not refuse removal upon technical or doubtful questions. Those questions should properly be left to the determination of the court in which the indictment has been found. But when an indictment appears, upon inspection, to clearly charge no offense, so that, in the opinion of the committing magistrate, no conviction can possibly be had, it is the duty of the magistrate not to order the removal of a citizen to a distant state or district for trial.

The simple fact is that these defendants, if the allegations of the indictment are true, were guilty of grossly dishonorable conduct, which might very properly be made criminal by statute. The defendant's counsel asserted on the argument that a bill for that purpose was pending in Congress. If such an act is passed, persons guilty of such misconduct can be criminally punished; but, in my opinion, until it is passed, they cannot.

My conclusion is that the defendant should be discharged.

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#### KORSSTROM v. BARNES et al.

(Circuit Court, W. D. Washington, N. D. February 5, 1900.)

No. 1,568.

#### 1. CHARITIES (§ 19\*)—TRUST ESTATES—UNCERTAINTY AND INDEFINITENESS AS TO TRUSTEES.

A testator devised and bequeathed all of his property to trustees, with directions that it be sold and the proceeds, after payment of his debts, paid over to "the trustees of the Theosophical Society at Adyar, Madras, India, or wherever the said Theosophical Society may be located, appointed or acting under a deed of trust dated the 14th day of December, 1892, and duly enrolled, \* \* \* to be used for the purpose as far as possible in obtaining translations into English of the ancient Hieratic Scriptures believed to exist in India and elsewhere, for the use of the Theosophical Society and its branches all over the world." *Held*, that the bequest was void for uncertainty in the designation of the trustees.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 19.\*]

#### 2. CHARITIES (§ 22\*)—TRUST ESTATE—PURPOSE.

Such bequest was also void for uncertainty in the designation of the purpose to which it was to be devoted.

[Ed. Note.—For other cases, see Charities, Dec. Dig. § 22.\*]

#### 3. PERPETUITIES (§ 8\*)—RE MOTENESS OF GIFTS AS CHARITIES.

Such bequest was also void as in violation of the rule against perpetuities.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 57-66; Dec. Dig. § 8.\*]

In Equity. Suit to establish the complainant's claim, by inheritance, to the residue of the estate of her deceased brother in the hands of

trustees, and for an accounting. Heard on bill and answer. Decree for complainant.

Fenton & Crews and W. H. Bard, for complainant.

Max C. Wardall, H. D. Moore, and F. T. Reid, for defendants.

HANFORD, District Judge. The complainant, who is admitted to be a sister and the sole heir of Charles A. White, deceased, attacks the validity of her brother's will, and the object of her suit is to recover possession of his estate, or the residue thereof, remaining in the hands of the executors named in his will. The will was executed in this state by the testator, who was a citizen of this state, and who died leaving real and personal property in this state admitted to be of more than \$50,000 value. The testator died in this state in the year 1898, and thereafter his will was duly admitted to probate and letters testamentary were issued by the superior court for King county to the defendants, they being the executors named in a codicil, and they have acted as such executors and as trustees under the will, and admit that they now have the title to and possession of part of the estate. The following is a copy of the material parts of the will:

"I, Charles A. White of the city of Seattle, county of King, state of Washington, being of sound mind and memory, do hereby make, publish and declare this to be my last will and testament, that is to say:

"First: I direct that my body be embalmed and cremated as soon as possible after my death, at the nearest crematory existing at the time to the place of my decease.

"Second: I direct that my funeral expenses, the expenses of my last sickness, and cremation, and all debts owing by me, be paid as soon as possible after my decease and out of the first moneys that shall come to the hands of my executors, hereinafter named, from any portion of my estate, real or personal.

"Third: All the rest, residue or remainder of my estate, real, personal and mixed, wherever situated, I give and bequeath to my executors, Frank I. Blodgett and Henry W. Stein, or the survivor of them, in trust nevertheless and upon the following conditions, to-wit:

"That the said trustees or the survivor of them as speedily as consistent with the best interest of my estate, shall sell all the property belonging to my said estate, and after paying the necessary and proper expenses of said trust, pay the proceeds of said sale to the Trustees of the Theosophical Society at Adyar, Madras, India, or wherever the said Theosophical Society may be located, appointed or acting under a deed of trust, dated the 14th day of December, A. D., 1892, and duly enrolled.

"And I direct that the receipt of the said trustees or the reputed trustees for the time being, shall be sufficient discharge for the said legacy. It is my express will that the said legacy to the said Theosophical Society in India be used for the purpose as far as possible in obtaining translations into English of the ancient Hieratic Scriptures, believed to exist in India and elsewhere, for the use of the Theosophical Society, and its branches all over the world.

"Fourth: It is my will, that upon my death this my will shall be proved as such in the superior court for the county of King, state of Washington, and order of probate thereof obtained, and that no further proceedings be had or taken in the matter of this my will nor in the matter of my estate by said superior court, tribunal or officer whatsoever; and it is my will that, upon my death my said executors forthwith enter into possession of my estate, and the whole thereof, and that absolute title rest in my said executors, hereinafter named; in trust however as hereinbefore provided, without any other or further proceedings in or on the part of said superior court, board, tribunal or officer whatsoever; and shall be managed by them with-

out accountability therefor, or supervision thereof, or control thereof, of any other court, board, tribunal or officer whatsoever.

"Fifth: I further direct that my said executors pay no claim or claims that may be made by my former wife, Elin M. C. White, or whatever her name may be, except in accordance with my statement of accounts, hereto attached, unless otherwise ordered in a court of justice, having competent jurisdiction.

"Sixth: I hereby nominate and appoint as the executors of this my will and testament, Frank I. Blodgett and Henry W. Stein, both of Seattle, Washington, and direct that they be not required to give bonds.

"Seventh: I hereby revoke all former wills made by me."

This court has heretofore decided that the will is a valid testamentary conveyance of all the property and pecuniary rights of the testator to the executors as trustees, and that the complainant cannot prevail in an action at law to recover possession of the estate (156 Fed. 280); and in a separate suit the court has rendered a decree establishing the superior right, in equity, of purchasers in good faith from the executors and trustees of part of the real estate; and in a preliminary stage of this case, the court has decided as follows:

"The will is valid as a testamentary conveyance of property, and the legal title to all of the testator's property became vested in the defendants Barnes and Stein as trustees, with full power to sell all of it at their discretion for the purpose of converting it into money for the benefit of the estate. The bill contains no specific charge of fraud, or breach of trust, sufficient to justify a decree annulling any sale or contract of sale made by said trustee defendants. Therefore the vendees have good titles as against the complainant.

"The bequest of the residue of money remaining after complete administration of the estate to trustees of the Theosophical Society is void for uncertainty in two important particulars, viz.: The legatees cannot be identified; and the intended use of the bequest cannot be ascertained or defined so as to be declared a charitable use, which can become effective through the exertion of the power of a court of equity to assume control of trusts, appoint trustees when required, and direct application of funds according to declared intentions of donors, or by the cy pres rule. Therefore, the defendants Barnes and Stein must be held accountable for the money belonging to the estate as trustees of the testator's heirs."

That decision was made upon consideration only of the will itself and averments of the bill of complaint, and since it was rendered the defendants have filed an answer, and the case has been submitted for final determination upon the bill and answer.

In rendering a decision upon the bill and answer, the court must accept as true all the averments of the answer as to the disposition made of the estate, and as to the honesty and good faith of the defendants, so that the rights of the parties to be adjudicated relate only to the residue of the estate, which the defendants now hold.

The material facts admitted by the answer are as above recited, and the controverted points are as follows: In the tenth paragraph of the amended bill of complaint, the complainant avers, in effect, that there was not at the time of the execution of the will, nor at the time of the death of the testator, nor has there been at any time since the execution of said will, any Theosophical Society at Adyar or elsewhere, nor any trustees of the Theosophical Society appointed or acting under any enrolled deed of trust; that there was not at the time of the execution of the will, nor has there ever been since

said time, any Hieratic Scriptures, existing in India or elsewhere, which might be translated into English; that the third paragraph of the will is void and incapable of enforcement because vague, indefinite, uncertain, and ambiguous, so that it cannot be ascertained therefrom in what manner the alleged trust therein is to be executed, nor what was the object of the alleged trust, nor what person or society or association was intended as the beneficiary; and that the will is void for the reason that it fails to make final disposition of the estate by a donation of the residue thereof to a discoverable devisee for his own use or for any ascertainable use. The answer responds to these averments by denying the same, and by averring to the contrary that at the time of the making of the will the testator was a member of the Theosophical Society, which was then and at all times since has been, and now is, a society organized for benevolent, charitable, and scientific purposes, with local branches in all the principal cities of the world, the headquarters of the society being at Adyar in the province of Madras, India, and that there was no other like society existing, "all of which was commonly known to the whole world, and to the said testator in particular"; that on the 14th day of December, 1892, Henry Steel Olcott, the founder and president of said society, held in his own name title to certain real estate and personal property, but in trust for the said society, and on that date he executed a deed of trust to certain trustees named and their successors, which deed of trust was duly and regularly enrolled in the office of the registrar at Chingleput, that being the office for the local registration of deeds for the district in which Adyar is situated; that the testator at the time of making his will had full knowledge of said deed of trust and of the trustees therein named, and that he intended to constitute the trustees named in said deed of trust as trustees to receive the residuary legacy for and in behalf of the said Theosophical Society; "that by the term 'duly enrolled,' as applied to the said deed of trust, the said testator intended and meant the said registration of the said deed of trust in the office of the registrar at Chingleput, Madras, India"; that at the time of the execution of the will there was, and ever since has been, and now is, at Adyar, Madras, India, a large library, containing thousands of manuscripts, priestly writings in Sanscrit, Pali, East Indian, and South Indian, and other languages, many of which manuscripts are extremely rare, and the translation of which into English would be of great value to literature, science, and philosophy, which library was accumulated, owned, and is and was maintained by the trustees mentioned in said deed of trust, all of which was known by the said testator at the time of making his will; that there was at the time of making said will, and now is, in existence in various parts of the world, ancient Hieratic Scriptures in other languages than English, some of which have been discovered since the date of the execution of the will; that the objects and purposes of said Theosophical Society are, and ever since its organization have been, the same as set forth in said deed of trust, from which the following statement is quoted:

"The objects of the said Society are (1) the formation of the nucleus of a Universal Brotherhood of Humanity without distinction of race, creed, sex, caste or colour. (2) The promotion of the study of Aryan and other Eastern Literatures, Religious Philosophies and Sciences. (3) The investigation of unexplained laws of Nature and the psychical powers of man. In connection with the above mentioned objects the objects of the Society shall also include (4) the examination of religious systems from an unsectarian standpoint for the purpose of demonstrating the substantial identity subsisting beneath their apparent diversity. (5) The revival of research connected with occult science and esoteric philosophy. The objects of the Society shall also include the establishment, taking over, carrying on, reconstitution or re-establishment of any Subsociety, Club or other Body with objects similar to or connected with those of the Society, or generally having objects of a philanthropic, benevolent or charitable nature, and shall include the carrying on of any manufactory, trade or business for the purpose of assisting the operation of the Society in printing and disseminating literature, or otherwise calculated to promote or assist the objects of the Society hereinbefore declared."

From all the sources of information to which the answer guides, including common knowledge, and the trust deed, the court cannot find that the Theosophical Society is a completely organized compact body having a head and members subject to discipline and capable of acting as an independent entity. On the contrary, it appears to be merely a voluntary association of a few persons as the nucleus of a hoped-for universal brotherhood; its branches are detached voluntary associations and clubs, and in its entirety it comprehends all free-thinkers and anti-sectarians interested in the study of ancient religions, astrology, mysticism, and occult science, having an infusion of charitable sentiments and stimulated by generous impulses, constituting an aggregation of independent individuals related to the nucleus association by sympathy, but not bound to it by any obligation, financial or moral.

The deed of trust confers upon the trustees latitudinarian powers in the use of whatever property or money may come into their hands, including power to accept voluntary contributions, gifts, legacies, and loans, and to expend or invest the same, and provides that they may set apart any gift or legacy for any special or particular purpose which may be indicated by the donor; and it provides for the succession of members so as to perpetuate the trusteeship, and further provides that, if at any time the objects of said society should altogether fail, so that for a space of five years successively no money shall have been paid or applied by the said trustees for or towards the objects and purposes of the society, the trustees for the time being are to use, apply, and deal with the funds vested in them "in such manner and for such purposes either religious, philanthropic, charitable or civil, not being in any way for their own personal benefit, as the majority of the trustees for the time being shall resolve and determine, and to lease, convey, assign, or dispose of the same accordingly."

As set out in the answer, the deed contains no evidence of its enrollment anywhere, but does contain the following indorsement:

"Registered as No. 2940 of Book 1 Vol. 102 Pages 231-238 22nd December, 1892. Fee Paid No. 5. L. C. Remkneut, Registrar."

To ascertain the true basis upon which the decision must rest, it is necessary to construe the third paragraph of the will in accordance with the intentions of the testator as indicated by the words and phrases which he used in making a bequest of the cash proceeds of the residue of his estate. In this connection it is first to be observed that the will provides that the money is to be paid to individuals in trust for a specified purpose. They cannot, consistently with the terms of the will, appropriate any of the money for their personal benefit, nor make a testamentary disposition of it; and their heirs and personal representatives cannot acquire any interest in the fund by inheritance; they are to take the fund in their official character as a board of trustees of the so-called "Theosophical Society," and expend it for a specified object, if that be possible, and, in case of impossibility, there is no use to which the money can be applied in accordance with the testator's directions.

It is next to be observed that, although the will expresses the idea that the Theosophical Society is to be the beneficiary of the bequest, nevertheless no authority is given to pay any of the money to the society, nor to expend it for the general purposes of the society. As contemplated by the testator, the benefit to the society was to be through the expenditure of the money in making translations of Hieratic Scriptures. To execute the will, it is necessary to pay the money to the trustees designated, if they can be found and identified. The will does not name the individuals to receive the legacy, nor indicate the number of them, nor the place where they reside, but refers to a certain document in which they are designated which is described as a deed of trust, of which the Theosophical Society at Adyar is the cestui que trust, the grantor is not named, no property or thing granted, or object of the trust is mentioned, and no place is referred to where the document may be found. The identifying features to be looked for are the trust character of the document, the name of the cestui que trust, its date, and its enrollment. Any deed of trust to the Theosophical Society dated the 14th day of December, A. D. 1892, executed by any person or number of persons or corporation to any grantee or grantees, made anywhere and enrolled anywhere, will meet all the specifications of the will. The description of the trust deed being thus meager, and considering the ease with which a spurious document might be formulated, rigid strictness is required in the application of the descriptive words of the will in any attempt to identify a document represented to be the trust deed referred to.

It is next to be observed that there is no limitation whatever of time within which the trust is to be executed or the money expended. If the trustees to whom the legacy is to be paid are a self-perpetuating permanent body, they may hold the money indefinitely waiting for the discovery of Hieratic Scriptures to be translated, and, so long as they hold the money for that purpose, they cannot be accused of disregarding the directions of the testator or of a breach of trust.

The will provides that the legacy is "to be used for the purpose, as far as possible, in obtaining translations into English of ancient Hieratic Scriptures, believed to exist in India or elsewhere." All

that can be assumed with any degree of certainty with respect to the writings or engravings or prints to be translated, is that they are ancient, in a language other than English, and Hieratic; that is, sacred or priestly, or Egyptian, or difficult to be deciphered.

The necessary deduction from the foregoing analysis is that the third paragraph of the will must be construed as follows: The defendants are required to convert the whole residue of the estate into money, the money is bequeathed in trust to an official board, the members of which are designated in an enrolled deed of trust which cannot be identified with certainty, for a use which cannot be defined with certainty, and for the benefit of a cestui que trust, which is merely an aggregation of people in all parts of the world and not an organized entity, and there is no prescribed limitation of time within which the trust is to be executed or the fund expended.

In this view, it is as impossible to control or execute the trust according to the intentions of the testator as it would be if he had made a bequest of money to be expended in obtaining translations into English of hieroglyphics for the use of all mankind. The practical difficulties in the way of carrying into effect the provisions of the will, in so far as it attempts to dispose of the residue of the estate, have not been overcome, but rather augmented, by the averments of the answer. The deed of trust which it sets forth appears to have been registered, but that is not equivalent to enrollment. The word "enrolled" signifies the faithful copying of the entire document into a record; registration may be the copying of the document in extenso, or merely the recording of particular facts as to the time of its presentation to, and inspection by, the custodian of the record and a summary of its contents. The answer presents for consideration a deed of trust, the existence and contents of which are alleged to have been known to the testator, and which contains the names of grantor and grantees, and which was registered but not enrolled, as being the identical deed to which his will refers. If he did have knowledge of this deed, the omission of the names of the parties and the variance in referring to an enrolled deed raises a strong natural presumption that it is not the document containing the names of the trustees whom he selected to receive and handle the bequest.

The answer introduces additional uncertainty as to the use of the fund by averring that there is at Adyar a library containing voluminous manuscripts and priestly writings, and that Hieratic Scriptures have been discovered elsewhere, all of which are in languages other than English. It is manifest, therefore, that expenditure of the funds to obtain translations of any of these manuscripts or writings or scriptures involves necessarily a selection from a mass of material containing wide diversity of ideas, theories, and dogmas, and such use of the money would be according to the preferences of strangers to the testator, rather than according to his will.

The answer in no wise meets the objection to the will on the ground that it does not create a right of property to become vested in beneficiaries within a period of 21 years after the termination of lives in being at the time of the testator's death. The bequest is under the

ban of the rule forbidding the creation of an estate in perpetuity, and is therefore void.

This conclusion determines the case in favor of the complainant, and a decree will be entered accordingly.

# LEHIGH VALLEY R. CO. V. PROVIDENCE-WASHINGTON INS. CO.

(District Court, S. D. New York. October 10, 1908.)

## 1. INSURANCE (§ 336\*)—MARINE INSURANCE—POLICY PROVISIONS—CONSTRUCTION—"EXISTING INSURANCE."

Where a carrier's marine policy provided that it did not cover or apply to any goods or merchandise on which there should be any existing insurance by or on account of the owners thereof, the term "existing insurance" included any other insurance during the continuance of the risk, which was valid and enforceable, and was not limited to insurance by the owner existing at the time the carrier's policy attached.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 856; Dec. Dig. § 336.\*]

## 2. INSURANCE (§ 622\*)—MARINE INSURANCE—ACTION—CONTRACT—LIMITATION.

Where a carrier's marine policy contained a contract limitation of actions thereon of one year, and suit was not brought by the carrier for the loss sustained until after the year had expired, the action was barred, though defendant had agreed to bear part of the loss and had not refused to pay under such clause, and the amount of the carrier's liability to the owner of the property was not adjudicated until after the year expired.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1544; Dec. Dig. § 622.\*]

In Admiralty.

Robinson, Biddle & Benedict, for libellant.

James J. Macklin, for respondent.

ADAMS, District Judge. This action was brought by the Lehigh Valley Railroad Company against the Providence-Washington Insurance Company to recover its loss under an open policy of insurance, made and issued by the respondent to the libellant on or about the 15th of November, 1902. The policy insured the libellant as owner, freighter, forwarder, bailee or common carrier on all kinds of grain and flax seed on board of barge or other vessel. During the month of December, 1902, and January, 1903, certain wheat was loaded and stored by the libellant, acting as common carrier, on the canal boat A. J. Dean and on the 23rd day of January the said boat was taken in tow by the steamtug Mercedes, owned by the libellant, to be taken to the Prince Line steamer Trojan Prince, then lying at the foot of 42nd Street, Brooklyn. Shortly after being delivered at her destination the boat sank, owing to a hole having been knocked in her by ice during the towage, whereby the wheat sustained serious damage. Shortly afterward an action was brought in this court by Herbert Bradley, as assignee of the owner of the wheat, against the libellant herein to recover the damages sustained by him through the sinking. In September, 1904, the libellant served a notice on the respondent

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



calling upon it to defend if it wished, and that if it should be found that the damage was caused by any of the perils insured against, the libellant would look to the respondent for such sum as might be due under the policy, together with the costs and expenses incident to the defence of the action. The respondent, on the 16th of May, 1904, advised the libellant that it had no interest in the action or its results, and the libellant defended with the result that Bradley obtained a decree here, by reason of the tug's negligence. *Bradley v. Lehigh Valley R. Co.* (D. C.) 145 Fed. 569. The case was appealed and affirmed, but upon other grounds of liability than those found in this court. *Id.*, 153 Fed. 350, 82 C. C. A. 426. A final decree was entered in the action, which required the libellant to pay the sum of \$3,490.65, with interest thereon amounting to \$6.98. The aggregate of these sums was paid by the libellant. In addition thereto, certain expenses were alleged to have been incurred, making a total claim of \$4,322.53 with interest thereon from April 22, 1907. The foregoing are the allegations of the libellant, supplemented by a stipulation between the parties, entered into herein May 16, 1908.

The respondent, in addition to admitting or denying the principal allegations of the libel, alleged as follows:

"Eighth: Respondent further answering alleges that by the terms of the policy of insurance referred to in the libel it was therein provided that said policy should not cover or apply to any goods or merchandise upon which there should be any existing insurance by or on account of the owners thereof; and upon information and belief that at the time of the alleged disaster and loss there was then outstanding and in force existing insurance upon the cargo upon the said boat A. J. Dean referred to in the libel, by or on account of the owners of said cargo, by reason whereof the said policy became void and of no force or effect as respects the cargo on said boat A. J. Dean referred to in the libel herein and the respondent was not liable for any loss upon the said cargo.

Eleventh: Respondent further answering alleges, that in and by the terms of the policy referred to in the libel it was expressly provided, 'That no suit or action against said company for the recovery of any claim upon, under or by virtue of this Policy shall be sustainable in any Court of law or chancery, unless such suit or action shall be commenced within the time of twelve months next after the disaster causing such loss or damage shall occur; and in case any such suit or action shall be commenced against said Company after the expiration of twelve months next after the disaster causing such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby attempted to be enforced.' That the libel herein was not filed and this action was not begun until more than twelve months after the disaster causing the alleged loss or damage had occurred by reason whereof the respondent is not liable to the libellant herein."

1. The contract provided:

"\* \* \* Nor does this Policy cover or apply to any goods or merchandise upon which there shall be any existing insurance, by or on account of the owners thereof."

Before the loss occurred, the respondent claims that the owners of the grain, which was the subject of insurance, had effected insurance upon all of it excepting one car load, upon which the respondent promptly paid the insurance, but denied liability as to the remainder, upon which the owner had previously taken out insurance. The libellant contends that the insurance in question took effect when the

grain was loaded on the Dean on December 22, 1902, January 8, and January 15th, 1903, and therefore there was no existing insurance by the owner at the time the policy of the respondent attached. The respondent's reply to this is that there was insurance which covered the goods from interior points and it was therefore existing.

The respondent's contention appears to be correct. The phrase "existing insurance" has seemingly a broader meaning than the libellant contends for. Assuming that there was existing insurance, the agreement here was equivalent to one that there shall be no other insurance during the continuance of the risk, which was valid and enforceable. 19 Amer. & Eng. Ency. of Law, 1021.

2. The respondent further urges that there can be no recovery here because the action was brought too late. The disaster occurred on January 23, 1903, and this action was commenced July 26, 1907. The respondent's claim is that the time within which an action should be brought was definitely fixed as within twelve months. The language was as set forth in the 11th paragraph of the answer, quoted *supra*.

The libellant claims that this provision was waived, and, if not, that the time began to run only from the time the first decree on mandate was entered in the case of *Bradley v. Lehigh Valley R. Co.*, which was April 10, 1907. It is contended that the loss was reported promptly and claimed, the respondent then taking the position that it was not liable because of the prior insurance mentioned above.

It is said in the case of *Bradley*, 153 Fed. 353, 82 C. C. A. 429:

"As is pointed out by Chief Justice Shaw, in *Farlow v. Ellis*, 81 Mass. 231, a waiver is the relinquishment of a right which otherwise the party making it would have enjoyed, and the voluntary choice on his part not to claim the benefit is of the essence of the waiver; and whether there has been a waiver is a question of fact, depending upon the intention of the party against whom the waiver is asserted."

There is no evidence of any intention on the part of the respondent to relinquish the defence now insisted upon.

It is argued that the respondent was even as late as August 4, 1903, willing to bear a part of the loss, and never based his refusal to pay on the clause in question. While this may be true, the language of the contract is too plain to admit of the claim of the libellant that the time only began to run at a period considerably subsequent to that fixed by the contract, which was the twelve months after the disaster occurred. The contract spoke very plainly for itself. It is further argued that if the libellant had sued within the year, there could have been no recovery because it had then paid nothing to the shipper whose property the goods were, and to give the clause the effect now contended for by the respondent, would have required payment by the libellant within the year. I see no merit in this contention. The contract required an action to be brought within a year, not that a judgment should be obtained and satisfied within the limited time. The rights of the libellant could have been preserved by exhibiting an intention within the year to enforce its claimed rights. This point of the case is covered by *Luckenbach v. Home Ins. Co.* (D. C.) 142 Fed. 1023, and authorities there cited.

The libel is dismissed.

## TWEEDIE TRADING CO. v. KATES et al.

(District Court, S. D. New York. October 6, 1908.)

## SHIPPING (§§ 50, 177\*)—DEMURRAGE—LIABILITY OF CHARTERER.

Demurrage at Puerto Cabello, Venezuela, under agreement, with claim for watching hawser, allowed to libellant, less an amount paid by respondents for labor in discharging.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576-584; Dec. Dig. §§ 50, 177.\*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

(Syllabus by the Judge.)

Ralph J. M. Bullowa, for libellant.

Adam K. Stricker, for respondent Kates.

ADAMS, District Judge. This action was brought by the Tweedie Trading Company against the firm of Kates & Bok to recover for 4 days' detention of the steamship *Albis* at Puerto Cabello, Venezuela, in July, 1906, claimed to amount to \$556.13, and for \$2.50 for watching the respondents' hawser in New York and for \$96.60 for the extra cost of loading timber at Sabine Pass, Texas, instead of lumber, which was the merchandise agreed upon, for transportation and delivery at the said Puerto Cabello. The answer of the respondent Kates admitted the detention but alleged that the agreement was entered into upon representations of the libellant that the lumber could be unloaded in 3 days, which was to the libellant's knowledge false and untrue and upon which, in the absence of knowledge on their part, the respondents relied. It was further alleged that an agreement in writing was made between the parties wherein it was provided that stevedoring at Puerto Cabello should be borne by the parties in equal proportions, and that when the steamer reached the port of discharge, stevedores were employed whose compensation amounted to \$714, which the respondents duly paid and that one-half thereof was due to the respondents, payment of which has been demanded and refused. The respondents denied the allegations of the libellant with respect to the disbursements of \$2.50 and \$90.60.

It appears that the parties had some transactions prior to the entry of the agreement in question, which were compromised and settled thereby. This agreement provided:

"New York, July 17, 1906.

It is mutually agreed between the Tweedie Trading Co. and Messrs. Kates & Bok as follows:

1st.—To waive demurrage charges on barges against demurrage charges on S/S '*Albis*' and to pay the sum of \$5000.00 in full and final settlement of freight on the S/S '*Albis*' to the Tweedie Trading Co. against their payment to Kates & Bok of \$2000.00, as liquidated damages in settlement of return of towage money for non-delivery of the dredge towed by the '*Myrtledene*.'

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2nd—All that is left of the 2 hawsers shall be turned over to Kates & Bok in accordance with agreement.

3rd—If the Tweedie Trading Co. has to pay for the stevedoring at Puerto Cabello then Kates & Bok shall pay half of the charges of said stevedoring.

For the discharging of the lumber in Puerto Cabello the Tweedie Trading Co. agrees to allow 4 running days whether the stevedoring is done by the Government of Venezuela or by themselves. Should any demurrage be incurred it should be settled at the rate of 8d. per net registered ton of the S/S 'Albis' and per day."

The principal dispute is with reference to responsibility for the time consumed in discharging at Puerto Cabello. There is no question that 4 days in excess of the agreed time were so consumed. The respondents' defence to this is a claim for fraud upon the part of the libellant in representing that the lumber could be discharged in 3 days. The lumber was designed for the construction of a dry dock by the government of Venezuela and when the vessel reached the port of discharge, instead of employing regular stevedores, the Venezuelan commandant in charge hired some mechanics from this country, who had gone there to build the dock, and also used some prison labor supplied by the government. I have no doubt the discharge was made as fast as practicable under the circumstances and that fact would seem to indicate that there was some mistake of judgment in stating 3 days as the time which would be consumed, but I do not think there is any basis for the claim of fraud. The president of the libellant estimated 3 days as the time that would be necessary but upon an objection of the respondents that it was insufficient, increased it to 4 days, which was incorporated in the agreement as above.

The 3d provision that if the libellant "has to pay for the stevedoring at Puerto Cabello then Kates & Bok shall pay half of the charges of said stevedoring," would indicate that the libellant was to do the discharging, as far as the vessel's tackles reached, as would be usual, but is somewhat in conflict with the succeeding provision: "For the discharging \* \* \* the Tweedie Trading Company agrees to allow 4 running days whether the stevedoring is done by the Government \* \* \* or by themselves," which would seem to show that Kates & Bok were to be responsible for the time occupied in that work. The meaning of the agreement is not at all clear but from the behavior of the parties it would appear that after reaching the port, the respondents were to attend to the discharging. In seeking to avoid responsibility through a claim of fraud they virtually acknowledged that the burden was upon them. If the Tweedie Company was to be responsible for the time used in discharging, there would have been no necessity for the provision for demurrage. I therefore conclude that the respondents are liable for the delay of 4 days. The net registered tonnage of the Albis was 860, which at 8 pence per ton would amount to \$139.03 per day or \$556.12 for 4 days.

It appears that the respondents paid the stevedoring expenses at Puerto Cabello, amounting to \$612.72. The master of the vessel refused to have anything to do with disbursements of this character and they were therefore paid by the respondents' agents. These payments were for the labor of the mechanics who were employed in discharging.

The agreement provided that if the libellant paid for the stevedoring, the respondents should pay one-half thereof. The respondents actually paid for the work and only one-half thereof should be borne by them; this would leave the libellant responsible for the other half of the stevedoring, amounting to \$306.36.

The libellant further claims \$2.50 paid a watchman for guarding the respondents' hawser on a New York wharf. The libellant obtained possession of the hawser and pending arrangement with the respondents retained it a day, for which time the watchman was paid. This seems to be a proper charge against the respondents.

The libellant claims for the extra cost of loading timber, instead of lumber. It is urged by it that by reason of the large size of the pieces, an additional expense was incurred. It is not clear enough for the purposes of establishing this claim that the timber was not intended to be covered under the general description of "lumber." If any distinction was intended, it should have been expressed in the contract. The claim is disallowed.

The result of the contentions is that the libellant is entitled to recover the demurrage, \$556.12 plus the watching of hawser \$2.50, making \$558.62, less one-half of the respondents' disbursements for labor, \$306.36.

Decree for libellant for \$252.26, with interest.



GLOBE NAVIGATION CO., Limited, v. RUSS LUMBER & MILL CO.

(District Court, N. D. California. December 10, 1908.)

No. 13,774.

1. SHIPPING (§ 104\*)—CARRIAGE OF GOODS—CONTRACTS OF AFFREIGHTMENT—IMPLIED TERMS.

In every contract of affreightment, unless otherwise expressly provided, the shipowner's undertaking is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly, without any unnecessary deviation.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 104.\*]

2. SHIPPING (§ 104\*)—CARRIAGE OF GOODS—LOSS OF CARGO—"DEVIATION."

Deviation, in contracts of affreightment, as in marine insurance means a departure from the usual course of the voyage, or from the usual manner of prosecuting it, thereby changing the risk to which the cargo is subject.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 104.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2042-2045.]

3. SHIPPING (§ 125\*)—CARRIAGE OF GOODS—LOSS OF CARGO—DEVIATION.

A steamer under charter to carry a cargo of lumber from a Puget Sound port to San Diego, Cal., shortly after starting took in tow a four-masted schooner belonging to the same owners. Three days later, while still having the schooner in tow, she encountered a storm, in which the sea swept over her and carried away the greater part of her deck load. *Held*, that in taking the schooner in tow she unjustifiably deviated in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the prosecution of her voyage under the charter, which deprived her of the right to the benefit of a provision of the charter party that the deck load should be at shipper's risk, and rendered her liable for the loss.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 459, 460; Dec. Dig. § 125.\*]

In Admiralty.

Jordan, Rowe & Brann, for libellant.

McClanahan & Derby, for respondent.

DE HAVEN, District Judge. This is an action to recover the sum of \$1,670.80, alleged to be due upon a contract of affreightment.

The libel alleges that on October 8, 1906, the libellant chartered to respondent the whole of the steamship Tampico, with the exception of the cabin and necessary room for the crew and the storage of provisions, for five consecutive voyages from two loading places on Puget Sound or Columbia river to San Francisco, Redondo, San Pedro, or San Diego, for the carriage of full cargoes of laths, shingles, and other lumber at prices therein specified. It further alleges that the charter party contained a provision to the effect that the vessel might "be permitted to carry her usual deck load, but at shipper's risk." The action is to recover the freight earned on the last of the series of voyages named in the charter party. The answer admits all of the allegations of the libel, and by way of cross-libel alleges that a portion of the cargo carried by the Tampico on the voyage mentioned in the libel was not delivered to respondent at the port of destination; that the cargo not delivered was of the value of \$3,046.92, and that by reason of the failure to deliver the same respondent has been damaged in that sum; and for this sum it demands judgment, after deducting therefrom the amount claimed in the libel.

The voyage in question was from Everett, on Puget Sound, to San Diego, Cal., and it appears from the evidence that the Tampico completed the loading of her cargo at Everett on the 30th day of March, 1907; that she did not have sufficient fuel coal with which to perform the voyage, and could not obtain it at Everett; that she then went to Seattle, a distance of about 27 miles, out of the usual course of a voyage from Everett to San Diego, where she obtained the necessary coal, and from thence, on March 31, 1907, proceeded to San Diego. About four hours after leaving Seattle she took in tow the Wilbur L. Smith, a four-masted schooner, belonging to libellants, and continued, with the schooner in tow, upon her voyage. On the afternoon of April 3, 1907, the vessels encountered a severe storm off the Oregon coast, which increased in violence as the night proceeded; and about 10 o'clock of that night the towing hawser parted, and the schooner was cast adrift, and an hour later the sea swept over the stern of the Tampico, and carried away the greater part of her deck load. The storm moderated about 4 o'clock on the morning of the next day.

1. In every contract of affreightment, unless otherwise expressly

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provided in the contract, the shipowner's undertaking is "that he will be diligent in carrying the goods on the agreed voyage, and will do so directly, without any unnecessary deviation." *Carver's Carriage by Sea*, § 285; *Propeller v. Cordes*, 21 How. 22, 16 L. Ed. 41. Under the contract of charter sued on, the libellant did not reserve to itself the right to deviate from the usual mode of prosecuting the voyage named in the charter party.

The question as to what constitutes a deviation is one which has frequently arisen in actions upon policies of marine insurance, and in such cases it has been defined as "any unnecessary or unexcusable departure from the usual course or general mode of carrying on the voyage insured." 9 Am. & Eng. Ency. of Law, p. 419. It has the same meaning in contracts of affreightment; that is to say, it is a departure from the usual course of the voyage, or from the usual manner of prosecuting the voyage, thereby changing the risk to which the cargo was subject under the contract of carriage. And in accordance with this view it has been held that taking another vessel in tow, without the consent of the shipper, constitutes a deviation.

*Crocker v. Johnson*, 1 Spr. 141, Fed. Cas. No. 3,398, was an action by the owners of the bark *La Grange*, against the consignee of a part of the cargo, to recover a contribution for damage sustained by the voluntary stranding of that vessel during a gale. The defense was that the bark had previously committed a deviation in going out of her course to speak, and then taking in tow, a vessel in distress, and the court held that taking a vessel in tow for the purpose of affording relief to the crew of a vessel in distress would not be a deviation, but that it would become so if the towing was continued longer than necessary to relieve the distress of the crew, and merely to save property.

So in *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 345, 346, 41 Am. Dec. 592, it was held that taking a brig in tow by a steamer bound for Natchez to New Orleans was such a deviation as would discharge the underwriters, there being nothing in the policy which expressly authorized such towing. The court in that case said:

"The effect of a deviation is a discharge of the underwriters. But by his breach of this implied warranty against deviation, the owner of the ship becomes liable to the owner of the goods for their loss. 1 Ph. 485; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745. It thus becomes necessary to decide whether taking the brig in tow amounted to a deviation, there being nothing in the policy which expressly authorized it. In our opinion it did. Mere delay, taking on board more cargo than is permitted by the policy, shortening sail to keep company with a prize, are all instances which have been holden to amount to a deviation. *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 26, 3 L. Ed. 257; *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 3 L. Ed. 414."

The act of the *Tampico* in taking the *Wilbur L. Smith* in tow constituted a deviation. It was something not contemplated by the contract of charter, and its effect was to prolong the risk to which the cargo was subject in going from the port of Everett to San Diego.

The libellant contends that the *Tampico* was justified in taking the *Wilbur L. Smith* in tow, by reason of the existence of a local custom which permits steam vessels, when going from Puget Sound ports to

ports in California, loaded with cargo, to tow sailing vessels between such ports. It is sufficient to say of this contention that the evidence is not sufficient to show the existence of such a custom, as applied to steamers carrying cargo, under a charter like that set out in the libel.

2. It only remains to consider the legal effect of the deviation above mentioned upon the rights of the parties in this action, and upon this point the rule seems to be that, when there has been an unjustifiable deviation upon the part of the vessel in the prosecution of her voyage, the shipowner is deprived of the benefit of exceptions contained in the contract of affreightment, unless it affirmatively appears that the losses would have happened if there had been no deviation. *Carver's Carriage by Sea*, § 288; *Maghee v. Camden Amboy R. R. Co.*, 45 N. Y. 514, 6 Am. Rep. 124.

The evidence in this case is not such as to warrant the court in finding that, if the *Wilbur L. Smith* had not been taken in tow, the loss of which respondent complains would have happened. It cannot be said with any degree of certainty that, if the *Tampico* had proceeded on her voyage with diligence, and without the incumbrance of the tow, she would still have been in the track of the storm, and have encountered the same peril which resulted in the loss of the respondent's lumber.

It follows from these views that the respondent is entitled to recover upon its cross-libel the damages sustained by it in the loss of the lumber referred to therein, and the case will be referred to a United States commissioner to ascertain and report the amount of such damages.

Let such a decree be entered.

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## WESTERN UNION TELEGRAPH CO. v. POLHEMUS et al.

(Circuit Court, D. New Jersey. January 19, 1909.)

### TELEGRAPHS AND TELEPHONES (§ 10\*)—RIGHTS IN USE OF HIGHWAY—LAW OF NEW JERSEY.

Under the law of New Jersey, where the title of owners of land along a highway extends to the middle thereof, the easement for the highway does not include any grantable right by the public for the maintenance of a telegraph line thereon, nor does Rev. St. § 5263 (U. S. Comp. St. 1901, p. 3579), confer such right on telegraph companies accepting its provisions, and it can only be acquired by agreement with the owners of the fee.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.\*

Rights of telegraph and telephone companies to use of streets, see note to *Southern Bell Telephone & Telegraph Co. v. City of Richmond*, 44 O. C. A. 155.]

In Equity. On final hearing.

John H. Backes and Henry D. Estabrook, for complainant.

Willard C. Parker and H. L. Stout, for defendants.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



LANNING, District Judge. The defendants are the owners in fee of lands abutting a public highway running between Lambertville and Neshanic, N. J. Their title, under the law of New Jersey, extends to the middle of the highway. The complainant is the owner of a telegraph line extending from New York to Philadelphia, supported by poles, a part of which are planted on the lands of the defendants within the lines of the highway. At the commencement of this suit, and for many years prior thereto, the telegraph line consisted of a single line of poles 150 feet apart. From time to time in the past the number of crossarms on the poles and of wires attached to the crossarms has been increased, until at the present time there are 5 crossarms on each pole, with 38 wires attached thereto. In order to strengthen the line the complainant has been doubling the number of poles on the highway, thereby placing them 75 feet apart. The defendants have cut down the additional poles planted on their lands, and the complainant now seeks an injunction to restrain them from such acts in the future.

The position assumed by the defendants is that the complainant has acquired no right to such additional appropriation or use of their lands. They say that to increase the number of poles on their lands, without their consent and without acquiring the right to do so by proper condemnation proceedings, is to impose an additional servitude thereon, and to take their property contrary to the protection granted them by the provision of the Constitution of New Jersey that "private property shall not be taken for public use without just compensation." The complainant, on the other hand, insists that, under the congressional act of July 24, 1866 (Act July 24, 1866, c. 230, 14 Stat. 221), embodied in sections 5263 to 5268 of the Revised Statutes (U. S. Comp. St. 1901, pp. 3579, 3581), authorizing any telegraph company organized under the laws of any state to construct, maintain, and operate lines of telegraph over and along any of the military or post roads of the United States, of which the road on which the complainant has attempted to plant its additional poles is conceded to be one, it has the right to strengthen its line in the proposed manner without the consent of the defendants and without compensation to them.

The trend of judicial opinion in the courts of the state of New Jersey has been that the public easement acquired by taking lands in that state for highway purposes does not include any grantable right by the public for the maintenance on such lands of telegraph lines by telegraph companies. *Turnpike Co. v. News Co.*, 43 N. J. Law, 381; *Broome v. Telephone Co.*, 49 N. J. Law, 624, 9 Atl. 754; *Duke v. Central New Jersey Telephone Co.*, 53 N. J. Law, 341, 21 Atl. 460, 11 L. R. A. 664; *Marshall v. Bayonne*, 59 N. J. Law, 101, 34 Atl. 1080; *Nicoll v. Telephone Co.*, 62 N. J. Law, 733, 42 Atl. 583, 72 Am. St. Rep. 666; *Andreas v. Gas & Electric Co.*, 61 N. J. Eq. 69, 47 Atl. 555. In *Nicoll v. Telephone Co.* the right to use the highways for telephonic purposes was put on the same footing as the right to use them for telegraphic purposes, and in considering that right Mr. Justice Dixon, speaking for the highest court of the state, said:

"We must therefore consider whether the acquisition by a telephone company of a right to erect poles and place wires and other fixtures for tele-

phonic purposes along a public street wherein the fee of the land belongs to private persons, without the consent of such persons, is the taking of private property.

"If the land were not subject to the easement of a public street, the matter would not be debatable; but it is equally clear that, whenever the property of the owner of a fee in a highway is subjected by law to an additional servitude, it is taken, within the meaning of the Constitution. The contention, therefore, must be over the question whether the right thus to be acquired would be an additional servitude upon the fee, or is embraced within the public easement, and hence grantable by the public for public use without regard to the owner of the fee.

"The public easement, as interpreted in this state, is primarily a right of passage over the surface of the highway, and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning, and lighting of the highway, the construction and maintenance of street railways, with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travelers while using the way. Secondly, the easement covers uses which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes, and gas pipes for the convenience of persons occupying neighboring lands. *State v. Laverack*, 34 N. J. Law, 201.

"The argument to support the proposition, that the right to construct and maintain a telephone line for common public use is within this easement, is that the structures required for the exercise of the right are mere adaptations of the road to the passage of the electric current, which thus travels along the highway. But the resemblance between this use and that ordinarily enjoyed under the easement scarcely goes beneath the words by which it may be described. In reality, the electric current does not use the highway for passage, it uses the wire, and would be as well accommodated if the wire were placed in the fields or over the houses; the highway is used only as a standing place for the structures. Such a use seems to us to be so different from the primary right of passage as to be essentially distinct. Nor does it rest on the same footing as those secondary uses to which allusion has been made. Telephone lines in a street do not afford to the occupants of neighboring property such general convenience, nor have they been permitted with such common and continued acquiescence, as sanction the other uses mentioned.

"We therefore think that the right now under consideration is not within the public easement, and can be acquired against the consent of the private owner of the fee only by condemnation under the power of eminent domain."

The complainant is a corporation organized under the laws of the state of New York. The statutes of New Jersey do not give to any foreign telegraph corporation the privilege of exercising the power of eminent domain, nor does any congressional act confer such a privilege. In *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 11, 24 L. Ed. 708, Mr. Chief Justice Waite said, concerning the congressional act of July 24, 1866:

"The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. Such sovereignty under the Constitution is not interfered with. Only national privileges are granted."

There is nothing in any of the subsequent decisions of the Supreme Court inconsistent with this statement. That it is the reasonable and proper construction of the act is clear.

The complainant does not claim any right to plant its additional poles on the properties of the defendants by virtue of any law of the state of New Jersey. Manifestly, it has no such right. It bases its alleged right on the congressional act of July 24, 1866, and on the fact that it has filed with the Postmaster General, in accordance with the terms of that act, a written acceptance of its restrictions and obligations. The cases cited in support of the claim are not applicable. There is no legislation by the state of New Jersey that conflicts with the congressional act. If the complainant wishes to appropriate to its use additional property of the defendants, it must acquire the right to do so by private arrangement with them. There is nothing in the congressional act that authorizes such appropriation in any other manner. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 100, 101, 13 Sup. Ct. 485, 37 L. Ed. 380; *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 569, 25 Sup. Ct. 133, 49 L. Ed. 312.

The bill of complaint will be dismissed, with costs.

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#### THE FERGUSON.

(District Court, E. D. New York. February 6, 1909.)

#### WHARVES (§ 22\*)—INJURY TO DRY DOCK—ELEMENTS OF DAMAGES—LOSS OF USE OF DOCK.

In computing the amount of damages recoverable from a vessel for the negligent injury of a floating dry dock, no allowance can be made for the loss of the use of the dock while being repaired, where no actual loss resulted because all work which might have been done in such dock during that time was taken care of in another owned by libellant.

[Ed. Note.—For other cases, see *Wharves*, Cent. Dig. § 7; Dec. Dig. § 22.\*]

In Admiralty. On exceptions to report of commissioner.

Wheeler, Cortis & Haight, for libellant.

Wing, Putnam & Burlingham, for claimant and respondent.

CHATFIELD, District Judge. The libellant herein brought an action for damages to a dry dock, caused, as he alleged, through negligent removal of a vessel from that dock, where she had been under course of repairs by the libellant. A decree in favor of the libellant was awarded by the decision of the Circuit Court of Appeals (153 Fed. 366, 82 C. C. A. 442), and a reference has been had to ascertain the amount of damage. The commissioner has assessed damages for the expense of repairing the injuries to the dock, but has refused to award damage for loss of the use of the dock in question, upon the ground that no actual loss was incurred. This fact was admitted by the libellant, and it appears that all work which would have been done in the dock in question during the time it was undergoing repairs was

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taken care of in a graving or stone dock almost immediately alongside. This dock was empty at the time, and was not wanted for any purpose that was not accomplished otherwise during the period in question. Certain expense and delay was occasioned by disconnecting the injured sections of the large floating dry dock and in reconnecting and replacing those sections after repairs, and the inability to use the injured sections caused a transfer to the graving dock of all large vessels, while smaller vessels were placed during this period in the remaining sections of the floating dry dock. These expenses have been included in the award.

The libelant contends that under the doctrine of *The Cayuga*, 81 U. S. 270, 20 L. Ed. 828, affirming 7 Blatchf. 385, Fed. Cas. No. 2,537, and *The Favorita*, 85 U. S. 598, 21 L. Ed. 856, he is entitled to a reasonable amount, similar to demurrage for loss of use of a vessel, and that the fact that he had an extra dock should be considered similar to the substitution of an extra or spare ferryboat in the cases mentioned. The libelant also cites the case of *The City of Birmingham*, 138 Fed. 555, 71 C. C. A. 115, which by coincidence was originally before the same commissioner who has made the determination in the present case. In that case demurrage was awarded for loss of service of an injured dredge, although no attempt was made to replace the injured dredge by making use of a spare dredge, which could have been substituted if the owner of the dredges had seen fit to do so. The basis for the allowance of demurrage was held to be an estimate of the reasonable value of the use of a dredge, like the one injured, during the period of repair.

The commissioner in the present case has found that restitution ad integrum for the tort committed should be the basis of recovery, but that only actual outlay for repairs and expenses can be included; that possible profits, or supposable business which might have been done, cannot be taken into account as the basis for damage. He has distinguished between the cases of the ferryboats and dredge and that of a dry dock. This court is disposed to differ with the commissioner in his idea that there is any distinct reason why one method of computation should be used in the case of a dredge, and a different one in the case of a floating dry dock. But it is a more serious question to determine a basis of value. In the ferryboat cases it was held, and the result has been approved by the highest court, that a fair compensation for the loss of use of the particular boat should be awarded to the party injured, without specific proof of damage, and even when loss of fares has been prevented by the substitution of another boat. In some instances the charter-party value of a boat has been taken as a fair basis of compensation. In others, as in the case of the dredge, an estimate of that valuation has been made. But the cases mentioned seem to have all been decided upon the theory that if a rental or charter or actual value of a vessel, as a boat capable of use for the purposes to which it was being put, can be satisfactorily and legally estimated, then this amount will be a fair basis for computation of damage caused by the loss of use of such a boat.

It has been assumed by the libelant herein, and seems to be fre-

quently asserted, that damages under such circumstances should be allowed according to the share of the profits which that particular boat would have earned if it had been kept in service, even though the same particular profits were obtained, without appreciable loss, by the libellant through the use of a different boat, or by the use of the remaining boats without hiring any in addition.

An examination of the cases shows no basis for this contention. As has been said, restitution is the basis of allowance of damages, and in the case at bar the commissioner seems to have found and allowed every item of damage or loss of use which has been proved. The mere inconvenience of using one dock for another, or of being deprived of having two docks for use in place of one, is not shown to be ascertainable in money value. The case is not like one where damages for pain and suffering can be assessed, and the report must be confirmed. The allowance for coal will be corrected by including five days rather than one.

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In re ERNEST MARTIN & CO.

(District Court, S. D. New York. September 19, 1908.)

ATTORNEY AND CLIENT (§ 117\*)—COLLECTIONS—DUTY OF ATTORNEY.

Where an attorney at law collects a sum of money on a claim placed in his hands before he is engaged for a bankrupt estate, he is required, in the absence of fraud, to pay it to the client for whom he made the collection, notwithstanding he receives it during the time he is employed for the estate.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 117.\*]  
(Syllabus by the Judge.)

Marcus Helfand, for the motion.

Robert L. Turk, opposed.

ADAMS, District Judge. Ernest Martin & Company, the bankrupts herein, on the 25th of October, 1904, made their note for the sum of \$500, payable to the order of Moses Blumenau at the Consolidated National Bank of New York, with interest. This note became due in October, 1905, and then amounted with interest, to \$530. Some time in May, 1905, one Joseph Paris, into whose possession the note had come in a negotiable form, called at the law office of Mr. Robert L. Turk and left the note with him for collection. In the early part of the succeeding October, Mr. Turk placed it in his bank, the said note mentioned above, for collection. Thereafter and on or about the 24th of October, 1905, and before the note become due, Martin & Company consulted Mr. Turk with reference to their financial affairs and he advised bankruptcy proceedings. The petition and schedules were filed by him as their attorney during the afternoon of the 25th of October, 1905. On the morning of that day, the note in question was paid to the said bank. On the 26th of October, 1905,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mr. Turk received a notice from the bank that the note had been collected and almost simultaneously with the receipt of the notice, Paris called on Mr. Turk and demanded his money, which was handed over to him, less \$30, which Mr. Turk retained as his fee, pursuant to agreement. Upon this state of facts, the special commissioner ordered Mr. Turk to pay to the trustee the sum of \$530 received by him, and the question now presented is whether such order should be confirmed.

The theory of the special commissioner is that Mr. Turk being aware of the bankrupts' financial condition when he made the payment, it should therefore be regarded as a nullity, and he should be required to pay the money involved into the estate.

The theory of Mr. Turk is that he merely acted as agent in the matter and if there is to be any recovery of the money, recourse to Mr. Paris, the principal, should be had.

I think the contention of Mr. Turk should be sustained. No doubt the knowledge which an agent obtains is, under ordinary circumstances, often imputable to his principal, but a somewhat different rule applies where the relations of attorney and client are involved and there is no question of fraud. In the latter case, it is the duty of an attorney to turn a collection, made in the ordinary course of business, over to his client and not to a third person.

This matter has not been litigated upon any theory of fraud, in which event, a fraud being established, a more stringent rule against the attorney should be applied. *Mayer v. Hermann*, 16 Fed. Cas. 1241. Here an order for the payment of money was made against an attorney who collected the sum in pursuance of business committed to him long before the bankruptcy and who paid it in due course to his client. It seems to me that compelling the attorney to pay the amount again is not justified and the referee's order to that effect should not be sustained. It is proper that the fee should follow the collection.

Motion to confirm denied.

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#### In re SCHULMAN et al.

(District Court, S. D. New York. January 19, 1909.)

#### BANKRUPTCY (§ 241\*) — LOSS OF ASSETS — EXAMINATION OF BANKRUPT — CONTEMPT.

Where there was an apparent loss of assets amounting to \$61,000 during the last six months of a bankrupt's business, which on his examination he failed to explain, and his whole examination indicated duplicity, intentional evasion, and refusal to disclose facts connected with the bankruptcy under the pretense of ignorance and stupidity, he was guilty of contempt and subject to imprisonment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.\*]

#### In Bankruptcy.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

James, Schell & Elkus, for trustee.  
Morris Meyers, for bankrupt Samuel Schulman.

HOLT, District Judge. This is a motion to punish the bankrupt Samuel Schulman for contempt. In January, 1908, the bankrupt made a written financial statement that his assets exceeded his liabilities in the sum of \$42,326. He was put in bankruptcy in July, 1908, and his schedules show that at that time his liabilities exceeded his assets in the sum of \$19,000, showing an apparent loss in six months of \$61,000. The bankrupt testified that his statement showing a net worth in January of about \$42,000 was correct. He verified the schedules, and he testified that he had stock on hand at the time of the failure worth about \$10,000. On his examination before the referee he was asked, in great detail and in repeated forms, to explain how he made the apparent loss of \$61,000 during six months' business, and what had become of his stock of goods. Substantially no explanation was made. At first his sole statement was that he had lost money, without any statement of how he had lost it. Finally, at the very end of the examination, in answer to his own counsel, he said:

"We sold goods to people, the panic came, and there has been a lot of goods returned, and the goods that were returned had to be sold at a low figure."

All efforts to get him to explain what the transactions were in which money was lost, what goods had been returned, and what goods returned were sold at a low figure entirely failed. To a great many of the questions he replied with the question, "What do you mean?" and it is apparent that in most of those cases he knew what was meant. Although he testified that he could not read or write English, and although it is true that he did not speak English very well, he could understand it and speak it sufficiently for all practical purposes. Whenever his own counsel asked him questions, he comprehended them well enough. On very numerous occasions his reply was the stock answer of the prevaricator, "I don't remember," and the whole examination from the beginning to the end is a perfectly transparent case of duplicity, intentional evasion, and refusal to make any explanation of the facts connected with his bankruptcy under the pretense of ignorance and stupidity. The whole attitude of the bankrupt in the entire proceeding is that of contempt of this court and of its authority, and a deliberate determination to conceal from his creditors all the material facts within his knowledge relating to the affairs of his firm.

The bankrupt is adjudged guilty of contempt, and, as a punishment for such contempt, is ordered to be committed to Ludlow Street Jail for six months. If, after five days of such imprisonment, he wishes to have an opportunity to be again examined, the marshal will be directed to take him again before the referee for re-examination, and if, upon such examination, he shall make a full and satisfactory disclosure of all the material facts of the case within his knowledge, an application may be made to the court for a discharge from further imprisonment; but if he declines to submit to such re-examination,

or if, having applied for it, he is guilty of the same evasion and duplicity which characterize the one already had, such imprisonment shall continue for the term already stated.

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In re GORDON.

(District Court, S. D. New York. February 1, 1909.)

No. 11,356.

1. BANKRUPTCY (§ 241\*)—EXAMINATION OF BANKRUPT—FALSE TESTIMONY.

On the examination of a bankrupt, he several times denied that he had any money in his pocket, and then admitted that he had about \$1.50, and finally, when directed to produce whatever he had in his pocket, took therefrom a roll of bills amounting to \$100, which he claimed belonged to another, as the receiver finally determined. *Held*, that the bankrupt's false testimony was not prejudicial to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.\*]

2. BANKRUPTCY (§ 241\*) — EXAMINATION OF BANKRUPT — FALSE TESTIMONY — CONTEMPT.

Where a bankrupt testified falsely with reference to the money he had in his possession at the time of his examination, which testimony was not prejudicial to his estate, he should be regarded as having purged his contempt by admitting the falsity of his testimony and testifying truly to all the facts during such examination.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.\*]

In Bankruptcy.

James, Schell & Elkus, for the motion.  
Max D. Steuer, opposed.

HOLT, District Judge. This is a motion to punish the bankrupt for contempt. The bankrupt, when under examination, was asked if he had any money in his pocket. At first he replied that he had nothing. The question was repeated several times, in substance, and he made the same reply, except that he admitted that he had about \$1.50. Finally the counsel asked him, and the commissioner conducting the examination directed him, to produce whatever he had in his pocket. He then produced from his pocket a roll of bills, amounting to \$100, and said that it was not his money, but that it belonged to a man named Schoolman, who had intrusted it to him for the purpose of making a purchase. The question who owned this money was subsequently referred to a referee, and he decided that Schoolman owned it. The alleged contempt consists in the bankrupt's repeated denials that he had any money in his pocket when first questioned on the subject.

In the first place, this is a trivial matter, so far as the interests of the estate are concerned. Even if the bankrupt was giving intentionally false testimony, it would not, if believed, have wronged the creditors of the estate. In the next place, it is possible that the bankrupt thought he had a right to answer as he did, because of the fact

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



that the \$100 in his pocket belonged to Schoolman, as has been decided by the referee.

But there is another ground upon which I prefer to put my decision in this case, and that is the importance of not discouraging bankrupts who have given false testimony from afterwards admitting the truth. Almost every bankrupt who has intentionally concealed his property before bankruptcy concocts a false explanation, and, when he is examined, at first gives false testimony in support of such fabricated explanation. Like all false evidence, however, such testimony usually will not stand the test of thorough cross-examination by a competent lawyer. It frequently happens that a bankrupt, after cross-examination has exposed the improbability or absurdity of the evidence given, would be willing to confess the truth, if he were not afraid of the consequences of the false evidence that he has given. In such cases he must take the chances of a prosecution for perjury; but, so far as the charge of contempt is concerned, I think that he should be regarded as having purged his contempt if he has, at any time in the course of his examination, given such full and truthful information concerning his estate as the creditors have a right to require. I think, therefore, as a general rule, that, in cases in which the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he ought not to be punished for contempt. In exceptional cases, or in cases where the recantation does not take place until adjourned dates, and in the meanwhile, because of his false testimony, any injury has happened to the estate, a different conclusion may be reached.

Motion denied.

## HILL et al. v. WALKER.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1909.)

No. 2,766.

## 1. COURTS (§ 279\*)—JURISDICTION—OFFICE OF JURISDICTIONAL ALLEGATIONS IN COMPLAINT IN FEDERAL COURTS.

Jurisdictional allegations in the complaint in federal courts are not made as a basis for proof at the trial, but to found the court's jurisdiction of the action at its commencement.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 279.\*]

## 2. COURTS (§ 280\*)—PROPER JURISDICTIONAL ALLEGATIONS MAKE PRIMA FACIE CASE.

A proper allegation of jurisdictional facts in the complaint in federal courts creates a prima facie case in favor of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816-818; Dec. Dig. § 280.\*]

## 3. COURTS (§ 280\*)—EFFECT OF PRIMA FACIE CASE MADE BY PROPER ALLEGATION OF JURISDICTIONAL FACTS.

The prima facie case in favor of jurisdiction, made by a proper allegation of jurisdictional facts in the complaint, continues until it is overcome by evidence which convinces the mind to a legal certainty that the court in fact has not jurisdiction of the action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816-818; Dec. Dig. § 280.\*]

## 4. COURTS (§ 339\*)—STATE CODES OF PROCEDURE—ALL DEFENSES IN ANSWER—NOT BINDING ON FEDERAL COURTS.

State codes of procedure are intended for courts of general jurisdiction. Their provision that objections to the jurisdiction of the court shall be taken by answer is not applicable to federal courts, because they are courts of limited jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 914; Dec. Dig. § 339.\*]

Jurisdiction as affected by state laws, see note to *Barling v. Bank of British North America*, 1 C. C. A. 513.]

## 5. COURTS (§ 279\*)—FEDERAL COURTS—GENERAL DENIAL—NOT PROPER PLEADING TO RAISE OBJECTION TO JURISDICTION.

Neither the general denial under state codes nor the general issue at common law is a proper method of challenging the jurisdiction of federal courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 279.\*]

## 6. REMOVAL OF CAUSES (§ 108\*)—JURISDICTION—DEFECTS—PROCEDURE.

Act March 3, 1875, c. 137, § 5, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511), covers the entire field of dismissals for defects of jurisdiction arising upon the evidence, and not only declares the duty of federal courts upon that subject, but also prescribes the showing necessary to the exercise of the power which it grants.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 108.\*]

## 7. REMOVAL OF CAUSES (§ 108\*)—JURISDICTION—DISMISSAL—EVIDENCE.

When the complaint contains proper jurisdictional allegations, in order to justify the court in dismissing an action for want of jurisdiction, under Act March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), evidence must be produced which convinces the mind to a legal cer-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tainty "that such suit does not really and substantially involve a controversy properly within the jurisdiction of said circuit court."

*Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579, examined and distinguished.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 108.\*]

8. APPEAL AND ERROR (§ 185\*)—ACTION AT LAW TRIED TO COURT WITHOUT JURY—GENERAL FINDING—OBJECTIONS TO JURISDICTION.

When an action at law is tried to the court without a jury, and there is a general finding in favor of plaintiff, and no objection is made to the jurisdiction at the trial, an appellate court cannot look into the evidence contained in a bill of exceptions to ascertain whether jurisdiction was properly proven at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1178; Dec. Dig. § 185.\*]

9. COURTS (§ 323\*)—JURISDICTION—EVIDENCE OF RESIDENCE—CITIZENSHIP.

Evidence in this case examined, and held to show plaintiff's citizenship as alleged in the complaint, though the direct testimony only established his residence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 885-886; Dec. Dig. § 323.\*]

Sanborn, Circuit Judge, concurs as to the last two grounds only. Hook, Circuit Judge, dissents.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

George B. Webster (Harry E. Sprague and Robert Funkhouser, on the brief), for plaintiffs in error.

Henry B. Davis and John A. Harrison, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This action was brought by George W. Walker, doing business as the Walker Stave Company, against the defendants (the plaintiffs in error), to recover a balance claimed to be due on a contract entered into between the parties on the 23d day of June, 1904, by the terms of which the plaintiff agreed to sell, and the defendants to purchase, 2,000,000 staves of different grades, delivery to be made in about equal quantities in each month down to November 1st of that year. It is not necessary in this place to state the issues more fully. The action was tried before the court without a jury, pursuant to stipulation. A general finding in favor of the plaintiff was made, and judgment entered accordingly. The judgment is chiefly attacked in this court upon the ground that there was no adequate proof of jurisdiction. The complaint properly states that the plaintiff is a citizen of the state of Illinois, and the defendant a corporation organized under the laws of Missouri. The answer is voluminous, raising many issues as to the merits of the controversy, and also contains a general denial which it is claimed puts in issue the citizenship of the plaintiff. On the trial Mr. Walker, while testifying as a witness was asked, "Where do you reside?" and answered, "I live in Vandalia, Ill." It is now assigned as a cause for impeaching the judgment that this testimony constitutes the only evidence

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as to plaintiff's citizenship. The inaccuracy of the proof was in no way challenged in the trial court, but is now presented here for the first time.

In passing upon this question, it is necessary to distinguish clearly between failure to plead jurisdictional facts in the complaint and a deficiency of proof on that subject in the evidence. The jurisdiction of federal courts, being limited, is aided by no presumption. Until the facts requisite to that jurisdiction are brought upon the record, there is no foundation for the exercise of any judicial power in the cause. It has therefore been uniformly held that these facts must appear with certainty and precision either in the complaint alone, or in the complaint when supplemented by other documents constituting a part of the record proper. Their absence cannot be waived, because they pertain to jurisdiction of the subject-matter and not of the person. By far the greater number of cases in which judgments have been set aside for jurisdictional reasons fall under this head. The facts essential to jurisdiction were not brought upon the record. The only other class is where want of jurisdiction has been disclosed by the evidence. In all such cases, with possibly one or two exceptions, the defect has appeared not from a failure to prove the allegations of the complaint, but by direct and positive evidence showing that the suit was not within the cognizance of federal courts. The present case falls under neither of these classes. Here the jurisdictional facts are alleged with certainty and precision, and the evidence does not show that jurisdiction is wanting.

The jurisdictional averments of the complaint in federal courts are not made as a basis for proof at the trial, but to found jurisdiction of the suit. They are not held in suspense until supported by proof, like allegations respecting the merits; but immediately, upon the filing of the complaint, they accomplish their purpose. Thereupon, by virtue of such allegations, plenary jurisdiction of the court over the cause arises. That jurisdiction is not suspended by a denial in the answer or defeated by such a denial combined with an inaccuracy or insufficiency of proof on the subject, but continues unimpaired until evidence is produced showing clearly that jurisdiction in fact does not exist. What, then, is the force and effect of a proper pleading of jurisdictional facts? (1) It makes a *prima facie* case in favor of jurisdiction. (2) Such jurisdiction continues until evidence is produced which convinces the mind to a "legal certainty" that the court in fact is without lawful cognizance of the suit.

Before examining the authorities which we believe support these propositions, it will be advantageous to consider the conformity act of June 1, 1872 (17 Stat. 196, c. 255), and the act of March 3, 1875, c. 137, § 1, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), section 5 of which defines the duty of federal courts as to the dismissal of suits for defects of jurisdiction arising upon the evidence. Before the passage of these statutes the jurisdiction of these courts could only be challenged by a separate plea which presented the question clearly as a subject for actual litigation. There is nothing in either of the acts which necessitates a change in this practice, and there are substantial reasons for the continuance either of that method, or of some-

thing no less direct and clear. Most of the state codes embodying the reformed procedure require all pleas and defenses to be set up in the answer. These codes, however, are intended to regulate the practice in courts of general jurisdiction. Under them the objection that a cause is not properly within the jurisdiction of the court very seldom arises; and when it does arise it is shown upon the face of the pleading by the nature of the cause of action, and therefore requires no investigation of matters of fact. The jurisdiction of our national courts, on the contrary, being limited, every cause brought before them presents a question of jurisdiction, and the subject often involves a serious controversy upon the facts. This fundamental difference between the courts of the states and of the nation justifies a difference in practice. The existence of jurisdiction being a part of every suit in the federal courts, and arising in much the greater number of cases out of facts wholly independent of the cause of action, the issue upon that subject ought not to be commingled in the answer with issues upon the merits. Such a practice tends to obscure this question of primary importance and thus cause it to be overlooked through inadvertence. It also leads to confusion in the trial of the cause, as was early pointed out by Judge Hammond in *Refining Co. v. Wyman* (C. C.) 38 Fed. 574. But the greatest objection is that it is idle and oppressive to require litigants to come before the court with their witnesses, prepared to try a cause upon the merits, when the jurisdiction of the court to hear the merits is in controversy. It is a noteworthy fact that, since the passage of the acts above referred to, the same as before, whenever it is proposed to really controvert the question of jurisdiction, the issue is raised by a separate plea. That has at all times been recognized at the circuit as the better practice. The general denial is now a part of nearly every answer in a code state, and, as a rule, is interposed simply as a catch-all to cover any matter that may have been omitted through inadvertence. To allow such fundamental subjects as jurisdiction to be litigated under such an issue is simply to invite inadvertencies on the one hand and sharp practice on the other. There being substantial reasons for the presentation of this issue in the federal courts apart from the merits, the conformity act does not preclude them from adopting and enforcing such a practice on the subject as will be most conducive to a fair and efficient administration of justice in those tribunals.

Speaking of the conformity act, the Supreme Court says, in *Indianapolis & St. Louis Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898:

"The conformity is required to be as near as may be—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose: It devolved upon the judges to be affected the duty of construing and deciding, and gave to them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals."

This court also, speaking by Judge Sanborn in the case of *Collin County National Bank v. Hughes*, 155 Fed. 389, 83 C. C. A. 661, says:

"The Supreme Court and this court have held that strict conformity to the practice and proceedings in the state courts is impracticable, and that this section does not require the courts of the United States to adopt any rule of pleading, practice, or procedure enacted by state statute or announced by the decision of state courts which would restrict their jurisdiction or unwisely encumber the administration of justice in their tribunals."

Congress has also clearly intimated that jurisdictional questions may be raised by plea. Section 1011 of the Revised Statutes was amended by the act of February 18, 1875, c. 80, 18 Stat. 318 (U. S. Comp. St. 1901, p. 715), more than three years after the passage of the conformity act, so as to read:

"There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error for any error in ruling any plea in abatement other than a plea to the jurisdiction."

Here is a manifest indication in a federal statute that jurisdictional questions may properly be raised by plea in abatement, and, of course, when there is a federal statute on a subject of practice, that is paramount to state statutes notwithstanding the conformity act. In our judgment, therefore, the rule of the codes that all pleas and defenses shall be embodied in the answer is not obligatory upon the federal courts when dealing with the subject of jurisdiction.

But if the code practice were controlling, it affords no justification for presenting objections to the jurisdiction of the court in the covert and indirect form of a general denial. As Chief Justice Ryan early pointed out, the rule of the codes that all defenses shall be contained in the answer has in no way changed the nature of the defenses. *Dutcher v. Dutcher*, 39 Wis. 651. Pleas to the jurisdiction were always affirmative, and the burden of their proof rested upon the defendant. The fact that under the codes they may be combined in the answer with defenses on the merits has not changed their character. They are still affirmative in their nature, and should be supported with affirmative proof by the party interposing them.

Again, though under the codes pleas in abatement must be united in the answer with pleas in bar, they cannot be so combined at the trial. On the contrary, their nature is so divergent that, though combined in the answer, they must be tried separately. This is not only the rule in the federal courts (*Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 291, 76 C. C. A. 172; *Ashley v. Board*, 8 C. C. A. 455, 468, 60 Fed. 55, 68; *Terry v. Davy*, 46 C. C. A. 141, 143, 107 Fed. 50, 52; *Toledo Traction Co. v. Cameron*, 137 Fed. 48, 54, 69 C. C. A. 28; *Wetmore v. Rymer*, 169 U. S. 115, 120, 18 Sup. Ct. 293, 42 L. Ed. 682), but has likewise been found necessary in state courts controlled by the code practice (*Board of Supervisors v. Van Stralen*, 45 Wis. 675; *Id.*, 46 Wis. 374, 1 N. W. 106; *Wells v. Patton*, 50 Kan. 732, 33 Pac. 15; *Christian v. Williams*, 35 Mo. App. 297). Inasmuch as pleas to the jurisdiction are by their nature so distinct from defenses involving the merits as to require a separate trial, there is no foundation in reason for the rule which requires both to be combined in the answer.

But the present case is independent of state practice. It is controlled by section 5 of the act of 1875. Under that statute as con-

strued by the Supreme Court, the question here raised relates to the burden of proof rather than the form of pleading. Section 5 reads as follows:

"If, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it," etc.

We cannot understand this statute without considering the mischief which it was designed to remedy. Under the old practice, when a want of jurisdiction did not appear on the face of the record, the objection could only be made by plea in abatement. Pleading to the merits operated as a final waiver of the defect, binding upon the court as well as the litigants. Under this rule the court would often discover on the trial that it had no jurisdiction of the case, and yet be without power to take judicial notice of the fact. Furthermore, by section 1 of the act of 1875 the restrictions upon suits by assignees of bills, notes, and other choses in action which existed under the original judiciary act of 1789 were swept away and the door opened wide for fraud by collusive transfers. Section 5, quoted above, was framed to meet both of these difficulties. Its most notable feature is that it deals only with those defects of jurisdiction which are disclosed by evidence. For those which appear on the face of the pleadings, there was no need of legislation. Whenever the complaint alone, or aided by the record, failed to show the existence of jurisdiction, federal courts had from the beginning taken notice of the fact *sua sponte*, and dismissed the cause. *Bingham v. Cabot*, 3 Dall. 382, 1 L. Ed. 646; *Emory v. Greenough*, 3 Dall. 369, 1 L. Ed. 640; *Capron v. Van Noorden*, 2 Cranch, 126, 2 L. Ed. 229; *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885. The practice in such cases previous to 1875 was precisely what it has been since. That statute assumes that the complaint will on its face show a case within the cognizance of federal courts, and deals only with defects of jurisdiction which exist *dehors* the pleadings. Here the courts were in need of statutory aid. As already explained, such defects could be attacked at common law only by plea in abatement, and were forever waived by pleading to the merits. As a matter of practical experience, however, the fact that the court was without jurisdiction would often first appear incidentally at the trial in the production of evidence; but as there had then been a plea to the merits, it was too late by the rule of the common law to deal with the subject. The result was that the jurisdiction of the courts was frequently imposed upon; but the courts, though cognizant of the wrong, felt themselves powerless to afford a remedy without the aid of legislation. *De Sobry v. Nicholson*, 3 Wall. 420, 427, 18 L. Ed. 263; *Farmington v. Pillsbury*, 114 U. S. 138, 143, 5 Sup. Ct. 807, 29 L. Ed. 114. Section 5 of the act of 1875 was designed to reach this evil, which it was feared would be

greatly aggravated by section 1 of that act. *Williams v. Nottawa*, 104 U. S. 209, 26 L. Ed. 719. Its object was to release the federal courts from the rule of the common law by which all objections to jurisdiction were waived by pleading to the merits, and to enable those courts to protect themselves at all times against frauds upon their jurisdiction. It does not deal with the subject of pleading in any way, save only to provide that want of jurisdiction shall be considered "at any time." The Supreme Court in applying the act has held that the question may now be brought forward in any manner either by plea, answer, or motion; but however presented, a dismissal of the cause is not authorized until it is made to appear to the satisfaction of the court by some affirmative showing in support of the pleading, whatever its form, "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court." The statute covers the entire field of dismissals for defects of jurisdiction arising upon the evidence, and not only declares the duty of federal courts upon that subject, but also prescribes the showing necessary to the exercise of the power which it grants. It requires proof which shall satisfy the court that the suit does not "really and substantially" come within its jurisdiction. The general denial has no place within its language which calls for affirmative proof and hence affirmative pleading. It was never intended to absolve counsel, when challenging the jurisdiction of the court, from the duty of framing their pleading, or other form of attack, so as to present the question clearly and directly as a subject of actual controversy. The right to hear the objection at any time, or in any manner, is for the protection of the court. It does not authorize a covert form of raising the issue without actually litigating it at the trial, but for the purpose of holding it in reserve as a possible basis of error in case of an unsatisfactory judgment. Such a procedure, instead of defeating fraud, would encourage it. While the court may seize upon any form of pleading for the purpose of protecting itself against frauds upon its jurisdiction, still counsel ought not to be permitted to use a mere form of pleading as a means of presenting this question for the first time in an appellate court without any actual contest of the jurisdiction in the court below. Such a practice leaves the existence or nonexistence of jurisdiction to be determined by a process of speculative inference from the pleadings, without disclosing the actual facts upon which jurisdiction depends. The present case is an impressive illustration of the results of such a practice. Here there is no proof of facts showing a want of jurisdiction, but simply a general denial combined with an informality in the evidence. Such is not the plan of the statute. It requires the production of evidence which shall bring the real facts to light. It is a grievous hardship for litigants to be led over the long course of federal justice in the belief that they are having their rights adjudicated, only to learn at the end that the entire proceeding is a nullity. Such a result should be strictly confined to the necessity which affords its only justification. Owing to the limited jurisdiction of the federal courts, such hardship cannot be avoided when the facts essential



to jurisdiction have not been brought upon the record; but when jurisdiction has once been established by proper averments in the complaint, it should remain until proof has been produced upon an actual trial of the issue that the cause is one which, in the language of the statute, "does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court." Such a practice is within the fair intent of the act, and has received the approval of the federal courts.

This will appear if we now return to the propositions announced in the earlier part of this opinion. The first of these was that a proper allegation of jurisdictional facts in the complaint creates a *prima facie* case in favor of jurisdiction. That rule was first clearly stated in *Sheppard v. Graves*, 14 How. 505, at page 510, 14 L. Ed. 518, as follows:

"The true doctrine applicable to the question is this: That although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet, wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and that it is incumbent on him who would impeach that jurisdiction for causes dehors the pleading to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof both rest upon the party taking the exception."

The other doctrine announced in the same case, that the objection could only be taken by plea, has, of course, been done away with. But so far as we are aware, the rule just quoted is still the rule of the federal courts. What the defendant is attempting to do is to challenge the jurisdiction of the court, and in order to do that he must not simply deny the citizenship as alleged in the complaint, but must allege affirmatively facts showing that the plaintiff and defendant are citizens of the same state, or make such other averments as shall show directly that the cause is beyond the lawful cognizance of the court.

The latest declaration of the Supreme Court, that a proper averment showing diversity of citizenship makes out a *prima facie* case in favor of jurisdiction, is in *Steigleder v. McQuesten*, 198 U. S. 141, 25 Sup. Ct. 616, 49 L. Ed. 986, where the court says:

"The averment in the bill that the parties were citizens of different states was sufficient to make a *prima facie* case of jurisdiction, so far as it depended on citizenship."

The same rule is declared by the Circuit Court of Appeals of the Seventh Circuit, in *Adams v. Shirk*, 117 Fed. 801, 55 C. C. A. 25: "The proper allegation of jurisdictional facts *prima facie* was true." There the objection was raised in a common-law state by the general issue. That, however, is quite as broad a form of pleading as the general denial under the code, and would admit of any attack upon the jurisdiction of the court which would be possible under a denial in a code state. Furthermore, inasmuch as a federal statute permits the objection to be raised "at any time," it would not be waived in the national courts by pleading to the merits under the one practice any more than the other.

The fact, however, that the proper averment of the citizenship of the parties in the complaint creates a *prima facie* case in favor of jurisdiction becomes more manifest when we consider the second proposition, namely, that the *prima facie* case thus made remains until it is overcome by evidence which satisfies the mind "to a legal certainty" that jurisdiction does not in fact exist. This second proposition was also first clearly announced in *Sheppard v. Graves*, 14 How. 505, 14 L. Ed. 518. It was again stated in the case of *Barry v. Edmunds*, 116 U. S. 550-559, 6 Sup. Ct. 501, 506, 29 L. Ed. 729, where it is said, when the complaint contains proper jurisdictional allegations, the Circuit Court is not justified in dismissing a cause for want of jurisdiction—

"unless the facts, when made distinctly to appear on the record, create a legal certainty of the conclusion. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account, 'shall appear to the satisfaction of said Circuit Court.'"

In that case the question arose as to the amount in controversy. The trial court, after receiving the verdict of the jury, instituted an inquiry upon that subject, and reached the conclusion that the suit really did not involve an amount sufficient to confer jurisdiction upon the court, and dismissed the cause. There was much evidence to support this conclusion, but the Supreme Court held that it was not sufficient to justify the dismissal, and reversed the cause, announcing the rule in the language above quoted.

In the case of *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725, the jurisdiction was based upon an allegation of diversity of citizenship. It appears from the record in the lower court (C. C.) 23 Fed. 835, that there was a general denial in the answer. In the course of the trial there was evidence tending to show that both parties were aliens, and the trial court for that reason, on motion of the defendant after verdict, dismissed the cause for want of jurisdiction. After referring to the statute of 1875, and the causes which led to its enactment, the Supreme Court says (page 590 of 116 U. S., page 522 of 6 Sup. Ct. [29 L. Ed. 725]):

"Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed. The evidence must be directed to the issues, and it is only when the facts material to the issues show there is no jurisdiction that the court can dismiss the case upon the motion of either party."

In this case there was a general denial, and the evidence also tended strongly to show that the proper diversity of citizenship did not exist. But the Supreme Court ruled that notwithstanding that showing, and notwithstanding a motion made in the trial court challenging its jurisdiction, still the trial court could not dismiss the cause for want of jurisdiction because the plaintiff had had no opportunity, after the question was directly raised, to meet that issue. The present case is much stronger than the *Hartog Case* for sustaining the

judgment. Here such evidence as was adduced tended to support the allegations of the complaint as to the citizenship of the parties. Here no motion challenging the jurisdiction was made in the trial court, as was done in that case; but we are now asked, upon attention being called for the first time to the inaccuracy of the evidence, to reverse the judgment for want of jurisdiction. That would be to go directly in opposition to the case of *Hartog v. Memory*, for there the Supreme Court, though the issue in the pleadings was the same as here, reversed the action of the trial court in dismissing the case, without giving to the plaintiff an opportunity to show that evidence, which on its face affirmatively established a want of jurisdiction, was in fact not true.

The case of *Hartog v. Memory* is an unqualified holding that any lack of evidence to support the jurisdictional averments of the complaint must be challenged in the trial court, and cannot be raised for the first time on appeal; and it further holds that, in order to justify a dismissal by the trial court for want of jurisdiction, the evidence material to that subject must show directly and affirmatively that there is no jurisdiction. This case has never been overruled; nor has it been in any way qualified except as we shall presently point out. On the contrary, it has been referred to as a controlling authority as frequently as any decision of the Supreme Court dealing with the subject of jurisdiction. The following are only the more important cases in which it has been thus cited: *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; *Huntington v. Laidley*, 176 U. S. 668, 20 Sup. Ct. 526, 44 L. Ed. 630; *Imperial Refining Co. v. Wyman* (C. C.) 38 Fed. 574, 576, 577, 3 L. R. A. 503; *Hewitt v. Story* (C. C.) 39 Fed. 158-160; *Foster v. Cleveland, C. & St. L. Ry. Co.* (C. C.) 56 Fed. 434-436; *Gubbins v. Laughtenschlager* (C. C.) 75 Fed. 615, 620; *National Masonic Accident Association v. Sparks*, 83 Fed. 225, 227, 28 C. C. A. 399; *Terry v. Davy*, 107 Fed. 50, 52, 46 C. C. A. 141; *Adams v. Shirk*, 117 Fed. 801, 804, 55 C. C. A. 25; *Pennsylvania Company v. Bay* (C. C.) 138 Fed. 203-205; *Every Evening Printing Co. v. Butler*, 141 Fed. 916, 918, 75 C. C. A. 657; *Briggs v. Traders' Co.* (C. C.) 145 Fed. 254, 257; *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288-291, 76 C. C. A. 172; *Gaddie v. Mann* (C. C.) 147 Fed. 955, 959; *Acord v. Western Pocahontas Corporation* (C. C.) 156 Fed. 989; *Crosby v. Cuba Railroad Co.* (C. C.) 158 Fed. 144.

In the case of *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690, *Hartog v. Memory* is reviewed, and some of the general language there used is said to have been irrelevant to the question before the court, and the decision is qualified to the extent of allowing a jurisdictional objection to be raised by any form of pleading. The substantial ground, however, of the decision in *Hartog v. Memory* is not questioned but reaffirmed. At page 325 of 129 U. S., page 292 of 9 Sup. Ct. (32 L. Ed. 690), Mr. Justice Harlan, referring to the evidence necessary to support a dismissal for want of jurisdiction under the act of 1875, says:

"It is true that by the words of the statute this duty arose only when it appeared to the satisfaction of the court that the suit was not one within its jurisdiction."

And again, at page 326 of 129 U. S., page 292 of 9 Sup. Ct. (32 L. Ed. 690):

"But the above rule is equally applicable in a case in which the averment as to citizenship is sufficient, and such averment is shown in some appropriate mode to be untrue."

And again, on the same page:

"And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal."

If it was error in the trial court in the Hartog Case, where the evidence upon the record affirmatively showed a lack of jurisdiction, to dismiss without giving the plaintiff an opportunity to rebut that evidence, surely here, where the evidence upon the record tends to support the averments of the complaint, and no question as to the sufficiency of that evidence was in any way raised in the trial court, it would be a pernicious practice for this court to set the judgment aside upon its attention being called to an informality in the evidence.

In *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923, after verdict a petition was filed by the defendant in which he alleged that the plaintiff, Young, was not the real party in interest, and that the title to the property in controversy had been collusively transferred to her for the sole purpose of vesting apparent jurisdiction in the federal court. To this petition an answer was interposed, and a trial had which resulted in a denial of the application. Speaking of the proof required by section 5 of the act of 1875, the court says, at page 252 of 134 U. S., page 544 of 10 Sup. Ct. (33 L. Ed. 923):

"In *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729, it was held that a suit cannot properly be dismissed by a Circuit Court of the United States, as not involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record create a legal certainty of that conclusion. 'Nothing less than this,' said Mr. Justice Matthews, 'is meant by the statute when it provides that the failure of its jurisdiction, on this account, shall appear to the satisfaction of said Circuit Court.'"

In *Mexican Central Railway Company v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699, jurisdiction was rested upon diversity of citizenship which was properly pleaded in the complaint. There was a general denial. On the trial of the cause, by cross-examination of the plaintiff, evidence was developed which tended to show that the plaintiff, instead of being a citizen of Texas, as alleged in the complaint, was in fact a citizen of the territory of Arizona. If this had been true, it would have divested the court of jurisdiction. The defendant asked leave to file a plea raising this question. The application was denied. So far as the record shows, there was no evidence to support the jurisdictional averments of the complaint, al-

though, as we have already stated, there was a general denial in the answer. The Supreme Court sustained the action of the trial court.

In *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, the question again related to the sum or value in controversy. The defendant at the close of plaintiff's evidence moved to dismiss the case upon the ground that the value of the property involved had been collusively exaggerated for the purpose of conferring jurisdiction upon the court. The motion was then denied, and the cause proceeded to verdict, which was in favor of the plaintiff for only \$1. Thereupon the court again entertained the motion of the defendant and dismissed the cause. The Supreme Court, after an extended review of the authorities, reversed this action of the trial court upon the following statement of the rule:

"Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before the court did not warrant a dismissal of the action for want of jurisdiction."

The same doctrine is again announced in *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322-333, 27 Sup. Ct. 529, 51 L. Ed. 821. That was a plea to the jurisdiction on the ground that the amount involved had been collusively stated for the purpose of creating jurisdiction. The court says:

"On the issue presented by the plea, the burden of proof was upon the appellant, and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount."

In support of this proposition *Sheppard v. Graves*, 14 How. 505, 14 L. Ed. 518, is cited by the court, thus clearly indicating that the rule declared in that decision, that a proper averment of jurisdictional facts creates a prima facie case and devolves the burden of rebutting it upon the defendant, was not changed either by the act of 1875 or by the conformity act.

The subject was brought under examination in this court in *National Masonic Association v. Sparks*, 83 Fed. 225, 28 C. C. A. 399; also by the Court of Appeals of the Third Circuit in *Every Evening Printing Co. v. Butler*, 144 Fed. 916, 75 C. C. A. 657. In the last case the question related to the citizenship of the parties, and was presented in the answer by the general issue. The case arose in the state of Delaware, where the common-law procedure is still in force; but, as already remarked in regard to the case of *Adams v. Shirk*, the plea of the general issue at common law would admit any defense which a general denial would admit under the codes; and the doctrine declared by the court is quite as applicable as it would have been if the case had arisen in a code state. There the court says:

"Even if defendant below had challenged the jurisdictional fact of diverse citizenship, as alleged in the declaration, at the proper time, by appropriate plea or notice, the burden of proving by competent evidence its own affirmative averment in that regard would have fallen upon it."

*Toledo Traction Company v. Cameron*, 137 Fed. 48, 69 C. C. A. 28, arose in the state of Ohio, where they have the code practice. The complaint contained proper averments showing that plaintiff and defendant were citizens of different states. There was a general denial in the answer. No proof was adduced at the trial in support of the jurisdictional averments. After verdict and judgment, the defendant, by motion, raised the objection that the court was without jurisdiction. We shall examine this case more at length hereafter. At present we simply cite the language of the Court of Appeals of the Sixth Circuit as to the evidence which is necessary to justify a dismissal for want of jurisdiction. Speaking of the action of the trial court on that subject, it is said:

"The court was acting under the authority of the act of 1875, and it is settled that it must clearly appear that the court is being imposed upon, in order to justify a dismissal of the cause; and we may add that this rule is applied with increased rigor when the presentation of the objection is long delayed, as when the case has been tried and a verdict and judgment on the merits has been reached before the attention of the court has been drawn to it; presupposing, of course, that the lack of jurisdiction is not apparent on the record. *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923."

Surely if this is the rule when the objection is taken in the trial court, it ought to be enforced with even greater rigor when, as here, the objection is for the first time raised on appeal. In fact, such an objection ought to be conclusively barred in the appellate court, because there it is impossible to produce the evidence showing the actual citizenship of the parties.

The only cases in apparent conflict with the rules which we have been considering are *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579, and a case in this circuit based wholly upon that case, *Cole v. Carson*, 153 Fed. 278, 82 C. C. A. 408. *Roberts v. Lewis* was an action of ejectment arising in the state of Nebraska, where the code practice is in force. The answer combined a plea of the statute of limitations with a general denial. At the conclusion of the evidence the jury, by direction of the court, made a special finding which disposed of all the merits of the controversy, but contained no reference to the citizenship of the parties. Upon the finding, judgment was entered in favor of the plaintiff. The Supreme Court, in reversing the judgment, uses the following language at page 658 of 144 U. S., page 783 of 12 Sup. Ct. (36 L. Ed. 579):

"The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff."

We are unable to harmonize that language with the uniform holding of the Supreme Court, both previous to the decision in which it was employed, and since. It overlooks the cardinal fact that the jurisdictional averments of the complaint are not made as a basis of proof at the trial, but to establish the jurisdiction of the court over the action at its commencement. It is no doubt true that the Supreme Court, in order to give full effect to the act of 1875, has permitted the question of jurisdiction to be raised in any way that will bring

the subject to the attention of the court, and it is possible that even a general denial would be held sufficient to support affirmative evidence adduced upon the hearing to show that the real citizenship of the parties is such as to destroy jurisdiction. But the statement that the plaintiff must prove the jurisdictional averments of his complaint, when they are simply challenged by a general denial, overlooks the purpose of the jurisdictional averments in the pleadings, and the uniform holding of the court from the case of *Sheppard v. Graves*, 14 How. 505, 14 L. Ed. 518, down to *Steigleder v. McQuesten*, 198 U. S. 141, 25 Sup. Ct. 616, 49 L. Ed. 986, that a proper statement of jurisdictional facts in the complaint makes out a prima facie case in favor of jurisdiction; and the other doctrine, also stated in *Sheppard v. Graves*, and frequently reaffirmed, down to as late as *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821, that such prima facie case remains and sustains jurisdiction until it is overcome by evidence showing a want of jurisdiction to a "legal certainty." The case of *Roberts v. Lewis* may possibly be explained upon the ground that the finding of the jury in the trial court would not support a judgment because it failed to dispose of all the issues raised by the pleadings. Such a ruling would have been in accord with many earlier decisions of the court. In *Patterson v. United States*, 2 Wheat. 221, 4 L. Ed. 224, it was said:

"A verdict is bad if it varies from the issue in a substantial manner, or if it finds only a part of that which is in issue. Although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

The same rule was again enforced by the court speaking by Chief Justice Marshall in *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508:

"Where in a special verdict the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this court will not render judgment upon such an imperfect special verdict, but will remand the case to the court below with directions to award a venire facias de novo."

The subject came again before the court in *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169, where it is declared that a special verdict which fails to find the facts upon all the material issues raised by the pleadings will not support a judgment, although it is recited in the judgment that it is based upon a special verdict of the jury, "and facts conceded or not disputed upon the trial."

This was possibly the ground of decision in *Roberts v. Lewis*, for the opinion at its conclusion speaks of there being no "finding upon this essential point." Such an explanation of the case is suggested in *Toledo Traction Company v. Cameron*, 137 Fed. 49, 53, 69 C. C. A. 28.

*Wells Co. v. Gastonia Co.*, 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003, is not in point, because there the issue related not to the domicile, but to the corporate existence, of the plaintiff. Such a defense may properly be presented under a general denial, or the form of answer employed in that case. It is also true that the evi-

dence was there fully presented, and the question was not left to a speculative inference from the pleadings.

Two objections might be interposed to the cases we have cited: (1) It might be urged that *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725, *Adams v. Shirk*, 117 Fed. 801, 55 C. C. A. 25, and *Every Evening Printing Company v. Butler*, 144 Fed. 916, 75 C. C. A. 657, arose in states having the common-law practice, and that for this reason, under the conformity act, the federal courts in those cases were controlled by the common-law rule that objections to the jurisdiction must be taken by plea in abatement. We are not dealing, however, with the conformity act, but with section 5 of the act of 1875. By that statute the rule of the common law as to the manner of raising objections to the jurisdiction of the court is abrogated. It is a federal statute, and is binding upon the federal courts regardless of local practice. The rule of the common law related to the order of defenses, and required those relating to jurisdiction to be first and separately taken. The act of 1875 provides that such objections may be taken "at any time," and, as that statute has been interpreted by the Supreme Court, they may also be taken in any manner. Here, then, we have the rule of practice for all federal courts abrogating the rule of the common law in regard to pleas in abatement. That rule being abrogated, objections to the jurisdiction may be taken in states having the common-law practice under the general issue, if it may be taken in code states under the general denial. The cases referred to are therefore as much in point as they would have been if they had arisen in states having the code practice. (2) It might be contended that *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729, *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, and *Hunt v. Cotton Exchange*, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821, turned not upon the citizenship of the parties, but upon whether the amount involved was sufficient to confer federal jurisdiction, and that from this circumstance these cases belong in a class by themselves. To such a contention there are several answers: (a) Though the feature is obvious, the opinions make no reference to it as a ground of decision. On the contrary, they lay down a general rule which clearly embraces all objections to jurisdiction. (b) They turn not upon the circumstance referred to, but upon a construction of section 5 of the act of 1875. They declare the meaning of the phrase in that statute, "shall appear to the satisfaction of said Circuit Court," and say that that language requires proof of the want of jurisdiction to a legal certainty. (c) The statute itself makes no such classification as this objection suggests. It deals with all objections to the jurisdiction of the court which do not appear on the face of the pleadings but do appear by evidence, and requires that such objections, whether based on the citizenship of the parties or the amount in controversy, shall be established by the party raising them "to the satisfaction of the Circuit Court." (d) Jurisdictional objections depending upon the amount in controversy are necessarily involved in the merits of the cause. For this reason they are sure not to be overlooked at the trial, while objections arising



out of the citizenship of the parties do not involve the merits and are thus likely to escape attention. This distinction, therefore, instead of lessening the duty of the defendant, ought to impose upon him the burden of more direct pleading and more certain proof.

But if we turn aside from this discussion of authorities and ask ourselves the central question, which practice will best promote justice? the answer is so plain as to make the discussion itself seem almost a reproach to the law. The practice here advocated simply requires that frankness toward opposing counsel and that candor towards the court which at the present time is fundamental to the procedure of all English-speaking communities. It imposes no burden except that of raising an objection directly and clearly in the court where it can be met with the least trouble to courts and the least expense to litigants. The other practice, on the contrary, authorizes clandestine pleading and captious practice; the keeping of an objection in ambush for the purpose of speculating upon the result of the trial, and then, if that result is unfavorable, bringing the objection forward for the first time in an appellate court, where it will result in the greatest loss of time to the courts themselves, and the greatest expense to the litigants, and make a mockery of justice in the judgment of all men outside of the legal profession.

Under the doctrine which we have thus considered, at perhaps too great length, the question of jurisdiction ought to be ruled against the plaintiffs in error. The allegations of citizenship in the complaint satisfy the most exact standards, and there has been no affirmative showing to overcome the *prima facie* case which they create.

The same result might be reached upon narrower grounds. This cause was tried by the court without a jury, and a general finding made in favor of the plaintiff. It has been repeatedly held by the Supreme Court that an appellate court cannot in such a case look into the evidence for the purpose of deciding whether it supports the finding. If a bill of exceptions is preserved embodying the testimony and the rulings of the court on the trial of the case, the appellant court can only look into such bills of exceptions for the purpose of deciding whether the lower court committed error in the course of the trial in its rulings upon questions of evidence and other like matters. Viewing the general denial of the answer in the most favorable light possible for the defendant, it presented the citizenship of the plaintiff as one of the issues in the cause for the decision of the trial court. That court by its general finding has found this issue, as well as those relating to the merits, in favor of the plaintiff. Under the rulings of the Supreme Court in the following cases, we are not at liberty to look into the record for the purpose of determining that such finding was not supported by the evidence as to every issue. *Norris v. Jackson*, 76 U. S. 125, 19 L. Ed. 608; *Insurance Company v. Folsom*, 85 U. S. 249, 21 L. Ed. 827; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373. See, also, *U. S. Fidelity Co. v. Board of Commissioners*, 145 Fed. 144, and cases cited on page 151, 76 C. C. A. 114.

It is urged that it is the duty of the court to look into all parts of the record for the purpose of discovering a want of jurisdiction.

We do not question the rule that when the complaint fails to allege the facts necessary to federal jurisdiction, or when it appears from the evidence that the cause is in fact outside of federal cognizance, it is the duty of all courts to take notice of the fact; but when jurisdiction is properly laid in the complaint, no court is authorized to dismiss the cause for want of jurisdiction upon a mere insufficiency of proof on that subject. In fact, the Supreme Court has held such action improper, even when on the face of the record there was affirmative proof of a lack of jurisdiction, combined with a general denial in the answer. To justify a dismissal, that court ruled that the question must be directly raised in the trial court, and opposing counsel given an opportunity to rebut the evidence showing that the court was without jurisdiction. *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725; *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690. See, also, *Mexican Cen. R. R. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699. Here the jurisdictional facts are properly alleged in the complaint, and there is no showing in the evidence which can create even a suspicion of fraud upon the jurisdiction of the court, and the objection is raised in an appellate court by a defeated party who presented the issue obscurely under a general denial and refrained from directly raising the question in the trial while he speculated upon the result of the litigation. Under such circumstances, surely, this court is not justified in reversing the judgment when there is a general finding supporting jurisdiction.

If, however, the foregoing limitation be waived and we examine the evidence, it is sufficient to support the finding that plaintiff at the commencement of the action was a citizen of Illinois. He was asked, while testifying as a witness, where he resided, and stated that he lived at Vandalia, in that state. The record also shows that he was engaged in business there, having an extensive manufacturing establishment at Golden Gate, which he had been conducting for at least five years. The long correspondence which is embodied in the record is also addressed to him at such place of business. This is the showing on the subject of plaintiff's citizenship. While it is not technically precise and certain, it is sufficient to support jurisdiction.

*Toledo Traction Company v. Cameron*, 137 Fed. 48, 69 C. C. A. 28, is instructive not only as to the particular matter now under consideration, but as to all features of the present case. The complaint there contained a proper allegation of diversity of citizenship. A general denial was embodied in the answer. The case was tried before a jury. No evidence was adduced as to the citizenship of either of the parties. At the conclusion of the testimony a motion was made by the defendant for a directed verdict in its favor. This was overruled, and the cause submitted to the jury, who returned a verdict in favor of the plaintiff upon which judgment was entered. Thereafter the defendant moved that the verdict and judgment be set aside, and for a new trial, and upon the hearing of that motion urged for the first time that no evidence had been offered by plaintiff at the trial to prove the citizenship of the parties. Thereupon the court set aside the judg-

ment and permitted the plaintiff and defendant to adduce evidence upon that subject. The plaintiff was a minor, two years of age, living with his mother. The mother had obtained a divorce in Ohio, in which she was awarded the custody of the plaintiff. On the trial before the court as to the question of jurisdiction, she testified that after the divorce was obtained "she went to Monroe, in the state of Michigan, to accept a position which had been offered her there; that she took the plaintiff with her, and that she and the plaintiff had lived in that state ever since; that during that time she took care of the plaintiff, keeping him with her." In the complaint the plaintiff was alleged to be a citizen of Michigan. No evidence was offered as to whether the mother's residence in Michigan was temporary, for the purposes of her employment only, or permanent; nor was there any testimony as to whether she was a citizen of that state or not, except the evidence just stated. The corporation defendant was a citizen of the state of Ohio. Upon this evidence the court found that at the commencement of the suit the plaintiff was a citizen of the state of Michigan, and reinstated the judgment. This action of the trial court constituted the error brought before the Circuit Court of Appeals for review. It will therefore be seen that this case was even a stronger one for dismissal than the present case, for the question was directly challenged before the trial court, and not only the deficiency of proof on the original trial, but also on the hearing before the court as to the citizenship of the parties, was urged by the defendant in the trial court. The evidence was certainly less strong than it is here. It consisted simply of the statement that the plaintiff was taken by his mother, who was his guardian, into the state of Michigan, by reason of the mother's employment there. No evidence whatever was adduced as to the permanency of the residence in Michigan, or of the mother's citizenship in that state. The action of the trial court, however, was sustained, and the judgment affirmed.

In *Adams v. Shirk*, 117 Fed. 801, 55 C. C. A. 25, there were proper averments in the complaint showing that the plaintiff was a citizen of Indiana, and the defendant a citizen of Illinois. To this complaint there was an answer setting up the general issue. Upon this issue the residence of the plaintiff below, the defendant in error, *Shirk*, became one of the controverted questions on the trial. It was urged upon appeal that under the general denial the plaintiff below had the burden of showing that at the time of the commencement of the action he was a citizen of the state of Indiana. On this subject the court says:

"The question is not, as plaintiff in error contends, whether the defendants in error have discharged the burden of proving that *Elbert W. Shirk* was a citizen of Indiana. The proper allegation of jurisdictional facts, *prima facie*, was true. Simply to deny that *Elbert W. Shirk* was a citizen of Indiana would not show a want of jurisdiction. He may have been a citizen of some other state than Illinois, whereof plaintiff in error was a citizen. That *Elbert W. Shirk* was a citizen of Illinois was a material and necessary allegation. It was an affirmative averment, the burden of proving which, even under a proper plea in abatement, would have fallen on the plaintiff in error. Under the plea in the present case, the office of which was no broader than a motion or a suggestion to the court to protect itself from imposition,

the burden most assuredly was upon the moving party. The plaintiff in error introduced no evidence on the subject. The evidence of defendants in error does not establish that Elbert W. Shirk was a citizen of Illinois, and that the Circuit Court was imposed upon."

Here, however, there was strong affirmative proof tending to show that Shirk was a citizen of the same state as Adams, and the question was directly raised in the trial court. If that showing was insufficient to justify the court in dismissing the cause for want of jurisdiction, surely here, where the affirmative evidence tends to support the jurisdictional averments of the complaint, there is no just ground for such action.

The only other decision to which we shall call attention on this branch of the case is *Sun Printing & Publishing Association v. Edwards*, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027. There the complaint alleged that "plaintiff is a resident of the state of Delaware." This, by the uniform holding of federal courts, was insufficient to support jurisdiction. The averment was admitted in the answer. On the trial the plaintiff testified:

"Just prior to my going to work upon the New York Sun, I was the publisher and business manager of the Evening Journal at Wilmington, Del., and president of the company. After my discharge by the Sun, I finally secured a place with the New Haven Paladium, and I was there a while. One of the reasons I left the New Haven Paladium was that it was too far away from home. I lived in Delaware, and I had to go back and forth. My family were over in Delaware."

The averment of the complaint, and this testimony of the plaintiff, constituted all the evidence there was in the record as to his citizenship. It nowhere directly rises above the proof of his residence. But the Supreme Court held that, taking the averment and evidence together, they justified the inference that he was a citizen of Delaware, and sustained the federal jurisdiction. It will be observed that the showing here was less strong than in the present case, because there was no direct allegation of the plaintiff's citizenship in the complaint, as there is here. The evidence in that case as to plaintiff's residence seems hardly more persuasive on the subject of citizenship than the evidence in the present case. The cases are alike in the fact that the jurisdiction of the Circuit Court was not questioned in the *Sun Printing Company Case* by the defendant in the court below; but that question was there clearly open in the appellate court, because the complaint itself only alleged residence, and hence failed to make a *prima facie* showing of jurisdiction. It is manifest that there is no consideration for the dismissal of the present case which was not there present, and that in this case the clear and direct averment of the plaintiff's citizenship in the complaint makes at least one feature in favor of sustaining jurisdiction which did not exist in that case.

In whatever aspect, therefore, the question is viewed, we think the jurisdiction of the trial court should be sustained.

There is an error, however, assigned as to the rejection of certain evidence which is well taken. One of the defenses set up in the answer was that the defendant gave to the plaintiff, in the latter part of August, specific directions in writing to bill certain cars to New

York over the Delaware, Lackawanna & Western Railway, and explained that the purpose of the direction was to divert the shipment to Buffalo, if market conditions should be more favorable there. The plaintiff shipped two cars upon this order, but accepted bills of lading, routing them over other lines than the one specified. It is alleged in the answer that as a consequence the cars were delayed and lost for a period of two months, and that the defendants were injured in the total sum of \$724.79. The plaintiff claimed that the Southern Railway Company, the only line at Golden Gate, Ill., where his mill was located, refused to obey his directions to route the cars over the Lackawanna Line; that he gave specific instructions on the subject, and did all in his power to comply with the order of the defendants. Evidence was adduced on these subjects by the plaintiff tending to show that it was impossible for him to comply with the directions of the defendants in the particular mentioned. The defendant, to support this issue on its part, called an agent of the Lackawanna Line, and asked him whether it was possible at the time in question "to route cars of staves from Golden Gate, Ill., to New York, via the Lackawanna Line." This evidence was excluded, and all other evidence of a similar character, and exception taken to the ruling of the court. We think the evidence was material and competent. The defendant was not concluded by the evidence of the plaintiff as to his efforts to obtain the desired routing from the agent of the Southern Railway Company. If it had been shown, as the defendant offered to show, that it was possible at the time in question to ship freight in the manner desired, and that freight was so shipped, this testimony would have gone directly to rebut the statements of the plaintiff that he endeavored to secure the routing desired for these cars. That such shipments could be made, and were made, would be very persuasive evidence that the plaintiff did not try to make them on the occasions in question. It may be true, as the trial judge suggested, that under the decision of the Supreme Court in *Southern Pacific Company v. Interstate Commerce Commission*, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. Ed. 585, the Southern Pacific Company in the present case had the legal right to choose the eastern line over which it would make a joint shipment to New York, and to refuse to make the shipment over a line selected by the shipper. But here it was not a question whether that company had the legal right to make such a selection, but whether it was willing to conform to the plaintiff's request. We are the more willing to sustain this exception because in our judgment the plaintiff had no right to depart from defendant's instructions without presenting the subject to them anew and obtaining their consent. This error, however, is entirely independent of the other issues in the case, and could not in any view have damaged the defendants beyond the amount of \$724.79 and interest at 6 per cent. from February 23, 1905, to the date of the judgment.

It will therefore be ordered that, unless plaintiff remits this amount from his judgment, the judgment be set aside, and a new trial granted. In case the terms stated are accepted, the judgment as reduced will be affirmed, without costs to either party in this court.

SANBORN, Circuit Judge, concurs in the result on the ground that, inasmuch as no request or motion was made at the close of the trial that the court should hold and declare as a matter of law that there was no substantial evidence to sustain the jurisdictional averments of the complaint and that it should dismiss the action on that account, that question is not open for consideration in this court, and on the further ground that, if it were open, there was sufficient proof to sustain the jurisdictional allegations.

HOOK, Circuit Judge (dissenting). I am unable to concur in the foregoing opinion, and feel it my duty to point out wherein I think it has departed from decisions of the Supreme Court and from what I have deemed to be the settled doctrine in this circuit. Reduced to brief terms, the opinion denies the authority of *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; holds that an averment of diverse citizenship in a complaint, though denied in the answer, makes a prima facie case in favor of jurisdiction of a Circuit Court of the United States, and casts upon the defendant the burden of sustaining his denial by proof to a legal certainty, although the state procedure, adopted by the conformity act of 1872, is otherwise; and applies the rule of *Norris v. Jackson*, 76 U. S. 125, 19 L. Ed. 608, to a case involving the existence of facts upon which the jurisdiction of a Circuit Court of the United States depends. In other words, it is held that when the trial is by the court without a jury, and there is a general finding and judgment for plaintiff, an appellate court cannot, in the absence of special findings or requests therefor or for declarations of law, look into the bill of exceptions to examine the evidence on an issue made by the pleadings as to diversity of citizenship upon which jurisdiction depends.

The opinion of the Supreme Court in *Roberts v. Lewis* is plain and concise. There is no doubt about what was held. It was averred in the petition in an action in ejectment in the Circuit Court for the District of Nebraska that plaintiff was a citizen of Wisconsin and defendant a citizen of Nebraska. The answer contained a specific defense to the merits, and also a general denial. The jury returned a special verdict covering the merits, but made no finding as to the citizenship of the parties. Under the Nebraska Code of Civil Procedure a general denial in an answer puts in issue averments of jurisdictional facts in a petition. On this the Supreme Court held that, as long as rules of pleading in courts of the United States remained as at common law, the requisite citizenship of the parties, if duly alleged in the petition, could only be denied by a plea in abatement and was admitted by pleading to the merits, but that since the conformity act all defenses are open to a defendant in a Circuit Court of the United States under any form of pleading that would be available under a like pleading in the courts of the state in which the Circuit Court is held. Mr. Justice Gray, who spoke for the court, said:

"The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made

by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the Circuit Court depended, the judgment must be reversed, with costs, for want of jurisdiction in the Circuit Court, and the case remanded," etc.

I can find no indication that the Supreme Court has ceased to regard this case with approval. On the contrary, it was cited and the above doctrine again announced as late as *Wells Company v. Mfg. Co.*, 198 U. S. 177, 182, 25 Sup. Ct. 640, 49 L. Ed. 1003. It was also cited in *Southern Pacific v. Denton*, 146 U. S. 202, 209, 13 Sup. Ct. 44, 36 L. Ed. 942, *Mexican Central v. Pinkney*, 149 U. S. 194, 206, 13 Sup. Ct. 859, 37 L. Ed. 699, and *Mattingly v. Railroad*, 158 U. S. 53, 57, 15 Sup. Ct. 725, 39 L. Ed. 894. Moreover, this court has twice followed and applied it in cases which arose, as the case now before us did, in Missouri, and involved the practice act of that state. *Yocum v. Parker*, 66 C. C. A. 80, 130 Fed. 770; *Cole v. Carson*, 82 C. C. A. 408, 153 Fed. 278. *Roberts v. Lewis* was also followed by the Court of Appeals of the Sixth Circuit in a case where it became necessary to apply the Kentucky Code—*Roberts v. Langenbach*, 56 C. C. A. 253, 119 Fed. 349; and again by the same court in *Toledo Traction Co. v. Cameron*, 69 C. C. A. 28, 137 Fed. 48, where the Ohio Code was applied.

Does an averment of diverse citizenship in a complaint in an action at law make a prima facie case in favor of jurisdiction, though it is properly denied in defendant's pleading according to the provisions of the local procedure? Does it cast upon defendant, who has duly taken issue upon it, the burden of disproving it to a legal certainty? We must bear in mind that in Missouri, where the case at bar arose, there is a modern Code of Civil Procedure under which a general denial in an answer puts in issue averments of jurisdictional facts in the complaint. An affirmative answer to the above questions would seem to violate all settled rules of code pleading and practice. It would certainly not accord with those prevailing in this circuit. In *Roberts v. Lewis*, supra, the court said that plaintiff's averment of citizenship, denied by defendant in his answer, "must be proved by the plaintiff." In *Wells Company v. Mfg. Co.*, 198 U. S. 177, 182, 25 Sup. Ct. 640, 49 L. Ed. 1003, the plaintiff, to invoke the jurisdiction of the Circuit Court, averred, among other things, that it was a corporation of Mississippi. The defendant denied the averment upon information and belief. The Supreme Court, speaking by Mr. Justice Harlan, held the denial sufficient to raise the issue, and said that:

"As the jurisdiction of the courts of the United States must always appear affirmatively, of record, it became necessary, under existing statutes and under the rules of practice and pleading in North Carolina (where the action was brought), for the plaintiff to prove that it was a corporation of Mississippi."

In *Cole v. Carson*, supra, the unanimous view of the three Circuit Judges of this circuit who sat in the case was that, following the conformity act and the Missouri Code of Civil Procedure, a general denial put in issue an averment of diverse citizenship in the petition, and

as "no proof was produced tending to establish the affirmative of the issue so tendered," the jurisdiction of the Circuit Court had not been shown. A similar conclusion was reached by us in *Yocum v. Parker*, *supra*.

Various reasons are assigned for disregarding these decisions:

(1) The policy of the law permitting the commingling in an answer of an issue upon a jurisdictional fact with issues upon the merits is doubted. As to this I will only say that since the conformity act the practice, where it accords with that of the state, is upheld without question by what I think is an unvarying line of decisions of the federal courts; and, further, that it is a feature of practically every modern reformed code of civil procedure.

(2) *Sheppard v. Graves*, 14 How. 505, 14 L. Ed. 518. As much reliance is placed on this case, which arose before the passage of the conformity act, it is well to observe closely what was decided. Defendants interposed a plea in abatement, attacking an averment of plaintiff's citizenship and therefore the jurisdiction of the trial court. They also filed an answer containing a general denial and a declaration that they did not waive their plea. The trial court struck out the plea, and ruled that plaintiff was not required to prove his averment of citizenship. The Supreme Court affirmed the action of the court below, and held: First, that a general denial made no issue on a jurisdictional fact, and that the practice was governed by the "time-tested rules of the common law." "Again," the court said, "by one of those rules, believed to be without an exception, it is ordained that objections to the jurisdiction of the court, or to the competency of the parties, are matters pleadable in abatement only, and that if, after such matters relied on, a defense be interposed in bar and going to the merits of controversy, the grounds alleged in abatement become thereby immaterial, and are waived." So the plea to the jurisdiction was held to have been waived by the answer to the merits and to have been properly stricken out. And, second, that when jurisdiction is averred in plaintiff's pleading it must be taken *prima facie* as existing, and, if defendant would impeach it for causes *dehors* the pleading, the burden is on him both to allege and prove such causes. Now it is said that the first doctrine is done away with (by the conformity act and the state codes where they exist), but that the second still obtains. I think, however, it is altogether clear from a reading of the opinion of the Supreme Court that the second was considered as following from and depending upon the first. This would naturally be so, for at common law a plea to the jurisdiction founded on facts outside the record did not prove itself or disprove averments in the petition; the burden of proof was on him who interposed the plea. Moreover, in that case the plea had been stricken out as having been waived, and as the court said that the general denial in the answer did not, under the common law, put in issue plaintiff's averment of his citizenship, the case stood solely upon that averment, and it was necessarily held to be *prima facie* true. This case does not seem to me to afford a substantial basis for holding that, upon an issue of fact as to the citizenship of a party properly raised by answer



in accordance with the conformity act and the state practice, plaintiff's averment remains *prima facie* true, and the burden of proving it to a legal certainty is on defendant.

(3) Again, reliance is placed on an observation in *Steigleder v. McQuesten*, 198 U. S. 141, 25 Sup. Ct. 616, 49 L. Ed. 986, that "the averment in the bill that the parties were citizens of different states was sufficient to make a *prima facie* case of jurisdiction so far as it depended on citizenship." But this was said with reference to the particular condition of the pleadings in the case, and not with reference to the proof upon an issue. It was averred in the bill in that case that plaintiff was a citizen of the state of Massachusetts, and defendants were citizens of the state of Washington. There was no denial of this averment by the answer. After the proofs were taken, defendants moved the trial court to dismiss the cause for want of jurisdiction, because all the parties, plaintiff and defendants, were "residents" of the same state—Washington. The Supreme Court held first, that residence and citizenship were wholly different things, and therefore the motion raised no question of jurisdiction; second, but as the trial court treated the question as raised it would do likewise, and then it concluded from an examination of the evidence that plaintiff was actually a citizen of Massachusetts and was but temporarily residing in Washington. In determining these facts from the evidence, plaintiff's averment of citizenship was not referred to as having any probative effect. Mr. Justice Harlan delivered the opinion in the case, and later during the same term he delivered the opinion in *Wells Company v. Mfg. Co.*, *supra*, in which it was held that a denial in an answer of plaintiff's averment of corporate citizenship put the burden on plaintiff of proving it. It is quite manifest that the observation quoted from the first opinion was not intended to put the burden of proof on a defendant who in an action at law took issue in a proper way. I may observe in passing, however, that *Steigleder v. McQuesten* was a suit in equity, and it may be questioned whether the conformity act requires an adjustment of equity practice in courts of the United States to that of the states, though this matter was not adverted to by the Supreme Court.

(4) *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 621, 29 L. Ed. 725. The point of decision in this case was overruled in *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690, and little was left of the case, but certain expressions in the opinion are relied on here. It appears from the statement of facts in that case that the answer contained a general denial and other defenses to the merits. The Supreme Court, in approaching the matter for decision, assumed that plaintiff's averment of citizenship was not put in issue because there was no plea in abatement. The reason for this assumption becomes apparent when it is noted that the case arose in Illinois, where common-law rules prevailed under which such a plea was the only method of tendering the issue, and a general denial or other defense on the merits amounted to a waiver of objections to the jurisdiction. It should not be inferred that the conformity act abrogated for courts of the United States the common-law procedure of a state. It merely

adopted for the Circuit and District Courts the practice and pleadings, "as near as may be," of the states in which such courts were respectively held, whether the same were according to the common law or otherwise prescribed by code. So those cases in which it appears that a general denial was set up in answer are not important here, unless they arose after the conformity act, and unless we are given to know what the state procedure was. *Adams v. Shirk*, 55 C. C. A. 25, 117 Fed. 801, also arose in Illinois. There the jurisdictional issue was raised by plea in abatement, and the court held that for casting the burden of proof on the plaintiff it was no more effectual than a motion or a suggestion to the court. That was so at common law.

(5) *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; *Hunt v. Cotton Exchange*, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821. In these cases, and there are many like them, the question was not as to the citizenship of the parties, but whether the requisite sum or value was in controversy; and the rule is that the absence of that ground of jurisdiction must be shown to a legal certainty. It is clear, I think, that this rule is due to the peculiar character of the question involved, and it should not be confounded with that relating to citizenship, nor the limitations appropriate to one be imported into the other. It doubtless grew out of the fact that in most cases in which the existence of a dispute over a jurisdictional sum is questioned the claim of a plaintiff as set forth in his complaint is in itself one of the elements of the controversy and performs an evidential office. When it is disputed by defendant it furnishes proof of the existence of a controversy over the sum demanded. And there is obvious reason for saying that the claim of a plaintiff, not clearly fictitious on its face, but which may possibly have legal foundation, makes a case for jurisdiction until it is overthrown by proof to a legal certainty, for as long as there is any doubt or uncertainty a dispute naturally remains to be determined upon a trial of the merits. The very lack of legal certainty to the contrary shows the continued existence of controversy. In many other cases involving property or property rights there is no fixed measure of value, but it rests largely in estimate or opinion, and is difficult of accurate ascertainment. These considerations, however, do not apply to questions as to the citizenship of the parties, and hence the logic of the different rule. The one stands upon the mere existence of controversy, not how the controversy shall finally be resolved, while the other stands upon the fact of diverse citizenship, to be definitely determined when questioned.

May an appellate court look into the bill of exceptions in a case like this and examine the evidence bearing on an issue upon a jurisdictional fact, or does the failure of the trial court to make a special finding on the issue and of counsel to make requests result in sealing up that part of the record? The fifth section of the judiciary act of March 3, 1875, imposes the duty of directing a dismissal if the cause does not really and substantially involve a controversy properly within the jurisdiction of the Circuit Court. That duty is to be exercised "at any time," and, so far as it rests upon an appellate court, it cannot be effected by what the Circuit Court or the parties did or re-

frained from doing at the trial. The appellate court may and should search the entire record before it, and it is perfectly proper for counsel to direct attention in any orderly way to the supposed want of jurisdiction, though they may not have done so below. In examining the record, the court may read the evidence upon a jurisdictional issue and weigh it and decide upon its sufficiency. It is not necessary to refer to the very many cases in which the performance of this duty is held to be imperative. Nothing is better settled in federal practice. Now suppose a defendant, having joined issue in a trial court upon an averment of diverse citizenship, contends, as here, that the plaintiff failed to prove it; should the appellate court refuse to examine the evidence because defendant had not preserved his right to require it to do so, though the statute imposes the duty of examination, especially when attention is directed to a supposed want of jurisdiction? If so, there would seem to be a distinction without much practical value. When a court is searching a record to see if the cause "really and substantially" involves a controversy which gives jurisdiction, there is little reason for refusing to determine whether a jurisdictional issue raised by a defendant was properly decided. It may be that it takes a clearer case of want of jurisdiction to justify a dismissal under the act of 1875 than when a defendant merely asserts there was not sufficient evidence to determine his issue against him; but even so, the more reasonable doctrine is that such questions, however they arise, are so fundamentally important they should not be classed with those relating to the merits in which the litigants alone are interested, and the power of an appellate court to examine them should not be held to depend upon the making of special findings or the proffering of requests in the court below.

The result of the evidence in this case is debatable, and I shall not further refer to it than to say that, as an averment of residence is universally held not one of citizenship, mere proof of residence without more is not proof of citizenship.

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#### HAINES v. SPENCER.

(Circuit Court of Appeals, Third Circuit. January 27, 1909.)

No. 11, October Term, 1908.

1. APPEAL AND ERROR (§ 1033\*)—FAVORABLE FINDINGS—RIGHT TO ASSIGN ERROR.

In an action for injuries to a servant, an instruction that defendant's engineer was not authorized to bind defendant by a promise to plaintiff that he would repair an appliance to the laundry mangle, plaintiff was operating, and return it shortly, was favorable to defendant and was not assignable as error by him, except as the attention of the jury was thereby diverted from the real issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. § 1033.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 219\*)—INJURIES TO SERVANT—MACHINERY—SAFETY APPLIANCES—PATENT DEFECTS—ASSUMED RISK.

Absence of means by which a laundry mangle could be thrown in and out of gear by hand or foot, while standing between the ends of the machine without going around or reaching over it, was a patent defect, the danger of which, whether appreciated or not, was obvious, and was assumed by a mature operator who had worked at the machine about four months without complaint.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 614-616; Dec. Dig. § 219.\*]

3. MASTER AND SERVANT (§ 270\*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—COMPARISON OF MACHINES—EVIDENCE.

Though evidence of other machines in common and ordinary use in similar establishments may be admitted for comparison to aid the jury in determining whether the machine by which plaintiff was injured was reasonably safe, proof of other machines having safety appliances, not on defendant's machine, none of which were in issue, was inadmissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 921; Dec. Dig. § 270.\*]

4. MASTER AND SERVANT (§ 101\*)—INJURIES TO SERVANT—MACHINE AND APPLIANCES—DUTY OF MASTER.

An employer is not an insurer, and is not required to furnish the safest or newest and best machines or appliances, but only to exercise due care to provide those reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 172, 181-184; Dec. Dig. § 101.\*]

5. MASTER AND SERVANT (§ 101\*)—INJURIES TO SERVANT—MACHINES—USAGE OF BUSINESS.

Negligence is not imputable to a master, where the machinery furnished is that which is generally employed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185, 186; Dec. Dig. § 101.\*]

6. MASTER AND SERVANT (§ 295\*)—INJURIES TO SERVANT—MACHINERY—ASSUMED RISK—INSTRUCTIONS.

Where plaintiff, a mature laundry mangle operator of experience, requested repair of a guard rail, and, while it was being repaired, operated the mangle and was injured by her hand being drawn between the rolls, the court erred in refusing to charge that the risk of injury from the absence of the rail was assumed by plaintiff, unless the jury believe that defendant or some one authorized by him so to do had promised to replace the rail and plaintiff continued to operate the machine in reliance on the promise, and that the jury must also find for defendant if no promise to replace was made by defendant or some one authorized to make it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1177; Dec. Dig. § 295.\*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

7. MASTER AND SERVANT (§ 219\*)—INJURIES TO SERVANT—MACHINERY—REVERSING MECHANISM.

A master was not required to furnish reversing mechanism on a laundry mangle, where the risk of injury from the lack of it was obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 614-616; Dec. Dig. § 219.\*]

8. DEFECTIVE MACHINERY—COMPLAINT TO MASTER—REFERENCE TO ANOTHER EMPLOYÉ—PROMISE TO FIX—DELEGATED AUTHORITY.

Semble, that where the plaintiff complained to the defendant with regard to the condition of the guard bar of a mangle at which she was working, and was referred by him to his engineer, who had charge of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

machinery, as one who would attend to the matter for her, this was sufficient to clothe the engineer with authority to speak for the defendant, and entitled the plaintiff to rely on the assurance given by him that he would fix it for her; he having taken off the guard bar to do so, and directed her to go on with the work, saying that he would bring it back shortly.

9. MASTER AND SERVANT (§ 288\*) — DEFECTIVE MACHINERY — PROMISE TO FIX SHORTLY—INJURY TWENTY-FOUR HOURS AFTERWARDS.

Where, on complaint by an employé, assurance was given by the master, through his engineer, who was authorized to speak for him, that a defect in the machinery would be remedied shortly, the defective appliance being taken away for the purpose, and the employé being directed to go on with her work, it is for the jury to say whether, under the circumstances, the employé has a right to rely on the assurance as continuing 24 hours afterwards, when she was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1084-1086; Dec. Dig. § 288.\*]

In Error to the Circuit Court of the United States for the District of New Jersey.

Malcolm G. Buchanan, for plaintiff in error.

John J. Crandall, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The plaintiff was injured by having her hand drawn into a mangle at which she was working. It was caught, as she says, by one of the towels which she was putting through the machine, which the wind, blowing in through the open window, wrapped around her hand before she knew it. It is possible that she was inattentive, as the wind blew the towel away from her hand and not towards it. But that was for the jury. Her story is not so improbable that we can lay hold of it. The negligence charged is in not having a protecting guard bar, as well as means by which to promptly throw off or reverse the power, by which the accident might have been averted. There was such a bar for the machine, but it sagged, and on complaint by the plaintiff to the defendant, her employer, he referred her to Lehman, the engineer, who had charge of the machinery, who promised to fix it, and at the time of the accident had removed it for the purpose of doing so, telling her to go on with her work and he would bring it back shortly. It was taken off Tuesday afternoon, and had not been returned 24 hours later, when the accident occurred, the plaintiff keeping at work meantime without it, relying, as she says on the promise which had been made her.

It was held by the Supreme Court of New Jersey, where the action was originally brought, that Lehman in his capacity as engineer had no authority to speak for the defendant, so as to give the assurance and direction which the plaintiff relied on. *Spencer v. Haines*, 74 N. J. Law, 13, 64 Atl. 970. But the evidence is different now, the plaintiff having testified that, upon speaking to the defendant about the condition of the guard bar, he referred her to Lehman as one who would attend to it for her, which would seem to be sufficient to clothe

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

him with authority. Notwithstanding this, however, the jury were instructed at the trial in the court below that Lehman was not authorized to speak for the defendant, and that what he said was immaterial, eliminating that as an issue. This favored the defendant, and so, of course, is not assignable for error. But if adhered to, the plaintiff clearly has no case, as the machine, except as to the guard bar, remained in exactly the same condition as when she went to work at it, and the other defects, if any, were obvious; the sole right to recover having thus to be based on the assurance given by Lehman, by which she was led to keep on with her work awaiting the return of the guard bar, assuming, of course, that the machine was not reasonably safe without it. The charge of negligence, in other words, is necessarily confined to the appliance with regard to which the assurance was given, and is not to be extended to other defects as to which there was no complaint and no promise, at least to the extent that the danger from them was obvious. It particularly cannot be predicated on the absence of means by which the machine could be thrown in and out of gear by the operator, by foot or hand, while standing between the ends of the machine, without going around or reaching over it, on which stress is laid and where the court below put it. This, if a defect, was a patent one, the danger from which, whether appreciated or not, was obvious, as to which the plaintiff, being a mature young woman, and having worked at the machine for nearly four months without complaint, must be taken to have been content, assuming whatever risk was involved in it. "Where a defect is known," says Mr. Justice Day in *Choctaw, etc., R. R. v. McDade*, 191 U. S. 68, 24 Sup. Ct. 25, 48 L. Ed. 96, "or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus, in the face of knowledge and without objection, without assuming the hazard of such a situation. In other words, if he knows of a defect, or it is so plainly observable that he must be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ notwithstanding this defect, and in such case cannot recover." This is emphasized by the recent case of *Butler v. Frazee* in the Supreme Court, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. —, which is so remarkably like the one in hand that we are moved to quote at large from it. The plaintiff there, as here, was employed at a mangle in a steam laundry, her duties being to spread the clothes to be ironed on a narrow feed board extending in front of the revolving cylinders, and guide them forward into them. For the greater safety of the operator the machine was equipped with an adjustable bar or finger guard, extending from side to side, and set at the height of an inch or two, according to the thickness of the material to be ironed. On the occasion in question the plaintiff's hand was caught as she was feeding in a tablecloth. It was shown that the feed board was loose, permitting the fabric which was to be laundered to drop between it and the cylinder, and there was evidence that this wrinkled it, which the plaintiff, at the time when her hand was caught, was endeavoring to remedy. It was also contended in explanation of the accident, that the guard bar was set too high, allowing the plain-

tiff's hand to be drawn into the cylinders. But, notwithstanding this, it was held that she had assumed the risk, and that a verdict was rightly directed against her. "One who understands and appreciates the permanent conditions of machinery, premises, and the like," says Mr. Justice Moody, "and the danger which arises therefrom, or by the reasonable use of his senses, having in view his age, intelligence, and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries." It is true, as was said by this court in *Blumenthal v. Craig*, 81 Fed. 320, 26 C. C. A. 427, that a defect in a machine, and the risk of operating it when defective, are not necessarily the same, and that the risk may not be obvious, although the defect may be. Or, as it is put by Mr. Justice Moody in the case referred to:

[Even] "where the elements and combinations out of which the danger arises are visible, it cannot always be said that the danger itself is so apparent that the employé must be held, as a matter of law, to understand, appreciate, and assume the risk of it. \* \* \* The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing [as he takes pains to add], and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employé is of full age, intelligence, and adequate experience, and all the elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court."

Commenting upon the facts by which the case was brought within the latter class, it is further said:

"The plaintiff was a person of mature years, intelligence, and of adequate experience. She had worked for some months upon this particular machine, and during that time it was always in exactly the same condition in which it was upon the day of the injury. The elements out of which the danger arose were plainly visible to her. The employer had no duty, statutory or otherwise, to use a rail to guard against so obvious a danger as that arising out of two cylinders in contact with each other and seen to be revolving inwardly. \* \* \* We see nothing in the manner of the adjustment of the guard rail which constituted an allurements or was calculated to blind the plaintiff to the danger. The adjustment of the parts of the machine was continually before her eyes. The danger of being drawn between the cylinder and the rollers by contact with the cylinder was illustrated to her every minute of the day by the drawing in of the clothes to be ironed by contact with the revolving cylinder. The distance between the guard rail and the feed board was constant, and its relation to the thickness of her hand was apparent. She must have understood that if her hand became inextricably entangled with the clothes, as seems from the rather vague testimony of the plaintiff was the case here, it would be drawn between the cylinder and receive the injuries which unhappily occurred. We think that it must be said, as a matter of law, that she voluntarily assumed the risk of the danger."

All this is of peculiar pertinence to the case in hand. The plaintiff, here as there, was a person of mature age and abundant experience, having worked at this machine for nearly a month. There was nothing intricate or obscure either in its mechanism or mode of operation, and the danger from the inwardly revolving cylinders or rolls, if her hand

got near enough to be caught by them, was obvious to a person of the most ordinary intelligence. She could not feed the material into them as she did from day to day and not know it. That there was no means to stop or reverse the machine handy to the operator was also manifest, which she had stopped and started the machine too many times not to observe. Neither, of course, was there any of the other appliances of which evidence was given. Except as to the guard bar which had been taken off to be fixed, the machine, at the time of the accident, was in the same condition as it had been right under her eyes from the start. She may now realize from having seen others that it could have been made safer had it been differently equipped. But that is not to the point. The question is as to the condition and safety of this machine; and having operated it long enough to be acquainted with its defects, if any, she must be regarded as having been content with it as it stood, except as to latent dangers, of which there is no evidence, and except, also, as upon the occasion in question, she worked on without a guard rail while it was away being fixed, resting on the assurance with regard to it which had been given.

Notwithstanding this, however, evidence was received of different styles of mangles which were said to be in use in certain other establishments, which not only had means for cutting off and turning on or reversing the power in the way suggested, but were also equipped with other safety contrivances, such as a moving apron to feed in the fabrics to be calendered, means by which the guard rail could be made to rise and let the operator extract her hand in case it was caught, and the like. This evidence was entirely aside from the case, and should not have been received. Its admitted purpose was to show that there were machines in use which by reason of these appliances were safer than the one on which the defendant was injured. But the employer is not an insurer, and the duty imposed upon him is not to furnish the safest or newest and best machines and appliances, but only to exercise due care to provide those which are reasonably free from danger. 20 Am. & Eng. Encycl. Law (2d Ed.) 76; 26 Cyc. 1102; *Washington & Georgetown R. R. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Patton v. Texas & Pacific R. R.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *McDonald v. Standard Oil Co.*, 69 N. J. Law, 445, 55 Atl. 289; *Kehler v. Schwenk*, 144 Pa. 348, 22 Atl. 910, 13 L. R. A. 374, 27 Am. St. Rep. 633. And the rule as to this is the usage of the business, negligence not being imputable where the machinery in question is that which is generally employed. *Higgins v. Fanning*, 195 Pa. 599, 46 Atl. 102. It may be that, for the purpose of comparison, it would be admissible, in order to aid the jury in determining what is reasonably safe, to put other machines in evidence, which are in common and ordinary use in similar establishments. It is so held in several well-considered cases. *Wheeler v. Wasson Mfg. Co.*, 135 Mass. 294; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176; *Dolan v. Cotton Mills*, 185 Mass. 576, 70 N. E. 1025; *Nadau v. White River Lumber Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; *Jones v. Railroad*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434. Although there are others, of equal authority, where it is held not; the



cases even in the same jurisdiction not being altogether in harmony. *Rooney v. Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Ross v. Pearson Cordage Co.*, 164 Mass. 257, 41 N. E. 284, 49 Am. St. Rep. 459; *Propson v. Leatham*, 80 Wis. 608, 50 N. W. 586; *Carr v. American Locomotive Works*, 26 R. I. 180, 58 Atl. 678; *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872; *Gravadahl v. Chicago Refining Co.*, 85 Ill. App. 342; *Sisco v. Lehigh & Hudson R. R.*, 145 N. Y. 296, 300, 39 N. E. 958; *Jacobson v. Cornelius*, 52 Hun, 377, 5 N. Y. Supp. 306; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467; *McGovern v. Smith*, 73 Vt. 52, 50 Atl. 549; *Couch v. Watson Coal Co.*, 46 Iowa, 17; *Bryce v. Burlington, etc., R. R.*, 119 Iowa, 274, 93 N. W. 275. It is justified in some of the authorities on the ground that, the conduct of the master being on trial, it is proper for the jury to know what appliances are in common use in the particular business involved. *Jones v. Railroad*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434. And, confined to common usage, the objection to it is largely removed. But that cannot be said of indiscriminate evidence as to what is used in different individual establishments, here and there, not limited to the time of the accident, such as was introduced here. The vice of this is that the jury will always select as the standard the newest and best, to which the master will thus be held, in the face of the rule that this is not required of him.

But the question of the admissibility of evidence of other machines in common use does not arise here, and need not be decided. Whatever be the correct rule in that regard, it was clearly out of course to allow proof, as was done, of other machines having safety appliances such as have been referred to, none of which were in issue, thus getting before the jury that which was immaterial and altogether aside from the case. As already pointed out, the plaintiff, having accepted the machine as it stood, without any such appliances, the effect of which was manifest, is now precluded from setting this up, the sole inquiry being whether the mangle, deprived of the guard bar to which she had been accustomed, was reasonably safe to operate, and if not, whether the plaintiff, as she claims, had the assurance from Lehman, representing the defendant and authorized to speak for him, to work on as she did, and whether, at the time of the accident, 24 hours after the guard bar had been removed, she had the right to rely on it. This was called to the court's attention by the defendant's eighth request, that:

"The risk of injury from the absence of the guard rail under the facts proved was assumed by the plaintiff, and the jury must find that the defendant is under no liability, because of the absence of it, unless they believe both that (a) the defendant, or some one expressly or impliedly authorized by the defendant so to do, had promised to replace the guard rail, and (b) that the plaintiff continued to operate the machine in reliance on that promise."

Or, as stated in the tenth request:

"If the jury believe that no promise to replace the guard rail was made to the plaintiff by the defendant or some one expressly or impliedly authorized to do so, they must find for the defendant."

This was a correct statement of the law, and should have been affirmed, and there was nothing in the general charge to take the place of it.

There also should have been an affirmance of the sixth point, to the effect that the defendant was not required to provide reversing mechanism on the mangle, because the risk of injury from the lack of it was a perfectly obvious one, which she was conclusively presumed to have assumed by continuing to operate the machine without complaint without it. This last instruction was of the highest importance to the defendant in view of the evidence which had been received with regard to the use of such reversing mechanism on other machines, and was the only possible way of doing away with the effect of it, if, indeed, it could be said to do so. But instead of this, the court not only refused the point, but expressly charged that, in deciding whether the machine in controversy was a reasonably safe one, the jury might consider the character of other machines in use, at the time of the accident, in other places (not those in general or common use, be it noted), and particularly that the machine on which the defendant was working had nothing by which it could be thrown out of gear, to be reached by the hand or foot of the operator, when standing at the middle of the machine. This disregarded the real issue in the case, and diverted the attention to that which was not involved in it, allowing a recovery upon an altogether incorrect and improper basis.

This case has been tried four times; twice in the state court (62 Atl. 1009, and 64 Atl. 970), where the action was discontinued, because, as frankly stated by the plaintiff's counsel, he did not like the law laid down to him; and twice in the court below, the first verdict having been set aside on the ground that the plaintiff by her own testimony assumed the risk of working without a guard rail, the promise made to her being that it would be returned in a few minutes, and the accident having occurred the next day after dinner—*Andrecksik v. New Jersey Tube Co.*, 73 N. J. Law, 664, 63 Atl. 719, 4 L. R. A. (N. S.) 913, being cited. We regret that the case must go back and be tried again, but we see no escape from it, the errors committed being vital; the point on which the case turns, and on which a recovery can alone be had, being declared to be immaterial, and the jury's attention being thus diverted from instead of being directed to it, and the verdict being thus made to rest on grounds upon which it cannot be sustained. The most that we can do for the plaintiff is not to make the present judgment final, the views expressed by the court below in granting a new trial, if correct, coupled with what has been said above, leaving very little, if anything, on which to recover. Without, however, going that far, and giving the plaintiff another opportunity to make out a case if she can:

The judgment is reversed, and a venire facias de novo is awarded.

## CENTRAL UNION TELEPHONE CO. v. CITY OF CONNEAUT.

(Circuit Court of Appeals, Sixth Circuit. January 22, 1909.)

No. 1,831.

## 1. MUNICIPAL CORPORATIONS (§ 206\*)—AGENTS—SUPERINTENDENT OF ELECTRIC LIGHT PLANT—AUTHORITY.

Where a city, owning an electric light plant in charge of trustees, employed a superintendent, without special instructions concerning construction and maintenance of wires, he had authority in carrying the electric light wires over the wires of a telephone company to adopt and carry out any scheme of detail reasonably calculated to accomplish the purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 206.\*]

## 2. EVIDENCE (§ 5\*)—JUDICIAL NOTICE—DANGER—ELECTRICITY.

Judicial notice will be taken that an electric light wire so placed that it occasionally comes in contact with a telephone wire is dangerously near the same as a known fact of general intelligence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 5.\*]

## 3. MUNICIPAL CORPORATIONS (§ 794\*)—DEFECTIVE STREETS—ELECTRIC POLE EXCAVATION—PROTECTION—DUTY OF CITY.

Where a city electric lighting superintendent informed the superintendent of defendant telephone company that if the latter would dig a pole hole in a street, at a point where the city's electric wires crossed the telephone wires, the city would put in a new pole, and defendant thereupon made the excavation, the city was bound to furnish the pole within a reasonable time, and on its failure to do so was thereafter bound to keep the hole protected so that it would not cause injury to pedestrians.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1653; Dec. Dig. § 794.\*]

## 4. MUNICIPAL CORPORATIONS (§ 790\*)—DEFECTIVE STREETS—POLE HOLES—NOTICE—NEGLIGENCE.

Defendant company dug an electric pole hole in a street under an agreement with the city's electric lighting superintendent to raise a pole therein to carry the city's electric light wires over defendant's telephone wires at an intersection. The city neglected to put up the pole for three months, during which time the lighting superintendent made temporary provision for the wires, and, several times finding the hole uncovered, recovered it. A pedestrian thereafter fell into the uncovered hole and was injured, for which he recovered damages against the city. *Held*, that the city had notice of the defect through its lighting superintendent, and was solely negligent in permitting the hole to remain in the street unprotected, and therefore could not recover over against the telephone company any part of the damages recovered by the pedestrian.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1645, 1646; Dec. Dig. § 790.\*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

A. E. Clevenger and S. H. Tolles, for plaintiff in error.

A. M. Cox, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and TAYLOR, District Judge.

SEVERENS, Circuit Judge. This is an action brought by the city of Conneaut against the telephone company to recover the damages

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and costs sustained by the former resulting from the alleged negligence of the latter in permitting an excavation, made by it in one of the streets of the city for the erection of a telephone pole, to remain in an unprotected condition, in consequence of which one Shipman had been injured and, in a suit brought against the city to recover therefor, had recovered judgment for damages and costs. At the time of the occurrences which were the basis of the suit brought by Shipman, Conneaut was a village of Ohio. Afterwards, and before the present suit was brought, it became a city. This is of no importance except to show that the city is the lawful successor of the village and competent to be the plaintiff in the action. A jury was waived, and the cause was, by agreement, tried by the court. There was a finding of the facts, and, as there is no contention that the findings are wholly unsustained by evidence, there is nothing to be determined but the questions of law arising upon the facts found. These were as follows, omitting now such as relate to the citizenship of the parties and the recovery of the judgment by Shipman, and the damages incurred by the city in consequence of that suit:

"The defendant \* \* \* was during all of the time hereinafter mentioned the owner of and engaged in the operation of a telephone system in the village (now city) of Conneaut, Ohio, under and by virtue of an ordinance duly passed by the council of said village on the 14th day of May, 1894.

"By the terms of said ordinance, which was duly accepted by said defendant, defendant agreed to hold the village of Conneaut free and harmless from all damages by reason of its negligence.

"It was further agreed in said ordinance that poles thereafter to be located or set upon any of the streets of said village (now city) should be at the approval of the street committee of said village (now city) of Conneaut, Ohio.

"Prior to the 15th day of October, 1901, the Central Union Telephone Company had constructed and was maintaining on the westerly side of Sandusky street, in said city, as a part of its telephone system, telephone wires attached to poles. These wires crossed Main street, and were attached to poles on the southerly side of said Main street, nearly at right angles, passing over wires of the electric light system of said village or city.

"Said village of Conneaut, long prior to said 15th day of October, 1901, had established, and was operating as the owner thereof, a municipal electric lighting system, providing street lights and electric lighting for private consumers, and the electric light wires were strung upon cross-arms attached to poles in the ordinary manner along the curb lines of some of the streets.

"One of the wires or leads of the municipal plant ran along the northerly curb line of Main street, passing by Sandusky street, and was attached to an arm on a city pole in the westerly line of Sandusky street, and below where the telephone wires of the defendant passed over the same.

"At and prior to October 15, 1901, the lighting plant of the village was under the control and management of a board of electric light trustees, as provided by sections 2486, 2487, 2488, and 2489 of the Revised Statutes of Ohio.

"In August of the year 1901 it was determined by the authorities in control of the electric light plant to make changes in their wire system, and in so doing they placed two electric light wires on the Main street lead.

"Under the provisions of section 2489 of the Revised Statutes of Ohio then in force, said board of electric light trustees appointed one W. E. Fownes to the position of superintendent, and as such, under the direction of said board, he had general charge of the work of making said changes; and some time before the 15th day of October, 1901, under the direction of the board of electric light trustees, he attached two additional electric light wires to an arm attached to said pole set in the northerly line of Main street and the westerly

line of Sandusky street, and these wires were so placed that a wire of the telephone company would at times come in contact with them.

"At this time one Andrew C. Tinker was the local superintendent of the defendant, the Central Union Telephone Company, at Conneaut, Ohio.

"In reference to this situation Fownes and Tinker had a conversation, in which Fownes said to Tinker that, if he (Tinker) would dig a hole for a new telephone pole, he (Fownes) would put in a higher pole for the telephone wires as soon as he took some poles out of Harbor street which he thought would be of suitable height, the purpose being to find a pole in Harbor street which would be suitable to be put in the excavation to be made by the telephone company. It was contemplated by the parties that there would be some delay in procuring and setting the pole.

"Tinker assented to this arrangement, and forthwith caused the new excavation to be dug close to the base of the pole which was then there. This excavation was made and completed by the telephone company on the 15th of October, 1901, and when completed was left by it covered and protected. As there was some delay in getting to work on Harbor street, Fownes, the electric light superintendent, nailed some 2 by 4 scantlings to the top of the Sandusky street telephone pole to temporarily raise and attach the telephone wires thereto, thus removing them from contact with the electric light wires. When Fownes came to take the poles out of Harbor street, he found that they were in no condition to reset.

"After making the excavation and covering it, defendant paid no further attention to it. The superintendent of the electric light plant found the excavation uncovered several times and re-covered it, after this conversation with Tinker and before the accident. No pole was ever placed in the excavation.

"On the 13th of January, 1902, one William W. Shipman, passing along Sandusky street, fell into the excavation and suffered the injury upon which the judgment was recovered, which is the basis of this action to recover over for the city of Conneaut from the defendant.

"The board of electric light trustees of the village of Conneaut had no knowledge of any promise on the part of Superintendent Fownes to furnish the pole mentioned to this defendant, the Central Union Telephone Company, and had no knowledge of the excavation until after the accident to Shipman.

"Neither the street committee of the council nor the council of the village of Conneaut had knowledge of the excavation at the time the same was made, or afterwards until the accident to said Shipman, and never made or gave any approval to the change in location of said pole or the excavation of said hole in Sandusky street.

"On or about the 9th day of March, 1903, said William W. Shipman brought his action in the court of common pleas of Ashtabula county, Ohio, against the city of Conneaut, to recover for personal injuries alleged to have been sustained by falling into said excavation.

"The defendant, the Central Union Telephone Company, was duly notified by the city of Conneaut of the action brought against it by the said Shipman, and was by the city and those in authority asked to appear and defend the suit, but the telephone company did not do so, but did employ counsel, who appeared to watch its interest at the trial of said Shipman."

Upon these facts the court found as matter of law:

"That it was the primary duty of the defendant, the Central Union Telephone Company, to guard and protect said excavation in Sandusky street, by proper coverings or otherwise, so that people using the street should not fall into the excavation and be injured thereby."

The court thereupon directed a judgment in favor of the plaintiff in the sum of \$10,519.37 and costs. In order to support this judgment, the necessary facts must be affirmatively found or must be reasonably inferable from those found.

We think the facts did not warrant the judgment, and that it should have been given in favor of the other party. In the ordinance by which was granted the franchise to the telephone company to con-

struct and maintain in the streets of the city a telephone system, it was provided that the company "should hold said village free and harmless from all damages by reason of its negligence." This stipulation is developed in the finding of facts as if it were important. But it seems to amount to nothing more than a term of the agreement which the law would raise by implication.

The telephone company having erected its poles and strung its wires in the streets of the city by its permission, and no fault being found with the manner in which it had been done, the city was bound to respect the rights of the telephone company thus acquired. It had not granted an exclusive franchise. It was not debarred from granting a franchise to another company to erect in its streets another telephone or a lighting system, or from erecting one for itself. But in either of these events, the other company, or the city, as the case might be, would be bound to construct its works in such manner as not to unnecessarily interfere with the poles and wires which the telephone company had rightfully constructed in the same locality. When, therefore, the city proposed to carry its electric light wires across the telephone company's wires, it was bound at least, in the absence of any order on the telephone company to make a change in its structures, to so string its wires, if that were reasonably practicable, as not to interfere with the telephone company's lines. It could not arbitrarily string its wires so near to the wires already there as to produce a condition of danger and thereby compel the telephone company to change its structures. And, if the trustees had given no directions as to how the crossing should be made, it was necessarily left to the superintendent as to how it should be done. Some mutual arrangement with the telephone company would be a sensible and proper thing, and this was the course adopted by the superintendent.

The substance of the controversy rests in the question of the scope of the authority vested in Fownes, the city's superintendent, to whom was intrusted the general charge under the direction of the trustees of the work of making the changes in its system of electric light wires. It does not appear that the trustees gave any instructions to the superintendent about the work, or, if they did, what the instructions were. For aught that appears, he had authority to do, with respect to this work, what the trustees might have directed him to do. Counsel for the city seem to put too rigid a limitation upon the power of the superintendent, and to suppose that he was only to supervise the workmen in the execution of the specifications of a plan laid down for him. It might well be that the superintendent was not intrusted with the duty of deciding upon the larger questions of city government or the expediency of large undertakings in its business affairs, such as the question of lighting its streets by electricity, or upon what streets the wires should be carried. But when the question concerns the minor details of the execution of extensive plans, and an agent is employed to conduct them, and no limitations are imposed upon him either by law or the express command of his superiors, it would seem that he had authority to do what was reasonably necessary to accomplish the intended result. It is reasonable to believe that this work was com-

mitted to the charge of the superintendent, because he was better qualified to take charge of the work than an ordinary person would be. We cannot doubt that when he encountered the problem of carrying the city's electric wires across the wires of the telephone company, and when he found that he had carried his wires dangerously near the telephone wires, he had authority to correct the mistake by raising his own or lowering them, or to arrange with the telephone company for a change in the location of their own wires, so as to obviate the difficulty, or to adopt any other scheme of details reasonably calculated to accomplish the purpose. His duties did not end when he got into the difficulty. They continued until the undertaking was fully accomplished and the wires were safely and securely located. Counsel urge that the finding of the court is not that the wires were put dangerously near those of the telephone company, but only that they were so placed that they would sometimes come in contact with them. But we should take judicial notice that an electric light wire so placed that it sometimes comes in contact with a telephone wire is dangerously near. It is a fact known to the general intelligence.

When the difficulty arose, the superintendent made an arrangement with the telephone company whereby the latter was to make an excavation at that place near the pole, which in the meantime was to stand, and the city was to furnish a higher pole and put it in, not immediately, but as the law would imply, no time being stated, within a reasonable time. The telephone company dug the hole, and had reason to expect that the pole would without unnecessary delay be put in place. The telephone company left the hole covered and protected. The city was disappointed in not finding a suitable pole as it had expected, and it neglected to put one in for a period of three months. Meantime the superintendent had made temporary provision by carrying up the wires on the pole then standing by means of scantling, and several times, finding the hole uncovered, re-covered it.

We think the responsibility for keeping this excavation protected after a reasonable time had elapsed for putting in a new pole devolved upon the city, and that the injury to Shipman was the result of its own fault. And, if the fault were not solely the fault of the city, it cannot, we think, be doubted that the city was negligent in not discovering the dangerous place and making it safe. Moreover, we should be inclined to the opinion that, as the participation of the superintendent in this undertaking of the city was not yet ended, the city had notice through him of existing conditions, and was at fault in not rectifying them. In either of these aspects of the case the city was a wrongdoer, and there is no right of contribution between such parties.

The judgment should be reversed, with costs, and the cause remanded with directions to enter a judgment for the defendant below.

NOTE.—The following is the opinion of Tayler, District Judge, in the court below:

TAYLER, District Judge. This is a suit brought by the city of Conneaut against the Central Union Telephone Company to recover the sum of \$9,518.29, being the amount of a judgment recovered by one William W. Shipman against the plaintiff in this case, and for the expenses of defending the suit brought by Shipman against this plaintiff. Shipman recovered a judgment in the

state court from the city of Conneaut for injuries received by him in consequence of his falling into an excavation made for a telephone pole on one of the streets of the city of Conneaut. The defendant denies any liability on its part in any event, and, in addition, alleges that, if it was guilty of any wrong in connection with the excavation referred to, it was a joint tort-feasor with the plaintiff herein, and, consequently, in the event of a recovery against one joint tort-feasor, the other cannot be held for contribution. The telephone company claims that, while its employes made the excavation, it did so under an agreement with the city which left the responsibility for the care of the excavation wholly upon the city, and that it was its (the city's) negligence wholly which resulted in the injury.

The substance of the agreement, if such it may be called, which the superintendent of the electric light plant made with the superintendent of the telephone company, was this: That since a new wire was being strung for the electric light plant, which would come close to, if not in contact with, the telephone line, the telephone line ought to be elevated so as to clear the electric light wire. These two superintendents, therefore, agreed that the telephone company should dig the hole and the city furnish and set the pole, which had to be some five feet longer than the other poles in use in that vicinity. There was no agreement as to just when the hole should be dug, or when the new pole should be set in the hole, nor as to who should take care of the excavation in the interval that might elapse between digging the hole and setting the pole. The superintendent of the electric light plant said to the superintendent of the telephone company that he was going to replace some electric light poles on Harvard street, and as soon as he got to that he could find a Harvard street pole that would be suitable for this place in question. It therefore seemed to be in contemplation of the parties that there would be some delay for an indefinite time before the electric light people would get to Harvard street and find the needed pole. The superintendent of the electric light plant says it was some time before they reached Harvard street, and that when they did they found that none of the poles were satisfactory, with the result that no pole was then, or ever, furnished or put into this excavation. The employes of the telephone company dug the hole and covered it up. At least once after that it came to the knowledge of the superintendent of the electric light plant that the hole was uncovered, and he had it protected by planking or otherwise.

It seems to me that in considering what are the rights and duties of the parties, as respects the claims made in this case, two facts must be borne in mind: (1) That there was no understanding as to just when the superintendent of the electric light plant would be ready to furnish the pole; (2) that there was nothing said or understood between these two representatives of the electric light plant and the telephone company as to who should take care of the excavation after the hole was dug. The defendant claims that it is not liable to the city in any event, that it is not even a joint tort-feasor, that it dug this hole under an arrangement with and by the direction of the city, and that, having done so, its duties and its responsibilities ended. To this the city replies: First, that the superintendent of the electric light plant had no authority whatever to make any arrangement or contract with the telephone people for the digging of this hole or the reconstruction in any respect of the line of the telephone company, that all such matters were under the control of the council, and that even the trustees of the electric light plant had no such power; second, that whatever the authority of the superintendent might have been to make this arrangement with the telephone company, or however incidental this work may have been to the general work of reconstructing the electric line, the hole was dug by the telephone company as a part of its work, and, upon its own theory of the agreement, that particular part of the work was to be done by the telephone company and something else by the electric light people, that the duty to keep this excavation covered until the pole was set was a primary duty of the telephone company. The city, through the electric light plant, was not bound to keep track of the holes that might be excavated by the telephone company, even though excavated by the authority of the city.

Whatever may be the soundness of the first position contended for by the plaintiff, the second proposition seems to be sustained by the decision of the Supreme Court of the United States in the case of *Chicago v. Robbins*, 67 U.



S. 424, 17 L. Ed. 298, where the court lays down the rule as follows: "The city must be reimbursed unless it has been itself in fault. The rule of law is that one of two joint wrongdoers cannot have contribution from the other. It is difficult in this case to see how the city was to blame, and least of all how Robbins can impute blame to it. Robbins desired to erect a large storehouse, and, to add to its convenience, wished to excavate the earth in the sidewalk in front of his lot. Without express permission from the city, but under an implied license, he makes the area. No license can be presumed from the city to leave the area open and unguarded, even for a single night. The privilege extended to Robbins was for his benefit alone, and the city derived no advantage from it, except incidentally. Robbins impliedly agreed with the city that, if he was permitted to dig the area for his own benefit, he would do it in such a manner as to save the public from danger and the city from harm; and he cannot now say that: True it is you gave me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition. If this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decision from the rights of private persons. Because the city is liable primarily to a sufferer by the insecure state of the streets offers no reason why the person who permits or continues a nuisance at or near his premises should not pay the city for his wrongful act. The city gave no permission to Robbins to create a nuisance. It gave him permission to do a lawful and necessary work for his own convenience and benefit, and if in the progress of the work its original character was lost and it became unlawful the city is not in fault. We can see no justice or propriety in the rule that would hold the city under obligation to supervise the building of an area such as this."

In its essential features there is not much distinction to be discovered between the facts as apparent in the quotation above made from the decision of the Supreme Court and the facts in this case. It is true that in a sense in this case the city had an interest apparently in the putting in of this new pole; but, after all, both were interested, and the understanding between the two was, whatever might be the rights and duties of the parties as to third persons, that the telephone company was going to dig the hole and the city was going to put in the pole. Now, it is not for the telephone company to say that it may dig a hole and leave it, and rely upon the fact that the city is going at some time to put a pole in, and answer to a claim arising out of an injury that it was not for the telephone company to take care of this hole or to pay any attention to the seasonable time when it should be dug. Nor was it, under the circumstances—putting them in their strongest form for the telephone company—for the city to fix the time when the hole should be dug, or to postpone the digging of it, or to watch the hole as between it and the telephone company. The business was the business of the telephone company. They were its poles and its wires that were to be taken care of. No work could be done with its wires without its knowledge. And so it is no answer to the situation which is thus created for the telephone company to say that it obeyed the instructions of the city officer and dug the hole, and then left the rest of the work to be done by the city officials. The work of putting in the pole and stringing the wires was of such character as that the telephone authorities would necessarily know when it was to be done and, indeed, participate in the stringing of the wires on the new pole. So, if the defendant prematurely dug this hole, then it had simply one primary and constant and continuing duty to perform, and that was to see that the excavation was so protected as that injury should not result.

Supporting, also, the doctrine of the case just quoted, is *Clark v. Fry*, 8 Ohio St. 359, 72 Am. Dec. 590, *Columbus v. Penrod*, 73 Ohio St. 209, 76 N. E. 826, 3 L. R. A. (N. S.) 386, 112 Am. St. Rep. 716, *Morris v. Woodburn*, 57 Ohio St. 330, 48 N. E. 1097, *Railroad Company v. Morey*, 47 Ohio St. 207, 29 N. E. 269, and the case of *Robbins v. Chicago*, 71 U. S. 657, 17 L. Ed. 298, affirming the case of *Chicago v. Robbins*, *supra*, in which the proposition is emphasized that, although we may infer permission to build an area, permission cannot be inferred to leave it in a state dangerous to persons passing by. And so in this case we may admit authority and permission to make this excavation, at

some indefinite time in the future to be filled by a pole by the city; but authority cannot be inferred from that to permit this excavation to become a nuisance or in any way to limit the primary duty of the person who made the excavation to see that it was kept safe until finally turned over to the person whose duty it was to use it.

In view of the reasons given above, it seems to me that the defendant is liable, and a judgment may be rendered accordingly.

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BOWEN v. KUTZNER et ux.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1908.)

No. 790.

1. CONTRACTS (§ 99\*)—VALIDITY OF ASSENT—CONTRACTS BETWEEN BROTHER AND SISTER.

While a brother and sister may lawfully contract with each other, in case of such contracts, sight ought never to be lost of the fact of the relationship existing between them and of the duty they owe one to the other to deal with the utmost frankness and good faith, and where one, who secures a large advantage by the contract, was fully informed as to the matters to which it relates, while the other was not, the presumption is against the validity of the contract, and the burden rests upon the one so informed to fully establish his contract and remove from it every doubt or suspicion that may attach to its execution.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 448; Dec. Dig. § 99.\*]

2. CONTRACTS (§ 94\*)—VALIDITY OF ASSENT—CONTRACTS BETWEEN BROTHER AND SISTER—UNDUE INFLUENCE.

An intestate left an estate of some \$250,000, mostly accumulated during the last few years of his life, and consisting principally of his interest in two coal companies, in which he was a large stockholder. He left as his heirs a son and a younger daughter. The son was secretary and treasurer of one of the companies in which his father had given him stock, had thus been associated with his father in business, and was thoroughly acquainted with his property and its value. The daughter had married when her father was comparatively poor, lived several hundred miles distant, and knew nothing of his affairs. After the father's death, on invitation of her brother, she visited him, and while there was taken by him to the office one evening and told that it was desirable to settle the father's estate between them; that such was the father's desire, and also that it should be kept secret; that it was their father's wish that her brother should have the stock in the coal companies and should take care of her, and that the father would not have owned such stock but for her brother. Shortly thereafter, she was taken one evening to a bank where were her brother, his attorney, and two of his friends and business associates, and there she signed an agreement prepared by the attorney dividing her father's property by which her brother was given all of the stock in the two coal companies, and the remainder of the property was about evenly divided, she being given an advantage of perhaps \$1,000. She was not advised to seek outside counsel, and did not, nor was she told the value of the respective properties. As a matter of fact, the stock in the coal companies constituted by far the greater part of the estate. *Held*, that in the absence of such advice or information, which it was the duty of her brother to give her, in view of their relationship and the circumstances, and the great advantage he obtained by the settlement, the agreement was void for fraud and undue influence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430; Dec. Dig. § 94.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

### 3. GIFTS (§ 18\*)—INTER VIVOS—NECESSITY OF DELIVERY.

Gifts *inter vivos* of personal property, to be effective, must be accompanied by the delivery of possession; the donor parting with all present and future dominion over it. The donor must be divested of, and the donee invested with, the right of property in the subject of the gift. It must be absolute, irrevocable, without any reference to its taking effect at some future time; and without such proof, clear and explicit, the gift fails.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 29-33; Dec. Dig. § 18.\*]

### 4. GIFTS (§ 49\*)—INTER VIVOS—EVIDENCE—TRANSFER OF CORPORATE STOCKS.

Evidence considered, and *held* insufficient to sustain the validity of a transfer of stock claimed to have been a gift from a father to his son, such stock constituting the larger part of the owner's estate, and the transfer having been made on the books of the corporation after his death by an attorney in fact under authority of an assignment and power of attorney indorsed on the certificates as of a date shortly before his death, but which was in fact signed by him in blank several years before on pledging the stock as collateral security to a bank.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-99; Dec. Dig. § 49.\*]

Appeal from the Circuit Court of the United States for the Southern District of West Virginia, at Bluefield.

The bill in equity in this cause was filed by Alice Kutzner, her husband, John T. Kutzner, joining with her, against her brother, W. H. Bowen, the defendant in the lower court, and appellant here, for the purpose of having rescinded a certain contract in writing entered into on the 25th day of November, 1902, between the female plaintiff and her brother, the appellant, filed as "Exhibit Contract" with the bill, whereby they divided between them, on the terms and conditions set out in said contract, the estate whereof their father, Jonathan P. Bowen, late of the county of Mercer, W. Va., shortly theretofore died seised and possessed, leaving as his sole heirs at law and distributees the said Alice Kutzner and W. H. Bowen. The preamble of the contract is as follows: "Witnesseth, that whereas, Jonathan P. Bowen, father of both parties hereto, departed life intestate, leaving considerable property; and whereas the said Harry Bowen and the said Alice Kutzner, parties hereto, are the only children and his sole surviving heirs; and whereas, it is the mutual desire of the parties hereto to amicably divide between themselves the property inherited from their father, the said Jonathan P. Bowen; and whereas, it is mutually recognized by the parties hereto, that it was the desire of the said Jonathan P. Bowen, as expressed in his lifetime, that the said Harry Bowen, party of the first part, should inherit his stock in Booth-Bowen Coal & Coke Company and Norfolk Coal & Coke Company." The property covered by the contract consisted of, first, 125 shares of the capital stock of the Booth-Bowen Coal & Coke Company; second, 260 shares of the capital stock of the Norfolk Coal & Coke Company; third, the property specifically set forth in clause 4 of said contract, as follows: "Fourth: The following property owned by said Jonathan P. Bowen shall be divided as nearly equally as possible between the parties hereto; 6 shares of stock in Bluefield Telephone Company; 80 shares of stock in Ridge Land Company; 50 shares of stock in Bramwell Water Company; 25 shares of stock in Eureka Land Company; 110 shares of stock in W. M. Ritter Lumber Company; 10 shares of stock in Bank of Bramwell; cash on deposit in Bank of Bramwell, amounting to \$17,623.42." By a subsequent provision of paragraph 4 of this contract, it is provided that the property set forth in said fourth paragraph should be divided equally between the parties, except the 25 shares of stock in the Eureka Land Company, of which the defendant, Bowen, was to have 12 shares, and the plaintiff, Alice Kutzner, 13; by the third clause, that said Alice Kutzner was to have the house and lot, of small value, of which

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

her late mother died seised in St. Clair, Schuylkill county, Pa.; and by the concluding paragraph of said contract it was provided: "Fifth: Any other property belonging to the said Jonathan P. Bowen, deceased, of which the parties hereto may not now be advised, shall be divided equally between them whenever said property shall be discovered."

The effect of this agreement was to give the appellant, Henry Bowen, unconditionally, the stock of the decedent in the Booth-Bowen Coal & Coke Company, and in the Norfolk Coal & Coke Company, which constituted in value the bulk of his estate, and to divide between himself and sister the residue of the estate, money in bank, and various stock ownerships in various companies set forth in paragraph 4 of the agreement, much of which at least may be said to be of doubtful value, and also to give to the female plaintiff the undivided one-half interest in the house and lot in St. Clair, Schuylkill county, Pa., of which their mother died seised, and supposed to be worth about \$1,000.

The plaintiff's case set forth in her bill, briefly, is that her father, in the year 1885, having by care and frugality lasting through more than 50 years, engaging in various capacities ranging from working in the breakers to mine foreman, in the anthracite region of Pennsylvania, accumulated a sum of money amounting to \$5,000, was induced to leave Pennsylvania and settle in the new coal fields of West Virginia, now famous as the "Pocahontas Flat Top Coal Field." That at said last-named place he formed a partnership with Messrs. William and James Booth, under the name of William Booth & Co., using his entire cash capital in paying for a one-third interest in the firm. Said firm leased from the Bluestone Coal Company a tract of land on Simmons creek, in Mercer county, W. Va., and engaged actively in mining and manufacturing coal, and the general retail mercantile business; that this business was very profitable, and soon largely increased; that a corporation was formed known as the Booth-Bowen Coal & Coke Company, absorbing the former copartnership, including the lease aforesaid. The stock of this company was fixed at \$75,000, and said Jonathan P. Bowen's share therein consisted of 250 shares, or one-third; that the business of this company became very successful, yielding handsome dividends, and large sums were expended on improvements and extending the same; and that said Jonathan P. Bowen then acquired by purchase of James Booth his one-third interest in the company. The business was especially valuable during the years 1899, 1900, 1901, and 1902. That some two years after her father left Pennsylvania, as aforesaid, in 1887, her brother, W. H. Bowen, moved from Pennsylvania, and accepted a position in his father's mine. The evidence shows that young Bowen was first blacksmith in the mine; then became assistant superintendent, and subsequently treasurer of the company; that, shortly after his removal to West Virginia, her father gave to her brother one-half of his original shares of stock in the company, to wit, 125 shares in the Booth-Bowen Coal & Coke Company, which complainant charged to be an advancement to him; that at the time of his coming to West Virginia her brother was without means, either money or property, with which to pay for the stock; that on the 10th day of October, 1902, her father died, leaving an estate worth between \$200,000 and \$250,000; and that shortly thereafter her brother wrote her an urgent letter to come to his home in Bramwell, W. Va., saying that Mr. Mann, the president of the bank, wanted to see her, that there was a matter which needed her presence; that she wired asking to delay her trip for a week, which was arranged; that soon after the 1st of November she went to her brother's home, and stayed there several weeks; that for several days after reaching his house nothing was said about business affairs, until one afternoon she was invited by her brother to go to the office of the company, the Booth-Bowen Company, at Bramwell, W. Va., where, with no one present except her brother and herself, he for the first time mentioned the subject of the division of their father's estate, telling her that it was the wish of her late father that he, W. H. Bowen, should have all the stock in the Booth-Bowen Coal & Coke Company and in the Norfolk Coal & Coke Company held by their father at the time of his death, and that said W. H. Bowen should "take care of Alice," meaning the female plaintiff. He further told her that, while the stock in

these two companies stood in the name of their father, he had bought the same, and that but for him his father would never have had it. He also told her that, with the exception of one share of stock, he had bought and paid for with his own money the stock held by her father in the Bank of Bramwell; that she was very much shocked at the apparent partiality shown in this division of the estate ascribed to her father, but felt that, if it was really his wish, she would carry the same out regardless of the consequences to herself; that she was especially warned and requested by her brother not to mention the matter to any one; that plans for the division of the remainder of the estate were discussed, and it was suggested that no writing of any kind would be needed; and several days later, her brother informed her that a writing would have to be made by each of them to avoid trouble, as he was advised, and that he expected his attorney, Mr. Rucker, up from Welch that evening, and asked her to go up with him to the bank and fix up matters; that late that evening they did go to the bank, met Mr. Rucker, and there were also present Messrs. Jenkin Jones and J. B. Perry, who acted as witnesses—Jones being the only one of the persons present personally known to her; that it was about 8 o'clock at night before the contract was signed; that the same was read to her by Mr. Rucker, but that no provision of the settlement was discussed, and no papers, other than the contract, produced and shown; that she signed the same, being utterly without knowledge as to the value and condition of her father's estate at the time; that she had the fullest confidence in her brother, and believed that he had properly obligated himself to, and would carry out the wishes of her father respecting herself; and that the only remark he made about the property, previously to the meeting when the contract was signed, other than hereinbefore stated, was: "As for the colliery up here (meaning the Booth-Bowen Colliery), there will be enough in it for both of us"; that, assuming it to have been the purpose of her brother to "take care" of her, as he stated it was the wish of her father that he should do, and which she supposed he had obligated himself to do by the contract aforesaid, he has utterly refused to make any provision whatever for her; that since the complainant realized the nature and character of the contract, which she did not do until she examined the same while returning to her home, she at once repudiated and declined to be bound by it, and from that day has endeavored to secure a fair and just division of the estate left her by her father; that although she promptly so informed her brother, she did not succeed in seeing him until the month of May, 1903, when he called on her at her home in Wilkesbarre, Pa., and they discussed the contract; that in that conversation she informed her brother all she desired was an equal division of the estate, and he then and there declared that it had been made, and, upon her calling his attention to the fact that by the contract the bulk of the estate had gone to him, he replied in substance that she could depend upon him to do what was right and that she was amply protected by the contract; that she asked him if there wasn't something more she ought to have to show for what had been promised her; that he said, "No, you have me"; that she said, "Suppose something happens to you"; that he said, "You will find you are all right"; that she called his attention to the fact that no reason had been given for what would look to others as a one-sided affair; that he said there was no reason, "You were just as much to father as I [meaning her brother] was"; that she again asked him for something to show for it, and he said she did not understand it all, that she was all right, only she did not know it; that previously he had sent her \$2,000, which she declined to accept, unless knowing in what way she was receiving the same; and on this occasion he wanted her to take \$500, and insisted on leaving with her a check therefor, which she subsequently returned; that she used every effort to cause him to correct the contract, but without avail. She charges especially that, at the time of making the same, he was fully possessed of all information bearing on her father's estate, and as to which she knew little or nothing; that she supposed the contract embodied a provision obligating him to do what he said was her father's wish—that he should take care of her; and she averred and charged that it was not true that her father ever made any such request, either for her care, or that her brother should have all the

stock in the two coal companies referred to, which constituted the chief part of his estate, nor was it true that her brother, and not her father, had bought the coal stocks in question; that the fact that she was to be provided for, coupled with a desire on her part to conform to her father's wishes, formed the chief motive and consideration moving her to enter into the contract, and if the provision in her interest was omitted therefrom, and her father's wishes were never carried out, the contract so far as she was concerned, was without consideration; that the actings and doings on the part of her brother constituted a fraud upon her; and that she was entitled to have said contract annulled and set aside because of the lack of consideration therefor, and the false representations by which she was induced to sign the same, and the time, place, and manner in which it was secured, and because of her lack of knowledge, and opportunity of knowledge, of the matters about which she was dealing.

The complainant filed interrogatories with her bill, to which the defendant demurred, as well as to the bill. The demurrer was sustained as to the bill and interrogatories, except interrogatories Nos. 14 and 15. Thereupon the complainant amended her bill, to which the defendant again demurred, and answered. This answer denied generally the averments of the bill, especially all charges of fraud and wrongdoing on the part of the defendant, and that he had withheld from the complainant any information respecting her father's estate. He admitted the ownership by his father of the property set out in the contract; that his sister came to his house after the death of his father, at his invitation, and after staying there some time, the contract was made. He avers that it was the desire of his father that he should inherit all the stock owned by his father in the two coal companies; that he so informed his sister before she signed the contract; and that she consented to respect and be bound by the wishes of her father. He denied that his father ever made of him any such request to "take care of Alice," that he ever held out such inducement to her to sign the contract, or that it was the wish of his father that he should do so. He admits that he requested his sister to keep private what had taken place between them, but he had no ulterior motive in so doing, further than to respect his father's wishes; it being one of the latter's characteristics not to allow the public to have knowledge of his private affairs; and he felt that this should be especially carried out in dividing up his estate. He also denied that he ever held out to his sister that she would have any interest in the colliery, meaning the Booth-Bowen colliery, or that there was enough for both of them in it. He admits depositing to his sister's credit \$2,000, referred to by her after his father's death, and alleges that he was prompted to do so by reason of his affection as a brother. He further denied that he had attempted to exercise undue influence over his sister, or had withheld any information from her; and insisted that the contract was entered into by her in good faith, and that she was satisfied with the same until others had intermeddled with his and her affairs; and that he had lived up to the contract in all respects.

To this answer, replication was duly made, depositions taken, and in the progress of the examination on the 28th of July, 1905, of complainant's witnesses, J. Walter Graybeal, secretary and treasurer of the Pocahontas Consolidated Company, of which the Norfolk Coal & Coke Company was a constituent company, with a view of ascertaining the number of shares of stock owned by Jonathan P. Bowen at the time of his death in said latter company, it appeared that 260 shares of stock of the Norfolk Coal & Coke Company, heretofore referred to as one of the subjects of litigation, was on the 16th day of December, 1902, transferred upon the books of said company to the defendant, W. H. Bowen, called "Harry Bowen," in the certificates, by virtue of an alleged power of attorney from said J. P. Bowen to Isaac T. Mann, dated 26th September, 1902, constituting said Mann his attorney in fact to make such transfer. Thereupon subsequently on the 16th day of January, 1906, the defendant amended his answer, setting up such transfer of stock, to the filing of which the plaintiff excepted, which exceptions the court overruled. The taking of depositions was continued, and thereupon the case was heard on the bill, amended bill, answer, replication, amended answer,

and replication thereto, and the depositions of witnesses, and the decree of the lower court entered annulling the contract between the complainant and defendant, because the same was procured by fraud, misrepresentation, and concealment, and without valuable consideration; and the court likewise decreed that the defendant's claim set up to the said 260 shares of stock in the Norfolk Coal & Coke Company, by virtue of the alleged assignment of stock, was not sustained by the proof, and that said stock constituted part of the estate of the decedent, Jonathan P. Bowen's estate, and upon his death intestate passed to his heirs at law and distributees; from which decree this appeal was taken.

Luther C. Anderson and A. W. Reynolds (Rucker, Anderson & Hughes, on the brief), for appellant.

T. L. Henritze and A. L. Williams, for appellees.

Before PRITCHARD, Circuit Judge, and PURNELL and WADDILL, District Judges.

WADDILL, District Judge (after stating the facts as above). Two questions are presented for determination by the court: First, whether the contract entered into on the 25th of November, 1902, by which the appellant secured to himself the large interest that he did in the estate of his father, by having his sister release to him all her interest in the stock referred to in the contract as the Booth-Bowen Coal & Coke Company and the Norfolk Coal & Coke Company, is a valid and binding one between the parties under the facts and circumstances under which it was entered into; and, secondly, the validity of the assignment of the stock of the Norfolk Coal & Coke Company set up in appellant's amended answer. We will first consider the law applicable to contracts entered into between parties related one to the other as these parties were, and made in the circumstances under which this contract was executed.

The fact that a contract between brother and sister may be lawfully entered into cannot be disputed. They have the same right to contract to and with each other relative to their property as other individuals. But in such contracts sight ought never to be lost of the fact of the relationship that exists between them, and of the duty they owe one to the other to deal with the utmost frankness and good faith. We have in this case an only and elder brother, dealing with his only sister, in making a settlement of their interests in their father's estate, by which contract it is conceded that the great bulk of the property of the deceased parent is parted with by the sister, and acquired by the brother, without consideration, and which she now charges was procured by fraudulent conduct and representations, and without her being informed as to her real interests, or the value of the same. Such a transaction should always be scrupulously guarded by parties occupying the relation and securing one an unfair advantage over the other. In *Pomeroy on Contracts*, § 269, in discussing what will be a sufficient concealment to warrant the rescission of a contract, it is said:

"If there is a relation of trust or confidence between the parties; if the person knowing the facts occupies a fiduciary relation towards the other—then the duty to disclose is clear. It is not necessary that such fiduciary relation should be expressed; in many cases it has been held to exist from the general circumstances."

"Mere concealment to afford general ground for rescission for fraud must be a willful suppression of such facts in regard to the subject-matter of the contract as the party making it is bound to disclose." Beach on Contracts, vol. 1, § 799.

"Where relations of trust and confidence exist, the duty to disclose is clear." *Id.*

And, in discussing inadequacy coupled with other inequitable incidents, Pomeroy says:

"If there is nothing but mere inadequacy of price, the case must be extreme, in order to call for the interposition of equity. When the inadequacy does not thus stand alone, but is accompanied by other inequitable incidents, the relief is much more readily granted." *Pom. Eq. Jur.* (3d Ed.) § 928.

"On the other hand, in transactions between this same class of parties (near relations) the circumstances may be such as raise a strong inference, if not win a presumption of bad faith, and especially where the party obtaining the benefit is in a position of natural superiority and command over the other, as father and child, an elder brother and younger sister, might raise a strong presumption of undue influence, and this calls for the interposition of a court." *Id.*

In Story's Equity Jurisprudence, vol. 1 (12th Ed.) § 251, it is said:

"Cases of surprise, and sudden action without due deliberation, may properly be referred to the same head of fraud or imposition. An undue advantage is taken of the party under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning. \* \* \* The surprise here intended must be accompanied with fraud and circumvention, or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him. If proper time is not allowed to the party, and he acts improvidently, if he is importunately pressed, if those in whom he places confidence make use of strong persuasions, if he is not fully aware of the consequences but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel before he is called upon to act, in circumstances of sudden emergency, or unexpected right or acquisition; in these and many like cases, if there has been great inequality in the bargain, courts of equity will assist the party upon the ground of fraud, imposition, or unconscionable advantage."

The leading English case on this subject is *Huguenin v. Baseley*, 14 Ves. 273, reported in *White & Tudor's Leading Cases in Equity* (Ed. 1887) 1184, to which, with the notes, reference is especially made. In the latter case, Lord Eldon said:

"The question is not whether she knew what she was doing, had done, or proposed to do, but how that intention was produced; whether all that care and providence was placed round her as against those who advised her, who from their situation and relation with respect to her they were bound to exert in her behalf."

In Pomeroy's Equity, §§ 951 to 957, inclusive, will be found a general review of the same subject. The Virginia cases are *Statham v. Fergusson*, Adm'r, et al., 25 Grat. 28, 69; *Davis et al. v. Strange's Ex'r*, 86 Va. 793, 11 S. E. 406, 8 L. R. A. 261; *Jones v. McGruder*, 87 Va. 360, 12 S. E. 792; *Todd v. Sykes*, 97 Va. 143, 33 S. E. 517. The Virginia decisions referred to each contain a full consideration of this general doctrine; and in the first-named case, of *Statham v. Fergusson*, the facts bear a striking resemblance to those in this case, but in which the party to the contract sought to be, and which was



by the Supreme Court of Appeals set aside, was possessed of greater information as to her rights, and afforded greater opportunity than the plaintiff here to act independently. There, the stepsons-in-law of Mrs. Fergusson, who were the administrators of her deceased husband's estate, and her stepchildren, secured from her a deed whereby she agreed to accept, in lieu of her rights under the law, the provisions of a certain will that her husband had made, probate of which was not allowed because of a defective execution of the instrument; and, as a result, she gave up considerable property. The court said, speaking through Moncure, president:

"It was the duty of the administrators of her husband, invested as they were by law with the title to his whole personal estate, and standing as they did in the confidential relation in which they stood towards her, to take care that before she made a donation of her estate, or a large portion of it, to themselves, as she did, she should be fully informed of her rights on the subject, and the effect of her act, or at least should have ample time and opportunity to consult counsel and advise with disinterested friends; and they should have advised her to avail herself of those advantages. That *uberima fides*, which the law expects and exacts of persons standing in such a confidential relation to another, required them to do so. Instead of doing so, if they did not advise and encourage, they, at least by their acts, facilitated the preparation and execution of the deed, when they must have known that she had not the necessary information and proper advice to enable her to act so wisely and discreetly in so important a transaction."

In *Parker v. Parker*, 45 N. J. Eq. 224, 16 Atl. 537, it is said:

"The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief where influence is acquired and abused, or where confidence is reposed and betrayed. \* \* \* It is especially active in dealing with gifts."

What has been stated applies to contracts generally between parties having the relation that these bore one to the other—one securing an advantage over the other; but it is doubly true when, as in this case, the one securing the advantage occupied a favored position of being thoroughly posted in and about what was being done, and the other in total ignorance thereof; one an experienced business man, engaged in the transfer of the stock of the corporation of which he was secretary and treasurer, and in the business of which he had been largely engaged, and the other an innocent woman, a sister living in a distant community. In such a case, the former receiving such infinite advantage, every presumption would be against the validity of so improbable a contract; and the beneficiary should, as it ought to be his pleasure to do, be required to fully establish his contract, and remove from it every element of doubt or suspicion that may attach to its execution; and the law thus rightfully places the burden upon him. *Pomeroy*, Eq. Jur. § 928; *Todd v. Sykes*, 97 Va. 143, 146, 33 S. E. 517, and authorities cited.

Coming to the consideration of the facts, we cannot fail to be impressed, upon a careful review of the pleadings and testimony in this cause, with the strong presumptions that exist in favor of the plaintiff against the defendant arising from the improbability that she would have done what it is now claimed she did; that is to say, in her poverty, strip herself mainly of her inheritance in the large and valuable

estate of her father, and give the same to her brother, who had an abundance, largely the result of his father's bounty, and the opportunity afforded him by the latter to make money, without consideration or hope of reward, had she been either fully aware of the facts in and about the transaction in which she was engaged, or fully realized the consequences of what she was doing. Nor can one fail, after reading carefully her deposition giving her story and version of what occurred, and that of her brother as to the same transaction, to note the apparent innocence and frankness of the one, and the coldness, secretiveness, and lack of sincerity of the other, as well as the full and complete explanation on her part of what she said and did, and his manifest reticence regarding the same transaction; the frequency with which he answers the most important questions, either "Yes" or "No," or "I did" or "did not," is most noticeable. This is strikingly illustrated in the effort to secure information as to the value of what the sister surrendered and the brother acquired. To this date, neither in his answer or deposition, or answer to interrogatories that would have elicited information on the subject, though an officer of one company, and a large stockholder in the other, has he vouchsafed to give the complainant or the court the slightest information as to the value of this property, although that fact has such important bearing upon the transaction. His failure to do so is a confession of his sister's charge respecting what she had given up, and his apparent reticence on the subject does not commend him as one who is seeking to act openly and fairly about the matter. Having admitted that as treasurer he had in his possession the books of the Booth-Bowen Coal & Coke Company, which would show the exact financial condition of the company, and that he had long had control of them, when asked to produce them, he declined so to do upon advice of counsel. When asked to give information respecting the dividends paid upon the stock, he replied that he would have to refer to the books; and when requested to do so, and state the amount, he again replied that "on advice of counsel I refuse to give the information." To an inquiry whether or not the dividends did not reach 25 per cent. per annum, he replied, "I refuse to answer the question." So that not only was the complainant, but the court is, left practically without information either as to the value of the stock or its earning capacity. These answers were made when this witness was under cross-examination in a litigation in which he was claiming the stock as against his sister, and, if he was thus noncommunicative under such circumstances, it is not unfair to assume that his sister, when dealing with him alone, was not favored with much information; and it may likewise be assumed that the questions asked would have been answered, if answers would have been favorable to the witness. The complainant's testimony briefly is that, having been persuaded to go to her brother's house, in connection with matters affecting the estate of her deceased father, she was taken privately to an office of the company, and there told by her brother that the two blocks of stock referred to would never have belonged to her father but for him, the brother. That it was the desire of the father that the brother should have

them, and also that the brother should take care of her; and she was enjoined to keep the transaction secret; that having the assurance of being taken care of from her brother in mind, and having the utmost confidence in him, and believing his statement as to the acquisition of this property, and of the expressed wish of her father that he should have the stocks, and in turn take care of her, and under the belief that she was to be so provided for, she agreed to the conditions imposed by her brother for the division of the estate, by which he was to take the stocks referred to. That when subsequently she was invited at a late hour in the evening to meet her brother's lawyer, and while surrounded by his friends, for the purpose of consummating the transaction between them, which her brother had assured her was necessary, she in like good faith, and with unabated confidence in her brother, and without the slightest suspicion that any advantage would be taken of her, carried out the same, and signed the contract, never for a moment thinking that there was omitted therefrom what was the most important feature to her, namely, that she was provided for; that she was without representative or friend, away from home, staying at her brother's, without information on her part as to the extent and value of the property with which she was dealing, without independent advice from any one, or the suggestion that she have such advice; and in this manner the paper sought to be set aside was procured from her upon a false representation of the facts, and upon an erroneous idea on her part as to its contents, and without knowledge as to the extent of the interests with which she was parting. There is a direct conflict in the testimony between the brother and sister as to what occurred between them in connection with the division of their father's estate, especially as respects the father's wishes regarding this stock, and the desire of the father that the brother should take care of his sister, and the degree of information imparted to the sister; and though it may be said that while the brother denies her statements as to what occurred, so far as giving her information is concerned, he does not inform the court what it was he did tell her, or the details of the information he gave her, all of which he should and would doubtless have been anxious to give had the fact been true that any such material information had been imparted to her. The facts in the case bear out her version, and not his, and what admittedly occurred as to keeping the transaction secret, and the apparent effort to entrap the female plaintiff on cross-examination by having her make admissions against herself of things that never occurred in connection with the execution of the contract, strongly tend to support her version of the transaction, and weaken those of the other side.

#### Request for Secrecy.

Complainant avers in her bill that her brother enjoined upon her the importance of secrecy as to what they were doing, and she makes the same statement in her deposition. This charge is denied by the appellant in his deposition, while in his answer on the same subject he says:

"Respondent denies the allegation in complainants' bill that he manifested to complainant, Alice Kutzner, any undue concern in respect to having their

business relations kept private. The whole intent and purpose of this respondent while arranging with complainant, Alice Kutzner, for a division between them of the estate inherited from their father, was to carry out and respect his father's wishes. It was a characteristic of Jonathan P. Bowen, well known to all his friends, and particularly to his family, that he never desired the public to have knowledge of his private business, and, when it came to dividing his estate, this respondent felt that the lifelong business method of his father should be respected and followed, and for that reason it was mutually agreed between the complainant, Alice Kutzner, and this respondent, that they would keep private the business pertaining to the division of the estate between them."

This answer in effect admits what the sister charges, though it attempts to show that it was by agreement that privacy was to be observed. The answer concedes that the respondent felt that he was carrying out his father's desires in keeping the matter secret, and since he, and not his sister, as is manifest from the terms of this contract, is interested in so keeping it, he cannot escape the consequences of an effort to prevent being known what was done between them.

#### Complainant's Cross-Examination.

Complainant is clear and explicit in her statement that at the time of the execution of this contract she was alone, her brother having his lawyer and friends present; that she was shown no papers; that no discussion of the terms of settlement were had; that all that was done was to read the contract to her, and she admitted signing the same freely. It was especially attempted to establish the defendant's case by her, and these significant questions were asked by the draftsman of the contract, Mr. Rucker:

"X. Q. 7. At the time the contract was signed, do you remember my reading the contract over in full, and after I had read it, in the presence of your brother, the defendant, Harry Bowen, Jenkin Jones, and J. B. Perry, asking you if you understood the terms of the contract, and your reply that you did; and my then asking you if you understood that by this contract you gave to your brother all of your interest in the 125 shares of stock in the Booth-Bowen Coal & Coke Company, and 260 shares of stock in the Norfolk Coal & Coke Company, which belonged to your father at the time of his death, and that you got nothing in exchange for your interest in these stocks, except your brother's undivided one-half interest in the old home place at St. Clair, and your replying that you understood that; and my then asking you if, with this understanding, you were perfectly willing to sign and enter into this contract, to which you replied in the affirmative; do you remember these questions and your reply thereto as I have stated? A. Now, as to the first part, when you read it, when Mr. Rucker read it, he asked me if I understood what he had read, and I said, 'yes.' There was no further explanation, or anything that would give me to understand any more about it. I have no recollection of Mr. Rucker putting questions that would have explained that to me. X. Q. 8. In order that you may have your memory refreshed, I will ask again if you do not remember of my asking you particularly if you understood that your brother was to get all of your father's interest in the Booth-Bowen Coal & Coke Company and the Norfolk Coal & Coke Company, and that the other property should be divided, except the house at St. Clair. A. I do not remember your putting the question. I remember your reading it in the contract."

These questions sought to commit the witness to having admitted in the presence of her brother, his attorney, and his two friends: (a) That she understood the terms of the contract; (b) that she especially understood that by signing it she gave up to her brother all in-

terest in the stock in the two coal companies, belonging to her father at the time of his death; (c) that she was to get nothing in exchange for her interest in these stocks, except her brother's one-half interest in the old home place at St. Clair; (d) and that with such understanding and knowledge she freely entered into and signed the contract. The answers of the witness to these questions are all in the negative. The court cannot fail to take notice of the fact that Mr. Rucker, the attorney asking these questions, neither saw fit to go upon the stand and deny this woman's statements, or establish the truth of what he asked her as to her alleged admissions; and the further fact, when he came to examine the subscribing witnesses to the contract, that he did not ask such questions of them as would have established his, and not Mrs. Kutzner's, account of what he claimed occurred at the time of the execution of the contract, as embodied in questions 7 and 8 above. The witness Jones was asked whether the contract was explained to the complainant, and this question was withdrawn, and a less leading and more general one asked; to which he responded that he heard Mr. Rucker read the contract, and ask her if she understood it, to which she replied in the affirmative; and of the witness Perry, only a general question was asked, as follows:

"Q. 13. You have stated that the said contract between Harry Bowen and Alice Kutzner was read to Mrs. Kutzner by Edgar P. Rucker before Mrs. Kutzner signed said contract. Please state what, if anything, was said or done by Mr. Rucker in connection with the reading of said contract to Mrs. Kutzner. Ans. In a general way, I would say that the contract was read over by Mr. Rucker, and the various objects or statements set forth therein were explained to Mrs. Kutzner."

But upon cross-examination he says that he means by "explanation" "that certain property went to her, and certain other property went to Mr. Bowen." The complainant has never disputed that; she at the time supposed she understood the contract. The question was whether she knew what she was doing, the nature and effect of her act, and was not induced thereto by any fraud or undue influence; in other words, whether she acted with full information in and about the matters under consideration; whether those upon whom she had a right to rely did not abuse her confidence, mislead her, and fail to exercise towards her the providence, protection, and care which, from their situation and relation with respect to her, they were bound to exercise in her behalf. She thought that her brother was to receive the coal stocks, upon terms and conditions stated by him to her, as to caring for her, and as to which she supposed he had obligated himself, and that she would share with him certain of the other property. The questions indicated above are not such as would have been asked this witness, nor would there have been a failure to produce Rucker as a witness, if any such explanation was made as is set forth in the seventh question of her cross-examination. The asking of such a question, and the failure to follow it up, is apparent, and is entitled to much significance in reaching a conclusion as to what occurred at the time of the execution of the contract.

Parties having the relation the appellant does to the appellee, holding the favored position as to knowledge, experience, and peculiar

acquaintance with the property involved, and receiving the disproportional, great, and unnatural advantage secured under the agreement sought to be annulled, cannot afford to hold anything back, and least of all can he, even when cross-examining his sister as a witness, place her in a false position, or attempt to entrap or catch her in any unfair manner. He should under such circumstances show high conduct and clean hands, and remove so far as he could from the transaction any possible doubt or question, and he should have prevented, instead of attempting to catch or inveigle her into making admissions against herself.

One occupying such position to his sister, and securing from her such advantages in dealing with her father's estate, cannot enjoin secrecy, or avoid the consequences of an effort so to do, by placing the same upon the otherwise high grounds of observing the wishes of his deceased parent. When in the absence of a will, or of a word of any sort in writing of a testamentary character, and without a single witness other than himself, he is seeking to secure from his sister virtually one-half of an estate worth over \$250,000, upon the alleged ground that his father intended him to have it, he must hide nothing, but remove doubt, and allay suspicion, otherwise so unnatural a thing, something so unknown to the law, and out of keeping with what is the general experience of mankind, ought not, and should not, be sanctioned.

#### The Stock Transfer.

Coming now to the effect of the transfer of stock of the Norfolk Coal & Coke Company, alleged to have been made to the appellant by his father in his lifetime, and which it is claimed the appellant had no knowledge of at the time of entering into the contract aforesaid with his sister, or indeed until after the 28th of July, 1905, when it developed in the taking of testimony on her behalf, and which assignment he claims the benefit of, and attempts to set up in this case by his amended answer of the 16th of January, 1906, the filing of which complainant excepted to, and the court overruled, and allowed the answer to be filed. There was much force in the exception, as it is highly improbable, considering the business connections existing between appellant and the officers of the company in which the stock was held and by whom it was transferred, the amount involved, and the connection he necessarily had with the property, that appellant could have remained in ignorance from September, 1902, until July, 1905, of the fact of the gift and the transfer, had he exercised any diligence whatever regarding the same. Nor does there appear to be any good reason why, under the circumstances of this case, a delay of six months should have occurred after the alleged discovery before the filing of his amended answer. *McKay v. McKay*, 33 W. Va. 736, 11 S. E. 213; *Foutty v. Poar*, 35 W. Va. 72, 12 S. E. 1096; *Daniel's Chan. Prac.* vol. 1, p. 777; *Beach, Modern Equity*, § 414; *Bates, Federal Procedure*, vol. 1, § 343 et seq.; *Barton's Chan. Prac.* vol. 1, p. 420.

The facts regarding this transaction as developed in the record are briefly: That Jonathan P. Bowen in his lifetime, to wit, on the 3d of January, 1898, being the owner of 3 certificates of stock in the Nor-

folk Coal & Coke Company, Nos. 402, 403, and 404, aggregating 260 shares, indorsed the assignment on the back of each of the certificates in blank, and left them with the Bank of Bramwell as collateral security for loans with the bank. The certificates had printed on the back the usual form of power of attorney, as follows:

"For value received — have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto — the stock named in the within certificate, and do hereby constitute and appoint — true and lawful attorney irrevocable for — and in — name and stead, but to — use, to sell, assign, transfer and set over all or any part of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer, any one or more persons to substitute with like full power. Dated —. Signed and acknowledged in presence of —."

These powers of attorney thus in blank had the signatures attached of J. P. Bowen and J. B. Perry, the latter the cashier of the bank, as attesting witness. The certificates remained in the custody of the cashier of the bank until the debt was paid off, some time in the fall of 1902, the date not given, when they were delivered by him to Isaac T. Mann, secretary and treasurer of the Norfolk Coal & Coke Company, who was also vice president of the Bank of Bramwell. From this time these certificates appear from this record to have been lost sight of until upon the examination of J. Walter Graybeal, secretary and treasurer of the Pocahontas Consolidated Company, of which the Norfolk Coal & Coke Company was a constituent company, on the 28th of July, 1905, the witness testified, upon being asked as to the number of shares Jonathan P. Bowen owned in the Norfolk Coal & Coke Company at the time of his death, that:

"The stock certificates were transferred from J. P. Bowen to Harry Bowen September 26, 1902, and were transferred on the books of the Norfolk Coal & Coke Company on December 16, 1902."

Not until after this deposition did even the appellant claim to know of this transfer, and complainant, of course, knew nothing of such transaction, as the stock was in the contract between her brother and herself as a part of her father's estate, and so treated in subsequent proceedings in this case. It now appears that the blank power of attorney on each of these certificates as signed by J. P. Bowen, and filed at the bank, had been filled up as of the 26th day of September, 1902, the name of Harry Bowen inserted therein as transferee, Isaac T. Mann's name as attorney in fact, and the necessary words of "I," "me," and "my" also filled in to complete the power of attorney. In two of these certificates, the name of J. P. Bowen appears to have been erased by one ink line drawn through each of the same, and one with two ink lines. Isaac T. Mann appears to have filled up these certificates, and as he claims, on the 26th of September, 1902, which was 14 days before the death of Jonathan P. Bowen; and subsequent to his death, on the 16th of December, 1902, he also appears to have caused a new certificate of stock to issue by the Norfolk Coal & Coke Company, in the name of Harry Bowen, for 260 shares of stock. This certificate is signed by Isaac T. Mann as secretary, and Jenkin Jones as president, of the company; being the same Jenkin Jones that witnessed the contract between

the complainant and her brother, treating this stock as belonging to the estate of J. P. Bowen, and giving it to her brother. Isaac T. Mann testified that he was secretary of and a director in the Norfolk Coal & Coke Company, and vice president of the bank of Bramwell, and was familiar with the signatures of J. P. Bowen and J. B. Perry, and that all the writing in the powers of attorney on the back of the certificates wherein he was named as attorney in fact, and the certificates made over to Harry Bowen, other than the signatures of J. P. Bowen and J. B. Perry, was in his handwriting; and in answer to the question at whose instance he did this writing, and for what purpose, he replied, "I believe the assignments as made by me were at the instance of J. P. Bowen, and it was for the purpose of transferring the stock to Harry Bowen"; and then, after explaining that the certificates were deposited as collateral with the bank, and the fact of their cancellation by the Fidelity Trust Company, on December 22, 1902, explained that the latter company were acting as transfer agents for the Norfolk Coal & Coke Company, and that it was customary, after preparing these certificates, to deliver to the trust company both the old certificates for cancellation, and the new certificate for registration, and that it was the duty of the trust company to cancel the old certificates before returning the same; and that therefore the cancellation made by the trust company was the usual cancellation, and that he was reasonably sure that such was the course pursued in this case, though he could not say positively without examining his books; that such new certificate would have been in the name of Harry Bowen. The witness further testified that he believed that the pen marks through the signature of J. P. Bowen on the original certificates of stock were made by him, but he was not positive, after the certificates had been returned by the transfer agent, saying that the transfer agent would hardly have made the transfer if the signatures had been canceled before he executed the new certificate; and, again, that it was rather a habit of his, after certificates had been canceled, to run his pen through the signatures. He was not, however, willing to give any special reason why this was done in this case, more than that it was customary for his company to forward the old certificates along with the new without cancellation; and he made no explanation of the fact of why it would not be proper for him, upon issuing the new certificates, as the representative of the Norfolk Coal & Coke Company, to have made such cancellation before sending both certificates with the power of attorney to the transfer company. The witness further testified that the date written on the back of the certificate, 26th of September, 1902, was the date the assignment was filled up by him; and to the inquiry of whether J. P. Bowen was present at the time, he replied:

"I do not recollect whether Mr. J. P. Bowen was present, but I do not believe I would have made the transfer unless in his presence, or by authority by him."

And to a further inquiry as to whether Mr. Perry was present or not, he answered:

"I am not able to state that Mr. Perry was present at the time the transfer was filled out, 26th September, 1902."



And to the inquiry whether there was a difference in the ink, particularly that used on certificate No. 404, and whether or not said assignments were not filled up at different times, he replied:

"I believe that the same ink was used in writing the assignments as was used in the dates, and I believe all of the writing made on the back of these certificates by me was made the same day."

He was then asked:

"Q. 22. State, if you can, where you were when Mr. J. P. Bowen directed you to fill up the assignments on the three certificates mentioned. A. I do not recollect. Q. 24. Was it at the Bank of Bramwell? A. I do not remember."

The witness then testified that the transfer company returned the certificates of stock to him, the originals as well as the new No. 436, in favor of Harry Bowen for 260 shares, which latter certificate he said was issued by him as secretary of the Norfolk Coal & Coke Company on the 16th December, 1902, and transferred by the transfer company on the 22d of December, 1902; that he properly recorded the three canceled certificates in the stock certificate book, but did not remember to whom certificate No. 436 was delivered; that it was returned to him along with the others by the transfer company, and he thereupon filed as a part of his deposition certificate No. 436.

Assuming this pretended transfer of stock to have been bona fide made, and otherwise legally and properly executed, there seems never to have been any delivery of the stock, which would have been necessary to make effectual the gift of the same. The specific question to whom Mr. Isaac T. Mann, who apparently was engaged in making this transfer, delivered the certificate, was not put to Mr. Mann, and it was an all-important one to those seeking to establish the validity of such a gift; and its consequence cannot be avoided by his statement that he did not remember to whom it was delivered. It does not follow that it was delivered to any one. On the contrary, the irresistible inference from Mr. Mann's testimony is that it was never delivered, and it could not have been until it was issued on the 16th of December, 1902, more than 60 days after the death of Jonathan P. Bowen. Nor is there the slightest suggestion that the original certificates of stock with the assignments on the back thereof, either while they were in blank, or after they had been filled up by Isaac T. Mann, were ever delivered to Harry Bowen. Indeed, from this record it does not appear that the donor, Jonathan P. Bowen, was ever in possession of these certificates of stock after their deposit with the bank as collateral some five years previously, and the evidence of Harry Bowen himself precludes the idea of any delivery to him, as he says he knew nothing of the alleged assignments until after the 28th day of July, 1905. Gifts inter vivos of personal property, to be effective, must be accompanied by the delivery of the possession, the donor parting with all present and future dominion over it; the donor must be divested of, and the donee invested with, the right of property in the subject of the gift; it must be absolute, irrevocable, without any reference to its taking effect at some future time; and without such proof, clear and explicit, the gift fails. No mere promise or declaration of intention to give will suffice, however

clearly the same may be established. Nothing short of a complete and unconditional delivery is sufficient to constitute a valid gift, and, until delivery, the gift is inchoate and revocable. Authority to support this position is abundant, and reference will only be had to a few of the decisions of the federal courts, and of the states of Virginia and West Virginia. *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; *Wright v. Bragg*, 106 Fed. 25, 45 C. C. A. 204; *Dickeschied v. Bank*, 28 W. Va. 340, 359; *Ewing v. Ewing*, 2 Leigh (Va.) 337; *Yancy v. Field*, 65 Va. 756, 8 S. E. 721; *Thomas, Adm'r, v. Lewis et al.*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. In this case grave doubt exists as well of the making of the gift as of the delivery of the property.

This transaction as to the alleged transfer of stock, whereby Jonathan P. Bowen is alleged to have parted with property worth \$150,000, is a most unusual one, and may be said to be shrouded from beginning to end in mystery and doubt. Had it ever been the purpose of Jonathan P. Bowen to part with more than half of his estate, and make a gift thereof to his son, it is hard to believe, considering the business relations between the father and the son, that the latter would not have known about it, and still more improbable that the father would have sought to perfect such a gift by a verbal direction to some one to fill up the blank powers of attorney upon certificates of stock that had been deposited in bank in blank some five years before; that there should have been no witness to such an occurrence, and the party in whom the trust was reposed of making the transfer of property of such magnitude should have been so little impressed by it that he does not know when or where it occurred, whether at the bank or not, nor indeed does he positively swear that it ever happened at all. The information that we are vouchsafed on this subject by the witness Mann is:

"I believe the assignments as made by me were at the instance of Mr. J. P. Bowen, and it was for the purpose of transferring the stock to Harry Bowen."

And he further states, in answer to the question of whether J. P. Bowen was present at the time he filled up the alleged assignment, that:

"I do not recollect as to whether Mr. J. P. Bowen was present, but I do not believe I would have made the transfer unless in his presence or by authority by him."

It will be observed in the last answer that the witness not only does not pretend that he was present, but clearly indicates that he would not have considered it necessary to have him present if he had his authority; and it is monstrous to suppose that a transaction of this size and unusual character would not have so impressed itself upon this witness that he would have been able to give us the minutest details of what occurred. Isaac T. Mann is not an ordinary witness; he was the secretary and a director of a great coal company, and vice president of the Bank of Bramwell; and it will not do for him within a period of four years to be uncertain as to such an important occurrence as the filling up of blank powers of attorney left with his bank, and the purpose for which had ended, thereby transferring from the estate of an

old man, within two weeks of his death, an amount of the size here, and constituting more than half of his estate. The fact that the death of Jonathan P. Bowen followed so quickly after this occurrence, and that this witness was engaged in consummating the transaction six weeks after his death, should have so impressed itself upon his mind that the smallest details thereof would never have faded from his memory; and it is incredible to suppose that he would have done all this without communicating what had occurred to the appellant, Harry Bowen, his business associate and friend, and with whom, as this record shows, he was in constant contact; and it is highly improbable that what occurred at Mr. Mann's bank at the time of the assignment of this stock, within 20 days of the death of Jonathan P. Bowen, when said Bowen and his sister were contracting about the stock, and Jenkin Jones and J. B. Perry acted as witnesses to the contract between the parties—said Jones being president of the Norfolk Coal & Coke Company, who subsequently signed the new certificate of stock now in question to Harry Bowen, and J. B. Perry a witness to the original certificate of stock held by the father—that something would not have occurred or taken place that would have developed the alleged transfer of the stock by the father in his lifetime to his son. Moreover, it is significant in this connection that, when appellant wrote for his sister to come to his home shortly after his father's death, it was, as she says, and which is not denied, that he wrote her that Mr. Mann wanted to see her on a matter of business, and that it would be necessary for her to be there in person. She did, after arranging by telegraphic communication for a delay of a week, make the trip, but nothing further, so far as appears from this record, seems to have come of Mr. Mann's wanting to see her. That he should have seen her, no one can doubt, with a power of attorney from her father in his possession claimed to have been filled up only 14 days before the father's death, giving to the brother more than one-half of an estate worth some \$250,000, and which power of attorney he had not acted upon or carried out. Ought he not in good conscience and fair dealing to have advised her of the transaction, and at least informed her of what he was going to do or felt it his duty to do under the power, after the death of her father, and thereby afforded her an opportunity to contest such a transaction if she wanted to?

The date, 26th of September, 1902, when it is claimed the assignments on the stock certificates were filled up, was important, and the status of the indebtedness of Jonathan P. Bowen with the Bank of Bramwell at that time was important, and would have thrown at least some light on when it was that this important transfer of property was made; but we are not favored with this information. Perry, one of the attesting witnesses to the contract, on the 25th of November, 1902, was also cashier of the bank, and he says the custodian of these certificates of stock of Jonathan P. Bowen until the loans were discharged, the exact date of which he says he cannot give, but that it was some time in the fall of 1902. That is very indefinite language—"some time in the fall of 1902." The books of the bank should have shown when this indebtedness for which these certificates were deposited as collateral was discharged, and at least it could have been as-

certained whether it was before or after the 26th of September, 1902, when it is explained the certificates were filled up. September was the first fall month. Jonathan P. Bowen was living but 14 days thereafter, and just when it was that these certificates passed from the bank to Isaac T. Mann, the secretary of the Norfolk Coal & Coke Company, as is claimed, and why they should have been so delivered to him, instead of to Jonathan P. Bowen, who was their owner, and had deposited them with the bank in blank as collateral, is all-important to know; as it is why, after the said Mann received them, and after it is alleged in the lifetime of Jonathan P. Bowen, on the 26th of September, 1902, he transferred them to Harry Bowen, he, Mann, should have delayed having the transaction consummated by making the transfer to Harry Bowen for more than two months after the death of his father. These, one and all, are circumstances of suspicion surrounding this transaction, which stamp it with disapproval. Too many unusual things occurred. We are asked to infer too much; namely, that a bank would have delivered \$150,000 of certificates held by it as collateral to a party to whom they did not belong, when it had served its purpose with the bank; that such person would have used these papers for the purpose of transferring the stock; that he would not have known the full and correct name of his own son, and used it in a transaction of such importance and magnitude. That the son would have had or acquired no knowledge thereof even for nearly three years thereafter, when he claims that he accidentally acquired the information a day or two after the 28th day of July, 1905, when an inspection of the original of this new certificate issued in his favor, filed with the deposition of Mr. Mann, shows that he had actually used the same by signing the transfer on the back thereof as early as May 5, 1904, and this transfer appears to be to the same Isaac T. Mann, and one Jenkin E. Jones, under a stockholders' agreement of the 29th of June, 1904, nearly two months after the date of the assignment, and of what stockholders does not appear. This blank power of attorney is witnessed by the same J. B. Perry. Nor can sight be lost of the fact of the failure of W. H. Bowen to explain what, if anything, he did to have this stock properly transferred to himself under his contract with his sister, or his failure to explain anything with respect to the receipt of dividends on this stock, and by what authority he received the same, if he got them. He did not know of the Mann assignment, he says, until July 28, 1905, and an application to transfer the stock under his title thereto from his sister would have elicited that the stock was already his, and such transfer to him should have been made to entitle him to the dividends; and it is hard to believe that he would either have failed to collect the dividends for so long a period, or have omitted promptly to have the transfer made to him under the agreement with his sister.

The whole transaction respecting this transfer of stock is but a companion of the contract entered into between the brother and sister heretofore fully considered, and is entitled to less weight and consideration because of the many circumstances of doubt, improbability, and suspicion which surround it; and the same, as well as the said contract, should be vacated, annulled, and set aside as fraudulent and void, and the said appellees awarded their full half interest in the

estate of which Jonathan P. Bowen died seised and possessed, as though neither of said papers had ever existed, together with the accumulations and profits arising therefrom, and incident thereto, in whosoever hands the same may be.

In conclusion, it must be borne in mind in this case that the appellant is apparently claiming this property in three different ways, each inconsistent with the other: First, if he, and not his father, bought the stock, then it is his, and does not belong to his father's estate; secondly, his claim under the assignment of the Norfolk Coal & Coke Company stock, alleged to have been made a few days before the death of his father, is inconsistent alike with his individual ownership of it, or of his father's; thirdly, the effort to secure under the contract with his sister the entire coal stock as part of his father's estate is utterly at variance with either of the other contentions. He must maintain his right to this stock, and thereby secure, as against his sister, the great bulk of his father's estate, upon some one, and not all three, of these contentions; and, as neither of the three are supported by any such evidence as he must produce to place him in the favored position that he apparently desires to occupy, all three should be denied. The devolution of estates left by deceased persons to those to whom they rightfully belong under statutes of descents and distributions cannot and will not be avoided by any such varying, uncertain, and inconsistent efforts so to do as is attempted in this case. Especially is this true where the effect of the effort would be to deprive a sister, in the interest of a brother, of her share of the estate under such circumstances as are attempted here. Brothers and sisters occupy a peculiarly delicate relation one to the other, when they come to a division of their ancestor's estate. They are usually fresh from the scene of affliction and sorrow; some of them not infrequently are for the first time called on to act for themselves, and admonished of their personal and individual responsibility in meeting the grave and serious affairs of life. This was strikingly true in this case; the female complainant had been raised as a poor girl; her father was a laboring man, and never until he had long passed the meridian of life had he been able to accumulate any property of consequence, and not then until he had removed some 500 miles away to another state, where he quickly accumulated a large fortune. His daughter remained at the old homestead, and the son accompanied his father, and became his business associate. The father died, and the daughter was summoned within less than a month to come to her brother's home, with a view of settling the estate's affairs. He knew everything as to the condition of the property jointly theirs; she in effect nothing. And she was thus called upon by him, while staying at his house, away from her home and husband, amid the scenes and surroundings in which her father had spent the declining and prosperous years of his eventful life, and with his death then fresh and vivid in her memory; and, naturally deeply affected and saddened by the memories that such environments would likely produce, she was but too easily amenable to any suggestion that appeared to her to be carrying out the wishes of her dead parent, and that she thus felt is only evidence of the higher motives and interests that ac-

tuated her. She had the right implicitly to rely upon her brother; she had been bereft of her father, upon whom she had so long been accustomed to lean; and her elder and only brother for the first time had been called upon and placed in the position of assuming the head of the family, and, to her, taking the place made vacant by the death of her father; and that he should have met this new relation in fact and truth, and not in mere form, goes without saying. Whatever occurred, he should have seen with scrupulous care that full justice was done to his confiding sister, and least of all should he have allowed himself to receive any unfair advantage over her in the division of her father's property; nor should he have received or accepted from her anything without giving to her the fullest possible information, and allowing her to act only after taking independent counsel and advice as to what she should do. How far short the brother on this occasion failed in his duty is only too apparent by what has heretofore been stated herein, and its manifest coldness, indifference, and almost cruel consequences need not be again recited, further than to say that what he did personally, and allowed others to do in his behalf, does not commend him to the consideration of a court of equity. It would be an evil day in the administration of justice, were the courts of the country to countenance such conduct on the part of a brother, and to sanction a policy that would give effect to a transaction such as is sought to be enforced in this case between those occupying the relationship that the parties here bear the one to the other.

The decree of the lower court is plainly right in all respects, and is affirmed, with costs.

Affirmed.

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UNITED STATES v. HOYT et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,575.

**INDIANS (§ 4\*) — INDIAN COMMISSIONERS — SALARIES — CONSTRUCTION OF CONTRACT FOR SERVICES—"ACTUALLY ENGAGED."**

Under an appointment of defendant by the Secretary of the Interior as an Indian commissioner to study the needs of and negotiate treaties with certain Indian tribes as directed, at a salary of \$8 per day and actual traveling expenses, the salary to begin when defendant left his home and to be paid while "actually engaged" in the performance of his duties, he was entitled to salary so long as he remained away from home at the places to which he was assigned, performing such duties as directed and reporting regularly, and not merely for the days on which he was actively engaged in the performance of some duty, and especially where defendant, as disbursing officer for the commission, paid himself and the other commissioners on such construction of the contract, and his reports and vouchers therefor were regularly approved, showing that such was the construction placed upon the contract by both parties.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 9; Dec. Dig. § 4.\*

For other definitions, see *Words and Phrases*, vol. 1, p. 172.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

For opinion below, see 158 Fed. 162.

A. G. Avery, U. S. Atty., and J. B. Lindsley, Asst. U. S. Atty. Cyrus Happy and W. W. Hindman, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error, Hoyt, was appointed one of three commissioners to negotiate certain agreements with certain Indians, and was also made disbursing agent of the commission. Subsequent to the termination of his service, the government brought the present suit against him and his surety, his co-defendant in error, to recover the aggregate amount of certain disbursements made by him, and which had been theretofore allowed and paid by the accounting and disbursing officers of the government. There is no dispute between the parties as to the amount the government is entitled to recover in the event it is entitled to judgment here at all.

The act making appropriations for the Indian Department for the fiscal year 1897, approved June 10, 1896 (Act June 10, 1896, c. 398, 29 Stat. 341), contained this provision:

"The Secretary of the Interior is hereby authorized to appoint a commission to consist of three persons, not more than two of whom shall be of the same political party, and not more than one of whom shall be a resident of any one state, to negotiate with the following Indians, namely:

"With the Crows and Flathead Indians in the state of Montana, for cessions of portions of their respective reservations; with the Northern Cheyennes and Crow Indians for the removal of said Northern Cheyennes from their present reservation on the Rosebud river at Lame Deer agency, to the southern portion of the Crow Reservation; with the Indians residing on the Fort Hull Indian Reservation in the state of Utah, for the surrender of any portion of their respective reservations, or for such modification of existing treaties as may be deemed desirable by said Indians and the Secretary of the Interior; and with the Yakima Indians in the state of Washington, for a surrender of a portion of their reservation lands, and for such modification of existing treaties as may be deemed desirable by said Indians and the Secretary of the Interior; any agreement thus negotiated being subject to subsequent ratification by Congress; and for the expenses of such commission and negotiations hereunder, the sum of ten thousand dollars is appropriated. \* \* \*

Appropriations were made for subsequent fiscal years for continuing the work of such commission (Act July 1, 1898, c. 545, 30 Stat. 592; Act June 6, 1900, c. 785, 31 Stat. 302; 31 Stat. 1041).

Act June 6, 1900, 31 Stat. 302, contained this provision:

"For continuing, after the passage of this act, and during the fiscal year 1901, the work of the commission under the act of Congress approved June tenth, eighteen hundred and ninety-six, to negotiate with the Crows, Flathead, and other Indians, fifteen thousand dollars, and the members of said commission shall perform such duties as may be required of them by the Secretary of the Interior."

The statute did not fix the compensation of the commissioners, but left that to the Secretary of the Interior, under whose direction the law was to be executed.

The case shows that Hoyt, of Beatrice, Neb., James H. McNeely, of Evansville, Ind., and B. J. McIntyre, of Kalispell, Mont., were the commissioners appointed by the Secretary of the Interior under and by virtue of the statute of June 10, 1896, and June 6, 1900, above referred to; the appointment of Hoyt, under the hand and seal of the Secretary, declaring that the commissioner was appointed for the purposes stated, and upon these terms and conditions:

"At \$8 per diem, and actual and necessary traveling expenses, exclusive of subsistence, to take effect July 1, 1900, or as soon thereafter as he shall file the oath of office and enter on duty, and empower him to execute and fulfill the duties of that office according to law; and to hold the said office, with all the rights and emoluments thereunto legally appertaining, to him, the said Charles G. Hoyt, during the pleasure of the Secretary of the Interior."

Hoyt's appointment as commissioner was made June 25, 1900, and on the 11th of July following the Secretary appointed him special disbursing agent of the commission, and required him to file an official bond in the penal sum of \$5,000. On the 14th day of July, 1900, the Commissioner of Indian Affairs sent to Hoyt his appointment as commissioner, and a copy of certain instructions addressed to the three commissioners under date July 6, 1900, inclosed in the following letter:

"Department of the Interior.

"Land Office of Indian Affairs.

"30378-1900

Washington, D. C., July 14, 1900.

"33170- "

"Charles G. Hoyt, Esq., Crow, Flathead, &c., Commissioner, Beatrice, Neb.

"Sir: There is transmitted to you herewith your appointment dated June 25, 1900, as a member of the Crow-Flathead, &c., Commission, at a salary of \$8 per day and actual and necessary traveling expenses, exclusive of subsistence, the same to take effect upon filing the oath of office and entering on duty. There is also inclosed copy of a draft on (of) instructions for the guidance of the members of said commission, dated July 6, 1900. Mr. James H. McNeely has been designated chairman of said commission. You will proceed from your home to the Yakima Agency by the most direct practical route, taking receipts for expenditures made for traveling expenses and reimburse yourself therefor. You will take the oath of office and proceed to your field of duty without unnecessary delay. Your salary will be regarded as having begun on the day when you depart from your home for the Yakima Agency, provided the oath of office shall have been taken and mailed to this office. Blank form for oath is enclosed. You will please acknowledge the receipt of your commission and of the instructions herewith and advise the office of the date of your departure to enter upon the duties assigned you. You have been designated disbursing officer of the Commission, and this will be the subject of another communication.

"Very respectfully,

W. A. Jones, Commissioner."

The record shows that McNeely died April 6, 1902, that McIntyre's services terminated September 30, 1901, and that Hoyt's services were dispensed with by the department on July 30, 1902, for the reason that Congress made no appropriation for continuing the work of the commission. The record further shows that Hoyt was a member of a previous similar commission, during the existence of which he did most of the work involved in keeping its accounts, for which reason he was designated disbursing officer of the commission in question.



The general letter of instructions of July 6, 1900, above referred to, addressed to Commissioners McNeely, Hoyt, and McIntyre, contained specific instructions to them in respect to their negotiations with the Yakima and Flathead Indians. Among other things, they were directed first to take up negotiations with the Yakimas, and upon completion of their work on the Yakima reservation, or, in case no agreement with the Yakimas could be concluded, to advise the office promptly and request further instructions, and upon the completion of the work with the Yakimas to proceed to the Flathead reservation and take up the work there. They were instructed that the most important part of their duties would be to study the special needs of the Indians in each case, in order that such agreements might be formulated as would best tend to promote their welfare; and numerous suggestions were made to them in that regard, and they were enjoined that in the event of the making of the contemplated agreements, to use the greatest care that they were "perfect in every detail, including spelling, punctuation, etc., and that they clearly expressed the objects and purposes intended to be attained"; and they were required to send all correspondence to the Commissioner of Indian Affairs, and to submit promptly at the close of each week a report showing the state of the work, the progress made, what was accomplished during the week past, etc. And the letter of general instructions closed with these words:

"These instructions must not be deviated from in any material particular, and should you deem deviation desirable at any time, you will submit a statement of facts to this office, and request further instructions. You will be allowed compensation at the rate of eight dollars (\$8.00) per day while actually engaged in the performance of your duties, also actual necessary traveling expenses. Your salaries will begin on the date of taking the oath of office and entering upon the discharge of your duties. \* \* \* You will proceed, without unnecessary delay, to the Yakima Indian Agency, Fort Simcoe, Washington."

The case further shows that, while Hoyt was serving under the former similar commission referred to, he was orally instructed at Washington, by an official of the Treasury Department, and with the approval of the Commissioner of Indian Affairs, that in paying the compensation of members of such commission a voucher should be taken, indorsed with the certificate of the payee, and approved by the chairman of the commission, substantially in these words:

"That during the period covered by the within voucher, I have been employed under the direction of the Secretary of the Interior, in the duties enjoined by the statutes pertaining to my office"

—and upon the trial Hoyt testified that, when he was appointed disbursing agent of the commission in question, he adopted the practice thus suggested and followed under the preceding commission. These vouchers were sent by him to the Commissioner of Indian Affairs, and were audited and approved by the Interior Department and paid by the Treasury Department. The accounts included payments to each of the commissioners for the whole time covered by their commission.

It appears that subsequently a question arose in respect to the compensation that had been allowed McIntyre, who had procured leave of absence without pay, on account of the illness of his wife, and who, subsequently being directed by the Secretary of the Interior to perform a certain service, announced, on the 16th day of May, 1902, his inability to comply with the order. The work that McIntyre was so directed to perform was performed by some one else, and thereafter he was not assigned to any further duty and performed no further service.

We are not called upon in this case to decide whether or not it was rightly held that McIntyre was not entitled to compensation after May 16, 1902. In the case of Hoyt there does not appear to have been any leave of absence, conditioned without pay, nor was there any refusal on his part to perform any service required of him; but, on the contrary, according to the record, he remained away from his home, and in the field of operations to which he was sent, ready and willing at any time to perform any duty required of him as such commissioner and disbursing agent, and regularly reporting such services as he did perform. And the question here for decision is whether he was therefore entitled to the \$8 a day, that he was allowed and paid, from the time he entered upon the discharge of his duties until July 30, 1902, when his services were dispensed with.

We think the court below rightly held that he was. The case does not wholly depend upon the single clause in the general instructions of July 6, 1900, reading as follows:

"You will be allowed compensation at the rate of eight dollars (\$8.00) per day while actually engaged in the performance of your duties"

—with the word "actually" therein construed as "actively." The rights of the parties must be determined in view of the appointments of Hoyt as commissioner and as disbursing agent, and in view of the letter of the Secretary inclosing his commission, as well as the letter of general instructions of July 6, 1900. Looking only at the latter, we find immediately following the clause above quoted, and upon which so much reliance is placed by the plaintiff in error, the statement to the commissioners:

"Your salaries will begin on the date of taking the oath of office and entering upon the discharge of your duties."

We think such must have been the reasonable understanding of the appointees, as well as of the appointing officer. In the case of Hoyt—the only one before us—it appears that he promptly took the oath of office and thereupon went into the field of operations to which he was assigned, and remained there, away from his home, performing such duties as he was directed to perform, and was at all times willing and ready to do so. We can see no just or legal ground upon which to take from him compensation therefor, from the time of his entry upon his duties until his services were dispensed with, at the rate fixed by the Secretary. This conclusion is in accord with the action of that officer in the case of Commissioner McNeely, where the Acting Secretary ruled, in his letter of June 3, 1902, as follows:

"Although Commissioner McNeely left Muskogee for Evansville, Indiana, on March 8th, his voucher is allowed in full for the whole quarter, it appearing that he was sick, and died at his home April 6th, last."

The judgment is affirmed.

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UNITED STATES v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1909.)

No. 1,796.

1. PENALTIES (§ 40\*)—SAFETY APPLIANCE ACT—ACTION—REVIEW.

An action by the United States against a railroad company to recover the penalty for violation of the safety appliance act of March 2, 1893, c. 196, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3174), is a civil action, and the judgment therein is reviewable at the instance of the United States on writ of error.

[Ed. Note.—For other cases, see Penalties, Dec. Dig. § 40.\*]

2. COURTS (§ 405\*)—DISTRICT COURT OF THE UNITED STATES—PROCEDURE—TRIAL WITHOUT JURY.

There is no authority either at common law or by statute under which the facts in an action at law may be tried by the judge of a District Court of the United States without a jury, and where a case is so tried by stipulation the judgment is not reviewable by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.\*]

In Error to the District Court of the United States for the Western District of Kentucky.

For opinion below, see 156 Fed. 195.

George Du Relle, for plaintiff in error.

T. K. Helm, for defendant in error.

Before SEVERENS, Circuit Judge, and KNAPPEN and SANFORD, District Judges.

SEVERENS, Circuit Judge. This is an action of debt brought by the United States in the District Court against the Louisville & Nashville Railroad Company to recover a penalty of \$100 for the alleged violation of section 6 of the "Safety Appliance Act" of March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 532, as amended by Act April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]). The cause of action stated in the petition is that the defendant "hauled a car with interstate traffic over its line of railroad in and about Louisville, in the state of Kentucky, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the 'B' end of said car was out of repair and inoperative, the chain connecting the lock pin or lock block to the uncoupling lever being broken on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

safety appliance act, as amended by section 1 of the act of March 2, 1903." The defendant pleaded not guilty, and, further answering, made other averments, most of which were stricken out on motion of the district attorney, apparently because supposed irrelevant. Thereupon the attorneys for the parties made and filed a stipulation in writing, as follows:

"It is hereby stipulated that the law and facts of this case may be submitted to the court without the intervention of a jury, and a jury is hereby waived."

The case came on for trial and was heard. The record states that the court "delivered an opinion in writing, which is filed, and pursuant and upon consideration of the testimony heard in this cause, it is found, considered, and adjudged by the court that the defendant, the Louisville & Nashville Railroad Company, is not guilty of the charge and violation of law alleged against it in the plaintiff's petition, and said petition is dismissed for that reason"; and that the court declined to make a special finding of facts. A bill of exceptions was tendered and settled; and from this it appears that upon the trial it was—

"stipulated and agreed by the parties hereto that the facts in this case are as follows:

"Interstate Commerce Commission Inspectors Belknap and Coutts, on March 26, 1907, at Louisville, Kentucky, at 7:55 a. m., inspected C. & O. coal car No. 26,285, on track 13 Water-street yard of the defendant at which time the chain connecting the lock pin or lock block to the uncoupling lever was broken on the 'B' end of the car; to operate this coupler required a man to go between the cars.

"It was inspected and marked by the railroad inspector 'loose lift chain 3-26.'

"Engine 313 of the defendant was used to haul this in this condition to the siding of the Ewald Iron Company at 10:30 a. m., same date.

"This car contained pig iron consigned from the Kelly Nail & Iron Company, Ironton, Ohio, to Ewald Iron Company, Louisville, Kentucky.

"The defendant is a corporation organized and doing business under the laws of the state of Kentucky, and is a common carrier engaged in interstate commerce by railroad.

"It is further stipulated that witnesses for the defense will testify as follows:"

Here follows the testimony of several witnesses by question and answer concerning facts incident to the location of tracks, the inspection of the cars including this one, the time when the defect was discovered, and the measures taken for remedying it.

The plaintiff having brought the case here by a writ of error, the defendant moved to dismiss it upon the grounds:

"(1) That the proceeding is criminal, and the judgment of the District Court is not subject to review.

"(2) That as the District Court tried the case on the facts, without the intervention of a jury, its finding is not subject to review."

The first of these is the only one which can be considered upon the motion to dismiss. The second is presented upon the consideration of the errors assigned, if the writ be not dismissed. Upon the question whether the judgment of the court below is subject to review, we think it is sufficient to refer to the opinion and decision of

this court in the case of *United States v. Baltimore & Ohio Southwestern Railway Company*, 159 Fed. 33, 86 C. C. A. 223, and especially to what we said at pages 38 and 39 of 159 Fed., page 228 of 86 C. C. A., on petition for rehearing. It being a civil action and not a criminal proceeding, the party complaining of the judgment was entitled to remove the case to this court, as it has done. If, indeed, the violation of this act were a criminal offense, the trial by the judge was a void proceeding, for the Constitution of the United States declares that all such cases shall be tried by a jury. Moreover, the highly important consequence would follow that the government would be concluded by the trial in the District Court. The court has jurisdiction of the process and of the parties and of the subject-matter; that is, of the subject to which the alleged errors relate. The motion to dismiss is therefore overruled.

The difficulty arises when we come to consider the errors assigned. It is found in the facts exhibited by the bill of exceptions. It was competent for the parties, if they saw fit, to waive a jury trial and accept the finding of the court upon the facts, as well as upon the questions of law involved, for if the finding of facts should be general, as it might be, there would be nothing to show any ruling upon a question of law, as there would be in case of a jury trial and the party wished a ruling by the court upon such a question. But the essential fact here is that the parties instead, of trying the case by a method known to the common law or provided by statute, were content to submit it to the determination of one who must necessarily act as an arbitrator, to whose conclusions a writ of error would not lie, that remedy being only available to correct errors in judicial proceedings authorized by law. And there is no law under which the facts may, in a common-law case, be tried by the judge in a District Court. As was pointed out in the case of *Rogers v. United States*, 141 U. S. 548, 12 Sup. Ct. 91, 35 L. Ed. 853, while there is statutory authority for the trial of causes by the judge upon the law and the facts in the Circuit Court (section 649, Rev. St. [U. S. Comp. St. 1901, p. 525]), no such authority is given to the judge of the District Court in the trial of a civil action. On the contrary, it is expressly declared by section 566, Rev. St. (U. S. Comp. St. 1901, p. 461), that all issues of fact, with the exception of equity and admiralty causes, shall be tried by a jury. In that case there had been a trial by the judge of the District Court, a judgment, a bill of exceptions allowed, and a writ of error to the Circuit Court, where the judgment was affirmed. The case was thereupon taken to the Supreme Court, where, on looking into the record, the court discovered that the case had been tried by the District Judge upon a submission of the cause to him, sitting without a jury. It was thereupon held (as the ruling is condensed in the syllabus) that:

"(1) The Circuit Court could not properly consider any matter raised by the bill of exceptions, nor can this court do so, because the trial was not by a jury nor on an agreed statement of facts.

"(2) All that the Circuit Court could do was to affirm the judgment of the District Court, and all that this court can do is to affirm the judgment of the Circuit Court, as the latter court had jurisdiction and this court has it."

At that time, and until the passage of the act of March 3, 1891 (Act March 3, 1891, c. 517, 26 Stat. 826),<sup>1</sup> creating the Circuit Courts of Appeals, the Circuit Court had appellate jurisdiction of civil suits brought in the District Court under section 633, Rev. St. This appellate jurisdiction was taken away by the operation of the repealing clause of the fourteenth section of the act of March 3, 1891, and the substitution of the Circuit Court of Appeals. But no change has been made in the method of procedure in the District Court or in the appellate jurisdiction, except in this transfer of the latter to the Circuit Court of Appeals. The result is that we have the very question which was determined in the case of *Rogers v. United States*. It is impossible to see that the mere change of the appellate jurisdiction from the Circuit Court to this court should affect the question we are considering. There has been no decision upon the point by the Supreme Court since the organization of the Circuit Court of Appeals, that we are aware of. But it was presented to the Circuit Court of Appeals for the Eighth Circuit in a recent case, *United States v. Cleage*, 161 Fed. 85, in which the court, upon a well-considered opinion by Judge Van Devanter, reached the same conclusion as that here indicated as our own.

Without considering any further question, we should affirm the judgment of the District Court, and it is so ordered.

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G. HIRSCH'S SONS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 132 (4,776).

**1. CUSTOMS DUTIES (§ 26\*)—CLASSIFICATION—METAL THREAD FABRICS—"ARTICLES."**

The word "article," when used in a tariff law, should be given a broad, liberal meaning; and in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 179, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1644), relating to "laces, embroideries \* \* \* or other articles" of metal threads, the doctrine of ejusdem generis does not operate to exclude fabrics in the piece from classification as "articles" under that provision.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 59; Dec. Dig. § 26.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 511-515.]

**2. CUSTOMS DUTIES (§ 26\*)—SPECIFIC DESIGNATION—"ARTICLES IN CHIEF VALUE OF METAL THREADS."**

Fabrics in the piece, composed chiefly of metal thread, but in part of silk, are more specifically enumerated in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 179, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1644), as "articles \* \* \* in chief value of \* \* \* metal threads," than under Schedule L, par. 387, 30 Stat. 186 (U. S. Comp. St. 1901, p. 1669), as "woven fabrics in the piece, not specially provided for, \* \* \* weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, \* \* \* dyed in the thread or yarn, and containing not more than thirty per centum in weight of silk, \* \* \* if other than black."

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 48-50; Dec. Dig. § 26.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

<sup>1</sup> U. S. Comp. St. 1901, p. 547.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The Board of General Appraisers (G. A. 6,498, T. D. 27,780) affirmed the action of the collector in assessing the importers' merchandise under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 179, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1644).

The following is the opinion of Hazel, District Judge, in the court below:

The merchandise consists of woven fabrics in the piece, being Exhibits 3, 4, and 5 in evidence, and is composed of a silk warp and a thread of metal weft; the metal thread admittedly being the component of chief value. The pieces of fabric weigh between  $1\frac{1}{2}$  and 8 ounces per square yard, and they were assessed for duty by the collector, under paragraph 179 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1644]), at 60 per centum ad valorem. The importers claim that the importation is dutiable under paragraph 387 (Schedule L, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669]) at 50 per centum ad valorem. The decision of the board was that paragraph 387 is clearly limited to woven fabrics in chief value of silk, and neither expressly nor inferentially are the woven fabrics in the piece in controversy included therein.

The case of *Rosenberg v. United States* (C. C.) 141 Fed. 379, seems to support this conclusion, and also holds that the articles mentioned in paragraph 179, which reads as follows: "179. \* \* \* laces, embroideries, braids, galloons, trimmings or other articles, made wholly or in chief value of tinsel wire, lame or lahn, bullions, or metal threads," etc.—are ejusdem generis with the merchandise in question. I am satisfied with this ruling and believe it to apply to the point presented. I concur in the reasoning of the board by which its conclusions on the disputed questions are reached.

The protests are overruled, and the decision of the Board of General Appraisers is affirmed.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for appellants.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The merchandise in question consists of woven fabrics used for making dresses and hats. It is imported in the piece, three-fourths of a yard in width, weighing between  $1\frac{1}{2}$  ounces and 8 ounces per square yard, and is composed of a silk warp and metal-thread weft, the metal thread being the component of chief value. The collector imposed a duty of 60 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 179, 30 Stat. 166 (U. S. Comp. St. 1901, p. 1644), which, so far as applicable, reads as follows:

"Laces, embroideries, braids, galloons, trimmings, or other articles, made wholly or in chief value of tinsel wire, lame or lahn, bullions, or metal threads, sixty per centum ad valorem."

The importers insist that duty should have been assessed under paragraph 387 (Schedule L, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669]), the applicable portions of which are as follows:

"Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, \* \* \* dyed in the thread or yarn, and con-

taining not more than thirty per centum in weight of silk, \* \* \* if other than black, ninety cents per pound; \* \* \* but in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than fifty per centum ad valorem."

The question presented is a most perplexing one, owing to the difficulty in placing piece goods three-quarters of a yard in width in a paragraph providing for laces, embroideries, braids, galloons, and trimmings.

Were this a case of first impressions, the application of the doctrine of ejusdem generis would seem to restrict the paragraph to articles of the same nature, as laces, embroideries, etc., which are not suitable for making dresses but are intended to be placed upon the dress when completed to give it additional beauty and symmetry. So construed the paragraph would read, "laces, embroideries, braids, galloons, trimmings, or other similar articles," and would exclude wide piece goods. The question, however, is not a new one, and was in June, 1905, decided by the Circuit Court adversely to the contention of the importers. *Rosenberg v. United States* (C. C.) 141 Fed. 379.

The word "articles" when used in a tariff law should be given a broad, liberal meaning, and in *Junge v. Hedden*, 146 U. S. 233, 239, 13 Sup. Ct. 88, 89, 36 L. Ed. 953, the court say:

"We agree with the Circuit Court that the word [articles] must be taken comprehensively and cannot be restricted to articles put in condition for final use, but embraces as well things manufactured only in part, or not at all."

If, then, the words "other articles" are comprehensive enough to cover piece goods made "in chief value of metal threads," and under these decisions we think they are, it follows that paragraph 179 accurately describes the imported merchandise. To hold otherwise would throw the silk schedule (387) into confusion by forcing into it an apparently alien article made in part of metal threads which represent three-fourths of its value.

After giving due consideration to the various contentions of the parties we incline to the opinion that Congress intended to cover by paragraph 179 all fabrics made wholly or in chief value of tinsel wire, lame or lahn, bullions or metal threads, without regard to the width or length of the fabric or the other materials composing it. We do not overlook the fact that this construction makes the paragraph read precisely as if the words "laces, embroideries, braids, galloons, trimmings, or other," were omitted, but this is a situation frequently encountered in tariff legislation.

The construction adopted by us, though not entirely free from doubt, has in our judgment fewer difficulties to overcome than the construction urged by the importers.

The decision of the Circuit Court is affirmed.



## ZINKEISEN &amp; CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 119 (4,920).

1. CUSTOMS DUTIES (§ 30\*)—CLASSIFICATION—ADEPS LANÆ—"WOOL GREASE."  
The provision for "wool grease," in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 279, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), does not include the refined and expensive products from wool grease, known as "adeps lanæ anhydrous" and "adeps lanæ cum aqua," and used medicinally.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 72-77; Dec. Dig. § 30.\*

For other definitions, see Words and Phrases, vol. 8, p. 7515.]

2. CUSTOMS DUTIES (§ 24\*)—"MEDICINAL PREPARATIONS."

The term "medicinal preparations," in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631), includes adeps lanæ anhydrous and adeps lanæ cum aqua, which are highly finished products of wool grease, are used principally in therapeutics, are sold generally to the drug trade, and are used to some extent in salves and medicinal soaps.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 32; Dec. Dig. § 24.\*

For other definitions, see Words and Phrases, vol. 5, pp. 4465, 4466; vol. 8, p. 7720.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision of the Circuit Court affirmed the decision of the Board of General Appraisers, sustaining the action of the collector in assessing the merchandise in controversy as medicinal preparations, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631). The opinion below is as follows:

HAZEL, District Judge. The Board of General Appraisers decided upon the same evidence submitted to this court that the merchandise, known as "adeps lanæ anhydrous" (wool fat without water) and "adeps lanæ cum aqua" (with water), was properly assessed for duty by the collector at the rate of 25 per centum ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631), as a medicinal preparation, nonalcoholic. The importers object, on the ground that the merchandise consists of wool grease, and is specifically provided for at one-half of 1 per centum per pound under paragraph 279.

I am satisfied, from reading the testimony, that the articles should be classified as medicinal preparations. The prima facie showing of the government has not been overcome by the testimony of the importer, upon whom the burden rested to show the incorrectness of the classification. The testimony of Mr. Brown, witness for the government, showing that wool grease is worth about 1¼ cents per pound, while the price of the articles in controversy is from 10 to 15 cents per pound, considered in connection with the inferences arising from the fact that United States Pharmacopœia (edition of 1905), National Standard Dispensatory (edition of 1905), and the British Pharmacopœia include anhydrous wool fat among medicinal preparations, sufficiently indicates the character of the importation.

Furthermore, this court heretofore affirmed the board in G. A. 5,881 (T. D. 25,910), wherein it was held that adeps lanæ anhydrous and adeps lanæ hydro-sus were nonalcoholic medicinal preparations. It is true such affirmation was

by consent of the parties and without argument, yet the record before me in this case is sufficient to warrant disapproving the decision of the board..

The claim of the importer that sample 4, which was imported in casks, is used as an ingredient in soap, loses force when it is considered that by its use certain curative properties are given to the soap. Its principal use unquestionably being medicinal, it would seem immaterial that it incidentally has other uses.

The decision of the Board of General Appraisers is affirmed.

Walden & Webster (Howard T. Walden, of counsel), for appellants.  
J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The collector classified the appellants' importations under Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631), which reads as follows:

Medicinal preparations not containing alcohol or in the preparation of which alcohol is not used, not specifically provided for in this Act, twenty-five per centum ad valorem. 30 Stat. 154.

The appellants insist that their merchandise should have been assessed as "wool grease" under paragraph 279 of the same act, which is as follows:

Tallow, three-fourths of one cent per pound; wool grease, including that known commercially as degreas or brown wool grease, one-half of one cent per pound. 30 Stat. 172.

The board and the Circuit Court, after a careful review of the facts, reached the conclusion that the merchandise was not wool grease. If not wool grease, the appellants must fail.

In February, 1895, two years prior to the passage of the act in question, the Circuit Court, in *Movius v. United States*, 66 Fed. 734, had before it a case in all essential particulars similar upon the facts to the case at bar. The paragraph (316) of Act Oct. 1, 1890, c. 1244, § 1, Schedule G, 26 Stat. 588, was identical in language with the paragraph now in question. The court there described wool grease as follows:

Wool grease is of a brown color and viscous consistency. It is extracted from wool washings, and consists of cholesterin and other fats and volatile fatty acids. It contains from 15 to 30 per cent. of potash. It emits a rank, disagreeable odor, it resembles molasses and tar mixed together, it is imported in returned petroleum barrels, it is worth from 2½ to 3 cents a pound, and its chief use is for stuffing leather.

The merchandise in question here is a highly finished product, used principally in therapeutics, and is sold generally to the drug trade, but a portion thereof (represented by samples 3 and 4) is used for medicinal and very high-class soap and for salves, imparting thereto certain curative properties. It is worth from 10 to 15 cents per pound. It is not wool grease chemically, is used for entirely different purposes, and has never been known commercially as wool grease or degreas.

We think that the importations are medicinal preparations as that term has been defined by the courts, and that there is no satisfactory testimony that it is possible to use them otherwise. *Dodge v. United*

States (C. C.) 130 Fed. 624; *Park v. United States* (C. C.) 66 Fed. 731.

The case is stronger for the government than the *Movius* Case, for the reason that the court prior to the passage of the present act had construed "wool grease" to include only the crude raw material and not the refined and expensive products derived therefrom. With this construction presumably in mind, Congress re-enacted the paragraph in identical language. This would hardly have been done if Congress had intended that the refined and expensive "lanolin" should enter as wool grease and pay duty at the rate of only one-half of 1 cent per pound.

The decision is affirmed.

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UNITED STATES v. WO ON & CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 134 (4,891).

**CUSTOMS DUTIES (§ 43\*)—CLASSIFICATION—THICK SOY—"SAUCE"—SIMILITUDE.**

In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), the provision for "sauces" means for a seasoning or dressing usually placed on the table to be used with prepared food; and thick soy, which is not so used, but is employed as an ingredient of sauces, or as a flavor or color for food while cooking, is not a "sauce," and does not resemble a sauce in material, quality, texture, or use, but is classifiable as an unenumerated manufactured article, under section 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 147; Dec. Dig. § 43.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The Circuit Court affirmed, without opinion, a decision of the Board of General Appraisers (G. A. 6,550, T. D. 27,944), sustaining the protest of the appellees.

J. Osgood Nichols, Asst. U. S. Atty.

Everit Brown, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The subject of this controversy is "thick soy" imported from China. The collector assessed a duty of 40 per cent. ad valorem under paragraph 241 of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]) which provides for "sauces of all kinds, not specially provided for." The importers protested, insisting that their merchandise is a nonenumerated manufactured article under section 6 of the act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), and should pay a duty of 20 per cent. ad valorem. The question, then, is whether thick soy is a sauce or bears the statutory similitude to a sauce. Thin soy is made from the soy bean with other ingredients, 60 per cent. being

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

water. Thick soy is made by adding molasses, treacle, or sugar, and perhaps licorice, and then boiling the mixture down. It contains but 20 per cent. of water. It is used by the Chinese as a coloring or flavoring matter in cooking meats, stews, gravies, and other dishes, and is an ingredient used in making Worcestershire or other sauces. It is brought here in casks.

This is a brief statement of the facts found by the board, which are fully established by the proof. Twice the board has reached the conclusion that thick soy is not a sauce and bears no substantial similitude thereto. An order was made permitting additional testimony to be taken in the Circuit Court, but none appears to have been taken. The Circuit Court concurred with the board upon the facts. We should hesitate long, in such circumstances, to disturb a conclusion reached after such careful and deliberate consideration. However, an independent examination has convinced us that the decision is correct. The great preponderance of testimony is to the effect that the two principal and controlling uses of thick soy are as an ingredient of sauces and as a flavor or color for food while cooking. It is not placed upon the table to be added to or used with food. Of course the fact that it is an ingredient for sauces does not make it a sauce. If this were not so, vinegar, oil, and cream might be classified as sauces.

The contention that it is a sauce because it is used in cooking is equally unavailing. Butter, molasses, and wine are so used, but they are not sauces. Our attention has been called to some definitions of "sauce," broad enough, perhaps, to cover the imported merchandise. But in the absence of any commercial meaning we must assume that Congress used the term as it is popularly and generally used, viz., as a seasoning or dressing, usually placed on the table to be added to prepared food. A sauce may be used in cooking and still be a sauce, but that which is used solely in cooking is never a sauce in the popular acceptance of that term. It is incapable of independent use, its individuality is lost in the process of cooking. It may be combined with other ingredients to make a sauce, but alone it is not one.

Our conclusion is that thick soy is not a sauce or similar to a sauce, in material, quality, texture, or use.

The decision is affirmed.

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#### THE NEW YORK.

(Circuit Court of Appeals, Second Circuit. December 15, 1908.)

No. 83.

#### SHIPPING (§ 81\*)—LIABILITY OF VESSEL FOR INJURIES CAUSED BY SWELL.

The fact that a scow lying at a bulkhead on the Hudson river, when tossed by the swell of a passing steamer, struck on some unknown projection on the bulkhead and was injured, does not establish negligence on the part of the steamer which renders her liable for the injury, where

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it appears that she had passed the place for years on regular trips at the same rate of speed without causing injury to any vessel.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 345; Dec. Dig. § 81.\*]

Liability of vessel for injuries caused by creation of swell, see note to *The Asbury Park*, 78 C. C. A. 3.]

Appeal from the District Court of the United States for the Southern District of New York.

Olcott, Gruber, Bonyng & McManus and Harrington Putnam, for appellant.

Wilcox & Green, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. May 28, 1907, the flat-bottomed scow *Mary Bulger*, 100 feet long, 27 feet beam, was lying with her starboard side alongside the bulkhead at Rodgers Island in the Hudson river, loading ice. At about 11 o'clock the steamboat *New York* passed down the river on one of her regular daily trips. In accordance with the usual practice the chute between the scow and icehouse was lifted as the steamboat approached, so that it should not injure the scow when she began to rock in the swells that would follow. The swells drew the scow off the bulkhead and threw her back on it twice. No line was parted, although it was said a fender was broken. After the swells died out the chute was hooked in again and the loading continued; no one suspecting that any damage had been done. In about an hour it was discovered that the scow was filling with water. She was entirely seaworthy, only 3½ years old, and her bottom was composed of planks running across from side to side without any keel. No damage was done to her side. No seams were started, nor any injury sustained, except that the starboard end of a single plank had been pulled down about two inches from the side timbers; five spikes being still in place, but partly drawn out. The trial judge concluded, and we quite agree with him, that the plank must have been started by striking against the bulkhead at a point where there was probably some projection, which caught it as the boat was moving.

The *New York* had been running past this icehouse for years without doing any damage to boats lying at the bulkhead. The libellant contends, and we may admit, that her speed was 22 miles an hour. It is quite true that it would be no defense to her, if she caused injury by her swells, that she was going at her usual rate of speed; but those in charge of her had no reason to anticipate that swells which had done no harm for many years would do it on this occasion, and should not be held at fault because of damage caused by the existence of a projection of which no one, so far as it appears, had any notice. It is said that no proof was made that there actually was such a projection; but the burden of proving negligence lies on the libellant, and we think, under the circumstances of this case, it cannot be inferred from the mere fact of the injury.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The decree is reversed, but, because of defenses set up which were wholly unsustainable, with costs of this court only.

NOTE.—The following is the opinion of Hough, District Judge, in the court below:

• HOUGH, District Judge. Eagan seemed to me a wholly disinterested witness, and since the trial his evidence has been read over to me. He declared that when the New York passed there were at least 400 tons of ice in the Bulger, so that she was more than half full, and, further, that this quantity of ice would fill her hold to the height of quite five feet. Eagan's testimony is, I think, entirely consonant with that of the Bulger's master. The facts, therefore, are that a barge, comparatively new and in good condition, was lying aground at a place where she had a right to be. The New York, passing at her usual speed and on her usual course, created swells of such size that the Bulger was lifted from the ground and dashed against the bulkhead wall. The contact with this wall does not seem to have been unusually severe; that is, more severe than the swells of such a vessel as the New York, passing at about 16 miles an hour, would ordinarily cause. No injury was immediately discovered; but, as the boat was aground, leakage would not be discovered by any settling in the water. It is therefore natural that no leak should have been suspected until the water rose above the cargo, and this accounts for the absence of investigation until after noon time. The proven fact is that she leaked at least five feet in about two hours. Such extreme leakage would be easily accounted for by the injury subsequently discovered—i. e., the starting of a bottom plank—and that bottom plank was in my opinion started by striking against the bulkhead wall at a point where there was probably some projection therefrom.

Except for the quality of the boat, the circumstances are very like those of *Cornwall v. The New York* (D. C.) 38 Fed. 710. So far as the law of this case is concerned, there is nothing that I can add to the opinion just filed in *The Hendrick Hudson* (D. C.) 163 Fed. 862.

Decree for libellant, with costs, and an order of reference, unless the amount of damages be agreed upon.

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## UNITED STATES v. BEHREND.

### SAME v. WING & EVANS.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

Nos. 90, 91 (4,304, 4,585).

#### 1. CUSTOMS DUTIES (§ 44\*)—CLASSIFICATION—FIRE BRICK—SIMILITUDE.

Retort settings (fire brick) weighing more than 10 pounds are dutiable by similitude as "fire-brick weighing not more than ten pounds each," under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 87, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1632).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.\*]

#### 2. CUSTOMS DUTIES (§ 25\*)—"SUSCEPTIBILITY TO DECORATION."

The rule that the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 97, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1633), for decorated and undecorated articles composed of mineral substances, does not cover articles not susceptible of decoration, excludes from that paragraph fire brick, which can be, but never are, decorated.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 25.\*]

#### 3. CUSTOMS DUTIES (§ 44\*)—SIMILITUDE—POINTS OF RESEMBLANCE.

Retort settings more than 10 pounds in weight, being fire brick, resemble fire brick weighing not more than 10 pounds, in material, quality,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

texture, and use, within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1694). Identity would ordinarily exclude all question of similarity, but not here, because of the distinction in weight.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.\*]

4. CUSTOMS DUTIES (§ 44\*)—TESTS OF RESEMBLANCE—INCONGRUITY OF ASSESSMENT.

The amount of duty is not one of the tests prescribed for the application of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1694).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.\*]

Noyes, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The Circuit Court affirmed decisions by the Board of United States General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of New York. There was no opinion filed in the Circuit Court, judgment being rendered on the authority of *Wing & Evans v. U. S.* (C. C.) 119 Fed. 479.

D. Frank Lloyd, Asst. U. S. Atty.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for appellee Behrend.

James R. Ely (E. B. Whitney, of counsel), for appellees Wing & Evans.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The articles in question are retort settings. The collector classified them as articles composed of earthy or mineral substances, under paragraph 97 of the act of July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1633), which reads:

"Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem."

The board classified them under paragraph 87:

"Fire-brick weighing not more than ten pounds each, not glazed, enameled, ornamented, or decorated in any manner, one dollar and twenty-five cents per ton; glazed, enameled, ornamented, or decorated, forty-five per centum ad valorem. \* \* \*"

In *Dinglestedt v. United States*, 91 Fed. 112, 33 C. C. A. 395, this court held that paragraph 86 of the tariff act of August 27, 1894, c. 349, § 1, Schedule B, 28 Stat. 513, which is similar to paragraph 97 of the act of 1897, applies only to articles susceptible of decoration, a view which seems to have been approved by the Supreme Court in *United States v. Downing*, 201 U. S. 354, 358, 26 Sup. Ct. 788, 50 L. Ed. 786. These retort settings are admittedly fire brick, and they are certainly not susceptible of decoration within this construction of the act; that is to say, though any article can be decorated, these never are decorated, and it would be absurd to do so. They, therefore, cannot be said to be enumerated in paragraph 97; and, although fire brick, they are

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not enumerated in paragraph 87, because, weighing more than 10 pounds each, they are expressly excluded from it.

We are therefore left to determine, under section 7 of the act, what enumerated article they most resemble in material, quality, texture, and the uses to which they may be applied. Obviously, they resemble fire brick in all these respects; indeed, they are fire brick. The late Judge Townsend so held in the Circuit Court in *Wing v. United States* (C. C.) 119 Fed. 479. Identity would ordinarily exclude all question of similarity, but not in this case, because of the distinction made between fire brick under and over 10 pounds in weight.

The government objects that this construction entirely nullifies the provision of paragraph 87 that it shall not apply to fire brick weighing more than 10 pounds each. Congress has prescribed just what tests are to be used to determine similitude, and the amount of duties to be paid is not one of them. If this results in an incongruity, the inference is not that the prescribed tests should be abandoned, but that those who drew the act, through oversight or otherwise, failed to express the intention of Congress.

Judgment affirmed.

NOYES, Circuit Judge (dissenting). I am constrained to dissent in these cases. Paragraph 87, under which the importers primarily claim, is limited in its application to fire brick weighing not more than 10 pounds each. These brick exceed that weight, and are not within the paragraph unless they can be brought in by similitude. But to do so wholly wipes out the statutory distinction. In my opinion, the similitude clause cannot have that effect, and does not bring in the identical material embraced in an act when in a condition expressly excluded from its operation.

Paragraph 97, under which the government claims, applies only to earthen articles susceptible of decoration. Fire brick have no similarity to them.

In my opinion, the merchandise should be assessed for duty under the general provision relating to manufactured articles not otherwise provided for.

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UNITED STATES v. J. A. & W. BIRD & CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 141 (4,593).

**CUSTOMS DUTIES (§ 24\*)—CLASSIFICATION—ENAMEL "WHITE PAINT GROUND IN OIL"—"PAINTS GROUND WITH SOLUTIONS OTHER THAN OIL."**

Enamel white paint, which contains zinc, but not lead, and is ground in oil, and to which, after grinding, certain ingredients are added to increase the gloss, is dutiable as "white paint \* \* \* containing zinc, but not containing lead, \* \* \* ground in oil," rather than "paints \* \* \* ground \* \* \* with solutions other than oil," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, pars. 57, 58, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 41, 42; Dec. Dig. § 24.\*]



Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision below reversed a decision by the Board of United States General Appraisers (G. A. 6,449, T. D. 27,633), which had in part sustained the importers' protests against the assessment of duty by the collector of customs at the port of New York. The opinion filed by the Circuit Court reads as follows:

PLATT, District Judge. The merchandise in question, which is invoiced as "zinc white paint" and "ripolin," and which is also known as "enamel white paint," was classified by the collector for duty at 35 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 53, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630), as a varnish, or as a paint "not otherwise provided for," at 30 per cent. ad valorem under the provisions of paragraph 58 of said act. The importer protested, claiming said merchandise properly dutiable at 1 $\frac{3}{4}$  cents per pound under paragraph 57, as "zinc, oxide of, and white paint or pigment, containing zinc, but not containing lead, \* \* \* ground in oil," or, alternatively, where the varnish rate was taken, at 30 per cent. ad valorem under paragraph 58 of said act as a paint. The Board of General Appraisers sustained the protest under said paragraph 58. From this decision the importers appeal to this court, insisting that paragraph 57 more aptly describes the merchandise in question.

I am of the opinion that oxide of zinc and white paint as found in paragraph 57 are not synonymous terms. I think the language of the paragraph clearly indicates that Congress had in mind a distinction between an imported article, which is composed of oxide of zinc either dry or ground in oil, and articles which may be called white paint or pigment containing zinc either dry or ground in oil. So far as I have examined the testimony here, it tends to show that the merchandise in question is a white paint containing zinc, but not containing lead, ground in oil, and thus exactly described by the terms of paragraph 57. It is true that, after having been ground, certain ingredients were added to increase the gloss; but I cannot see that the materials thus added change the character of the article imported, if we assume the article imported to have been a white paint. *De Jonge v. Magone*, 159 U. S. 562, 16 Sup. Ct. 119, 40 L. Ed. 260; *United States v. Dudley*, 174 U. S. 670, 19 Sup. Ct. 801, 43 L. Ed. 1129; *Myers v. United States*, 147 Fed. 204, 77 C. C. A. 430. I cannot concur in the board reasoning that paragraph 57 by its terms excludes a liquid paint. The same reasoning would exclude liquid paint from classification under numerous other paragraphs of the paint schedule where the phrase "ground in oil," or other solutions, occurs, including paragraph 58, under which the board held the merchandise in suit to be dutiable.

The decision of the Board of General Appraisers is reversed, following the decision of Judge Townsend in *Pomeroy & Fischer v. United States* (C. C.) 126 Fed. 583.

D. Frank Lloyd, Asst. U. S. Atty. (Charles D. Lawrence, Asst. Treasury Counsel, on the brief), for the United States.

Comstock & Washburn (Albert H. Washburn, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decision affirmed, on the opinion of Judge Platt.

## COFFIELD et al. v. FLETCHER MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1909.)

No. 1,850.

## PATENTS (§ 148\*)—SUIT FOR INFRINGEMENT—EFFECT OF APPLICATION FOR RE-ISSUE.

Where a patentee, pending a suit for infringement, applies for a reissue under Rev. St. § 4916 (U. S. Comp. St. 1901, p. 3393), on the ground that the specification of his patent is insufficient and such reissue is granted, he is estopped to claim that the specification was sufficient, or to further maintain the suit for the infringement of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 148.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

R. J. McCarty, for appellants.

E. E. Wood and W. R. Wood, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and KNAPPEN, District Judge.

SEVERENS, Circuit Judge. It appears from the transcript in this case that the appellants filed their bill of complaint in the court below on June 9, 1906, charging the appellee with infringing the rights secured by letters patent No. 806,779, granted to Peter T. Coffield December 12, 1905, for improvements in water motors, of which the appellants are assignees. The appellee appeared, and on July 26, 1906, answered, setting up the usual defenses, that the patentee was not the original inventor of the said improvements, and that the appellee had not infringed. A replication having been filed, testimony was taken, and on June 11, 1907, the cause was submitted to the court. While the cause was under consideration and before it had been determined, the appellee filed a motion to dismiss the cause for the reasons set forth in the motion, and which were not denied, namely, that while the cause had been pending, and on July 28, 1906, the appellants had applied for a reissue of said patent under the provisions of section 4916 of the Revised Statutes (U. S. Comp. St. 1901, p. 3393), which application had been allowed, and a reissued patent, numbered 12,719, had been granted. The appellants moved for leave to file a supplemental bill, which they tendered, alleging the facts in regard to the reissue as above stated, and praying that the cause be continued upon the footing of the original and supplemental bills. Leave to file the supplemental bill was denied, and the motion to dismiss the original bill was granted. From the action of the court in both these respects, the complainants have appealed. The section of the statutes above referred to reads as follows:

"Section 4916—Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the sur-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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render of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specifications, to be issued to the patentee, or, in case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended patent. The Commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a reissue for each of such reissued letters patent. The specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so reissued, together with the corrected specifications, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

In the reissue, the single claim of the old patent was carried into the new and stands as the second. A new claim was inserted, standing as the first. The specifications were amended for the purpose of making them more definite.

We shall first deal with the order for the dismissal of the original bill, for, if that was a proper decree, the application for leave to file a supplemental bill fell with it. Counsel for the appellants urges that the bill should not have been dismissed because—and these are the principal reasons assigned—the original patent contained only a single claim, and this was continued without variation in the reissued patent; that each claim in a patent represents a single distinct invention, as much so as if there were so many patents for as many inventions; that the reissue was not a new grant so far as the original claim was concerned, but a renewal of the old one; and, further, it is urged that, the original grant being valid, the patentee had, in consideration of the disclosure of his invention, acquired a substantial property right, and that in consequence of the infringement of it he had a right to the profits and damages arising therefrom, of which he ought not to be deprived; that these were vested rights, and that what happened to the patent thereafter could not annul them; that as between him and the infringer nothing had occurred which should release the latter from his liability; and, further, that the United States had no interest in depriving the patentee of his remedy against the infringer. At first blush the argument seems plausible. But on looking deeper into the matter, we find cogent reasons why it should not prevail.

When the patentee came to ask for a reissue, he was confronted with certain conditions on which only could the reissue be permitted. One was that the specifications of his patent, as it stood, were inoperative. He was obliged to aver and prove that they were so. This was the ground on which the patentee applied in the present case. And he made the necessary avowal in his application. If this was true, the patentee had been exploiting a patent which, though it might

have contained the germ of an invention, was practically useless to the public, for a patent which does not disclose a way to work or use the invention does not constitute the expected consideration for the grant. Having averred in a solemn manner, and to induce the granting a reissue, that the fact was as just stated, he was estopped from claiming otherwise. In that case the government owed him no protection, and it would follow that private individuals were not bound to regard him as entitled to a monopoly. It was therefore perfectly just that the government should so legislate that the patentee should not be at liberty to prosecute others as infringers who had, while the old patent was running, disregarded the patentee's exclusive claim. And it has been constantly held that such is the effect of a surrender and a reissue obtained under the provision of the section of the Revised Statutes, above cited. *Moffitt v. Garr*, 1 Black, 273, 17 L. Ed. 207; *Reedy v. Scott*, 23 Wall. 352, 23 L. Ed. 109; *Peck v. Collins*, 103 U. S. 660, 26 L. Ed. 512; *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. 537, 28 L. Ed. 963; *Eby v. King*, 158 U. S. 366, 15 Sup. Ct. 972, 39 L. Ed. 1018; *Allen v. Culp*, 166 U. S. 501, 17 Sup. Ct. 644, 41 L. Ed. 1093; *McCormick Machine Co. v. Aultman*, 169 U. S. 606, 18 Sup. Ct. 443, 42 L. Ed. 875.

Of course, the question will always be presented to the patentee who has a patent of doubtful validity or value, on account of defective or insufficient specifications, whether he will continue to do the best he can with the patent he has, or surrender it and obtain something which will more clearly manifest the invention he supposes himself to have made, more adequately explain the manner of its use, and more certainly obtain the protection due to it, a protection which he would have had if he had in the first instance proceeded in the manner which the law requires and made his specifications clear. He must take the risk of his choice. But this is the common experience in most business affairs.

We have, in what precedes, assumed that a patent, although the specifications be defective or insufficient, might still not be utterly void. It seems necessary to assume this because of the importance which the Supreme Court has attached to the right of the patentee to recall his patent if a reissue is not allowed. *Allen v. Culp* and *McCormick Machine Co. v. Aultman*, *supra*. It is possible, however, that this right to recall the patent was regarded as a privilege, to which he was entitled, to have the validity of his patent determined by a judicial decree. We need not speculate, however, upon this subject, which is involved in some intricacy, for the general proposition that the surrender of the patent upon a reissue involves the cessation of all rights acquired under it has long been settled.

We think the court did not err in dismissing the bill, there being no controversy about the facts which required the framing of an issue.

The decree of the Circuit Court must be affirmed, with costs.

NOTE.—The following is the opinion of Cochran, District Judge:

COCHRAN, District Judge. This cause has been heard orally and on brief, and submitted for disposition. Pending the consideration thereof by the court,

to wit, on November 12, 1907, a reissue of the patent sued on was granted by the Commissioner of Patents upon an application made prior to the submission, but after the bringing of the suit, to wit, on July 28, 1906. Thereupon the defendant moved the court to dismiss the bill at complainants' costs. Pending the hearing of the motion the complainants moved the court to permit them to file a supplemental bill setting up the reissued patent, or, if not, to file an original bill thereon, with an order that the testimony taken in this suit may be used in the new suit. Pending both these motions, the defendant tendered a supplemental answer, setting up the reissued patent, and moved the court to file same. Of course, each of these motions involves a motion that the order of submission herein heretofore made be set aside and that further action be taken as moved.

In order to properly dispose of these motions it is essential to understand the effect of the granting of the application for a reissue of the original patents, and the reissue thereof, on existing rights. It amounts to a surrender of the original patent. Indeed, it is provided (section 4916, Rev. St. [U. S. Comp. St. 1901, p. 3393]) that the power of the Commissioner of Patents to cause the new patent to be issued is conditional upon the surrender of the original patent, and that it shall take effect from the issue of the new patent. With the surrender of the original patent goes all rights thereunder. These include the right to further prosecute existing suits. In the case of *Moffit v. Garr*, 1 Black, 273, 17 L. Ed. 207, an action at law to recover damages for an infringement of a patent was dismissed, pursuant to a plea that since the commencement of the suit the plaintiff had surrendered his patent. Mr. Justice Nelson said: "A surrender of the patent to the Commissioner, within the sense of the provision, means an act which in judgment of law extinguishes the patent. It is a legal cancellation of it, and hence can no more be the foundation for the creation of a right after the surrender than could an act of Congress which has been repealed. It has frequently been determined that suits pending which rest upon an act of Congress fall with the repeal of it. The reissue of the patent has no connection with or bearing upon antecedent suits. It has as to subsequent suits. The antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists and is in force at the time of trial and judgment the suit fails." And in the case of *Peck v. Collins*, 103 U. S. 660, 26 L. Ed. 512, Mr. Justice Bradley, in referring to the case of *Moffit v. Garr*, said: "Since the decision of this case it has been uniformly held that if a reissue is granted the patentee has no rights, except such as grow out of the reissued patent. He has none under the original. That is extinguished. And although, for the purpose of fixing a date to the title in a question of priority and of limiting the period for which the patent is to run, the date of the original patent is important, no damage can be recovered for any acts of infringement committed prior to the reissue." See, also, *Meyer v. Pritchard*, 131 U. S. ccix, 23 L. Ed. 961.

Such, then, being the effect of the reissuance of a patent, to wit, a surrender of the original patent and the foregoing of all existing rights thereunder, including pending suits, it would seem that there is no possible room for sustaining the first part of complainants' motion; i. e., to permit them to file a supplemental bill setting up the reissued patent and seeking a recovery thereunder. And so it has been expressly held in the case of *Reedy v. Scott*, 23 Wall, 352, 23 L. Ed. 109, Mr. Justice Clifford said: "Surrendered patents cease to be operative when the new patent is issued, from which it follows that such a patent, after the surrender, is not the proper foundation for an action at law or of a suit in equity to recover either as damages or profits for the infringement of the surrendered patent. Pending suits are defeated when it appears that the patent on which the suit is found has been surrendered, nor is a supplemental bill setting up the reissued patent a proper pleading to revise such a suit in equity, as nothing can be recovered either as damages or profits for the infringement of the surrendered patent." Again he said: "Where the patent expires and is extended pending the litigation, and the infringement by the respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the in-

fringement both before and subsequent to the extension; but the rule is otherwise where the original patent is surrendered, as the effect of the surrender is to extinguish the patent, and hence it can no more be the foundation for the creation of a right than can a legislative act, which has been repealed without any saving clause of pending actions. Consequently the infringement of the reissued patent becomes a new cause of action, for which, in the absence of any agreement, or implied acquiescence of the respondent, no remedy can be had, except by the commencement of a new suit."

In that case a supplemental bill setting up a reissued patent had been filed, and, though this was improper under the quotations thus made, the Supreme Court did not reverse for this irregularity. It was held that the irregularity had been waived, which may be done, as stated in the concluding clause of the last quotation. Mr. Justice Clifford set forth this waiver in these words: "Instances, however, may be found where, in such a case, the complainant sought his remedy in a supplemental bill, no objection having been made by the respondent; and such examples induce the court to disregard the irregularity in this case, inasmuch as neither the respondent nor the court below appear to have regarded it as a matter of any importance. Instead of that, the complainant was permitted to file his supplemental bill charging infringement as in case of an extended patent, and the respondent, making no objection to the regularity of the bill, refiled the plea which he had filed to the original bill of complaint, accompanied with a general denial of every material allegation contained in the supplemental bill, as subsequently amended by leave of the court. Subsequently the proofs exhibited were taken, and, the parties having been heard, the court entered the aforesaid decree, deciding the whole case, as more fully set forth on the record. None of the proofs were taken before the reissued patent was granted, nor until after the supplemental pleadings were completed."

In view of the fact that the question had been waived in this case, it may be claimed that what is said as to the impropriety of a supplemental bill in such a case was a mere obiter dictum, and probably rightly so; but in the case of *Fry v. Quinlan*, Fed. Cas. No. 5,140, the question was directly involved, and it was held that a supplemental bill cannot be filed in such a case if seasonable objection is made thereto. That case was decided after, but in the same year that the case of *Reedy v. Scott* was decided; but no reference was made in the opinion therein to that case. In that case the original bill was filed under a patent that was afterwards surrendered upon a reissue. The complainant thereupon applied for leave to file a supplemental bill founded upon the reissued patent, and asked for an injunction. The motions were denied. The decision was rested on the authority of *Moffit v. Garr*, supra. Judge Johnson said: "It is true that the point decided in that case was that the surrender barred an action at law for a previous infringement; but the ground upon which the decision is put is equally applicable to a suit in equity." He then pointed out that it was contrary to the function of a supplemental bill for it to be filed in such a case. He said: "It is not, in general, the function of a supplemental bill to restore or renew a cause of action which has ceased to exist. Such a bill, on the contrary, rests on the equity of the original bill, and seeks to apply it under altered circumstances, but in the enforcement of the same right." As to the proper procedure to be had he said: "In order to avail himself of any rights he may have upon the facts stated in the supplemental bill, the complainant must proceed by original bill founded on the reissued patent, as was done in *Orr v. Badger*, Fed. Cas. No. 10,587."

In support of the application for leave to file the supplemental bill, the following authorities are relied on, to wit: *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Reay v. Raynor* (C. C.) 19 Fed. 308; *Same v. Berlin & Jones Envelope Co.* (C. C.) 30 Fed. 448; *Woodworth v. Stone*, Fed. Cas. No. 18,021; *Dental Vulcanite Co. v. Wetherbee*, Fed. Cas. No. 3,810; *Tremolo Patent*, 23 Wall. 518, 23 L. Ed. 97.

In the case of *Littlefield v. Perry* it does not appear, save inferentially, that there was a supplemental bill; and, if there was one, no objection to its being filed was made, and any objection that could have been made thereto was waived. In one of the quotations made from the opinion of Mr. Justice Clifford in *Reedy v. Scott*, supra, he says that: "Instances can be found

where, in such a case, the complainant sought his remedy in a supplemental bill, no objection having been made by the respondent, and such examples induce the court to disregard the irregularity in this case." Possibly the case of *Littlefield v. Perry* is one of the instances or examples which the learned justice had in mind. It is not exactly clear what patents were the subject of recovery in *Littlefield v. Perry*; but certainly it was not held therein that a recovery could be had on a surrendered patent after the surrender, or that the reissued patent could be set up by supplemental bill, if reasonable objection is made thereto. There is nothing in the case that squints at either position, and, if there were, it could not prevail over the abundant authority otherwise.

The case of *Reay v. Raynor* was not a case like the one we have in hand. It was not a suit on an original patent whilst in force, but which was subsequently and pending the suit surrendered. The original patent had been surrendered and the reissue granted long before the suit was brought. The suit was brought on the original patent, when it should have been brought on the reissue. By an amended bill the suit was changed from the one to the other. It was held that this could be done. Whether rightfully so or not, it is not necessary to determine herein. We have no such case here. What is involved here is a supplemental bill, and not an amended bill.

The cases of *Woodworth v. Stone* and *Dental Vulcanite Company v. Wetherbee* should be considered together, as they arose in the same district, that of Massachusetts. In each case suit was brought on the original patent before its surrender, and thereafter upon its surrender a supplemental bill was filed setting up the reissue. In neither case was any objection made to the practice pursued, to wit, of setting up the reissue by a supplemental bill. That seems to have been the recognized practice in that district at the time these cases were decided. Possibly these are two more of the instances or examples to which Mr. Justice Clifford referred in his opinion in *Reedy v. Scott*. The latter case, no doubt, was one of them, as he rendered the decision therein. Concerning that case Judge Johnson had this to say in the close of *Fry v. Quinlan*, supra: "The case only shows that in the district of Massachusetts it is in fact the usual practice to file a supplemental bill upon a reissued patent before surrender. It does not appear how or upon what view of the right of the parties that practice was established. The statute only declares that the reissued patent with the corrected specification shall have the same effect and operation in law on the trial of all actions for causes thereafter arising as if the same had been originally filed in such corrected form. Rev. St. § 4916 (U. S. Comp. St. 1901, p. 3393). But this declaration gives no countenance to the idea that the reissued patent can be availed of to sustain and render effectual a suit the basis of which is taken away by the act of the party in surrendering his patent."

In the *Tremolo* Case the reissue involved was granted before the suit, and in the suit both parties treated it as if it was a suit thereon. The respondent was held to this action on his part, and not allowed to claim that the reissue was not sued on.

There is, then, nothing in any of these decisions controverting *Reedy v. Scott* and *Fry v. Quinlan*, and the principles on which they are based. The order of submission is set aside, as such seems to be the desire of both parties. The motion for leave to file a supplemental bill must be overruled.

As to the motion to be permitted to file a new bill and for an order that the testimony taken herein may be used in the new suit thus instituted, there is to be said: The complainants had a right to bring a new suit without leave of court; and it is not proper to make an order in this suit as to what shall be done in the new suit. Such an order can only be made in that suit. Of course, testimony taken herein relevant in the new suit can be used therein; but that is not a matter to be determined herein.

Then, as to the defendant's motion to dismiss the bill at complainants' cost, both parties appear before me, stating that the original patent has been surrendered and reissue granted pending the litigation, and seek action of the court on the basis of that fact. One seeks to have the bill dismissed. The other seeks alternative relief heretofore stated. In view of this, I think I am justified in accepting such to be the fact, and act accordingly, without any new pleadings. Both parties are agreed that the case should not and cannot pro-

gress as it is. This being the case, this cause has come to an end, and should be dismissed. An order will be entered dismissing the bill; each party paying its own costs. I think this is equitable.

I have not considered the question as to the validity of the reissue, and the effect of the surrender and reissue on intervening rights, which have been discussed by counsel, as they are not involved herein.

The motion to file supplemental answer is overruled.

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WESTMORELAND SPECIALTY CO. et al. v. HOGAN.

(Circuit Court of Appeals, Third Circuit. February 15, 1909.)

No. 47.

1. PATENTS (§ 16\*)—VALIDITY—UNRECOGNIZED BENEFITS OF INVENTION.

The mere failure of a patentee to realize all the benefits and possibilities of his invention does not render his patent invalid, the benefits which test, time, and use develop being what really determine merit.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 16.\*]

2. PATENTS (§ 328\*)—INVENTION—DREDGE.

The Hogan patent No. 752,903, for a dredge for salt and pepper, having a celluloid cap, which has the advantage over metal caps that it will not oxidize and of being flexible so as to make a better joint, and the greater advantage that it insulates the salt and prevents it from caking, was not anticipated, and discloses invention. Also, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

3. PATENTS (§ 286\*)—SUIT FOR INFRINGEMENT—TITLE OF COMPLAINANT.

A transfer of a patent by the patentee *held* merely by way of pledge, and not to disable him to maintain a suit for infringement.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 286.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For former opinions, see 145 Fed. 199; 154 Fed. 66, 83 C. C. A. 178; 163 Fed. 289.

Howard P. Denison (Wm. A. Jones, of counsel), for appellants.

E. M. Marble (Charles Howson, of counsel), for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Oliver K. Hogan charged the Westmoreland Specialty Company with infringement of patent No. 752,903, granted to him February 23, 1904, for a dredge. That court, in an opinion reported at (C. C.) 163 Fed. 289, sustained the patent and found infringement. From a decree to that effect respondent appealed.

The opinion below is so exhaustive that we content ourselves with reference to it for the details of this case. It suffices to say the patent concerns a celluloid top dredge, the principal use of which is holding salt. While at first thought the device seems of minor importance, yet it has, in its sphere, served a very useful purpose, and has gone into rapid and general use. The use of celluloid as a dredge cap has several advantages: First, it will not oxidize; second, its flexibility adjusts it to irregular, noncircular, screw-mouthed vessels; and, third, it insulates the salt, keeps it dry, and prevents it from caking. This

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



insulating capacity of celluloid is not generally known. It arises from the fact that practically no surface moisture film or layer of adsorbed (not absorbed) moisture is deposited on celluloid. Under ordinary atmospheric conditions, metals and glass have layers of condensed moisture too thin to be perceptible to sight or touch. The ordinary salt cellars, prior to Hogan's device, had glass bases and metal tops, which collected moisture films. The moisture layers serve as wicks to convey moisture from the air to the salt in the cellar. The salt at the base of the cellar absorbs from the adjacent glass wall the moisture thereon. This is replaced by moisture drawn from higher up, and thus a continuous downward moisture transference goes on from the cap to the base of the cellar. This soon converts a perfectly dry mass of salt in the cellar to a moist, sticky one. The moisture film on the metal cap being the supply source of this downward process, the substitution of a celluloid top insulated the salt from the humidity of the external air. This highly desirable result was novel, and by it a dredge with a new function was created. It is true that at the time this patent was applied for the particular process of moisture supply from a metal cap and the insulating capacity of celluloid to stop it were not stated, or, indeed, known to the patentee. He knew metal caps would oxidize, and substituted celluloid to stop oxidation, and such use has shown that the stoppage of oxidation resulted in keeping the salt dry. But the mere failure of a patentee to realize all the benefits and possibilities of his invention is not fatal. The after-discovery of unsuspected usefulness in a disclosed apparatus, far from detracting from its value, may serve to enhance it. It is the benefits which test, use, and time unfold that really determine merit. It is this after-test, the test of use, that proves the worthlessness of the great majority of patents and establishes the value of the few. We are therefore of opinion that the after-recognition of the scientific fact of the insulating capacity of his celluloid dredge cover should not affect the validity of Hogan's patent. It had other patentable advantages. Mechanically, its flexible top could be used on dredges of irregular, noncircular mounted dredges, which latter could not be used at all with metal caps. Moreover, the nonoxidizable celluloid top made a much cleaner and more hygienic dredge. The fact that a celluloid cap had been previously used on a talcum-powder bottle, far from being an anticipation of its use on a dredge, rather tends to emphasize the novel character of Hogan's device. Although it was so used, it never suggested to any one its use on a dredge. But reflection will show they are not analogous uses. Talcum powder is a dry, chalky substance which neither caked nor became damp. Hence oxidation, causing dampness, or hygienic considerations and their avoidance, were not involved in its use on a talcum bottle. After full consideration, we are therefore of opinion the court below rightly sustained the patent.

We agree with it also in holding that Hogan could maintain this bill. The papers which it is contended showed an assignment by Hogan are set forth at length in the court's opinion. It rightly held they should be considered as a whole. As such, it is clear there was no

intent to transfer the title. On the contrary, there was a clear intent not to do so. In substance, there was a temporary pledge whereby Hogan's indebtedness could be liquidated from the proceeds of a business carried on under the patent. As the rights of other parties may be involved in these papers, we refrain from any present discussion of them, contenting ourselves with saying they did not preclude Hogan from maintaining this suit.

The decree below is affirmed.

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INTERNATIONAL TIME RECORDING CO. v. W. H. BUNDY RECORDING CO.

(Circuit Court, N. D. New York. January 6, 1909.)

No. 7,175.

PATENTS (§ 328\*)—INVENTION AND INFRINGEMENT—WORKMAN'S TIME RECORDER.

The Bundy patent No. 671,129, for a workman's time-recorder, claims 1 and 4, which in effect claim broadly "means" for insuring the "proper" insertion of the card in the recorder to unlock the actuating mechanism, are void, in view of the prior art. Claim 2, which includes as a specific element a card having a portion cut away to prevent its insertion in any except the proper position, if conceded validity, must be narrowly construed to cover only what is shown and described, and, as so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Bill in Equity to Restrain Alleged Infringement of United States Letters Patent, and for an Accounting.

Kerr, Page, Cooper & Hayward, for complainant.  
Parsons, Hall & Bodell, for defendant.

RAY, District Judge. The patent in suit, No. 671,129, for workman's time-recorder, was issued to the Bundy Manufacturing Company, of New York, assignee of Willard Le Grand Bundy, April 2, 1901, on application filed October 25, 1899, and is now owned by the complainant company. It contains 26 claims, of which claims 1, 2, and 4 only are in issue here. These read as follows:

"(1) In a recorder adapted to make a record upon a card or other removable record-surface, the combination, with suitable recording mechanism and suitable impression mechanism and means for actuating it, of a lock adapted to prevent the operation of the impression mechanism, and means actuated by the card or other record-surface, when properly inserted in place in the machine, for removing the lock from its locking position to permit the operation of the impression mechanism, whereby the recording mechanism cannot be operated to make an impression until the card or other record-surface has been properly inserted in place to receive the impression.

"(2) In a recorder adapted to make a record upon a card or other removable record-surface, the combination, with suitable recording mechanism and suitable impression mechanism and means for actuating it, of a lock adapted to prevent the operation of the impression mechanism, a card or other removable record-surface having a portion cut away, and means adapted to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be struck and actuated by the card or other record-surface only when the latter is properly inserted in the machine with the cut-away portion of the card in its proper position in the card-holder, for removing the lock from its locking position to permit the operation of the impression mechanism, whereby the recording mechanism cannot be operated to make an impression until the card or other record-surface has been properly inserted in place to receive the impression.

\* \* \* \* \*

"(4) In a time-recorder adapted to make a record upon a card or other removable record-surface, the combination, with suitable time-recording mechanism and means for driving it and suitable impression mechanism and means for actuating it, of a lock adapted to prevent the operation of the impression mechanism, and means, actuated by the card or other record-surface, when properly inserted in place in the machine, for removing the lock from its locking position to permit the operation of the impression mechanism, whereby the recording mechanism cannot be operated to make an impression until the card or other record-surface has been properly inserted in place to receive the impression."

These are combination claims, and claim 1 has (1) in a time-recorder adapted to make a record upon a card or other removable record-surface, (2) the combination with suitable recording mechanism, and (3) suitable impression mechanism, and (4) means for actuating it, (5) of a lock adapted to prevent the operation of the impression mechanism, and (6) means actuated by the card or other record-surface, when properly inserted in place in the machine, for removing the lock from its locking position to permit the operation of the impression mechanism, whereby the recording mechanism cannot be operated to make an impression until the card or other record-surface has been properly inserted in place to receive the impression. Claim 2 adds the card or other removable record-surface having a portion thereof cut away. Here "the means" actuated by the card for removing the lock from its locking position so as to allow the impression mechanism to operate and make an impression is actuated only when the cut-away portion of the card is in its proper position in the card-holder, and this is accomplished only by inserting the card properly in the machine.

It seems to me that claims 1 and 2 are the same, except it may be the cut-away part of the card as a card or other record-surface must be read into the combination of claim 1 to make its operative. It is actuated by the card or other record-surface only, if we would make an impression at all; that is, print the time or anything else. The machine cannot print or record anything unless we have a card or recording-surface upon which to print or make the record, and the means to remove the lock from its locking position so as to permit the operation of the impression mechanism is actuated by this card or other record-surface. True, in claim 2 the cut-away portion of the card must be in its proper position in the holder, but, if it has a cut-away portion and is properly inserted, the cut-away portion will necessarily be in "its proper position." In both claims we have a card necessarily, and in both the card is "properly inserted." Claims 1 and 4 say "in a recorder," while claim 2 says "in a time-recorder adapted," etc. Claim 4 adds to claims 1 and 2 "means for driving" the recording mechanism.

Such a time-recorder was old; suitable recording mechanism was old; suitable impression mechanism and means for actuating it, and a lock adapted to prevent the operation of the impression mechanism, were all old in the art. Even cards or other record-surfaces, actuating the means employed for removing the lock from its locking position so as to permit the operation of the impression mechanism, were old in this art. The difficulty sought to be remedied was that the card or record-surface used by a workman, each having a card, has parallel, horizontal lines, or may have, one for each day of the week, and also perpendicular lines forming spaces headed "in" and "out," so as to record in the proper space and for the correct day the hour and minute of the entrance and departure of the workman. It is important that the card be inserted right end up, and with the right side thereof to the type which do the printing on the card before the lock is removed from the locking position to permit the operation of the impression mechanism, as otherwise, if the workman is careless in inserting his card, there would be no regularity or order in the record, and the "in" record in the morning might be found on one side of the card and the "out" record at noon on the other, and some of the record might be printed right side up and some wrong side up, etc. The object of the combination of the claims was to prevent this, and compel a proper insertion of the card right end up and right side to the type, in order that the impression mechanism should be released at all and any record made. In other words, the locked impression mechanism is neither released nor unlocked, except by the card, and then only when it is inserted right end up and right side to the front, so to speak. It is also essential that it shall be impossible to release the impression mechanism by means of the insertion of the card before the card has reached its proper position in the card-holder. That proper position is one where the day of the week, as, for instance, Tuesday, for which day the record is being made, indicated by the lines on the card, is exactly opposite the printing or impression mechanism when the card has been pushed down to the abutment, the correct position of which is fixed from day to day by the time mechanism of the recorder. When the card is so inserted—that is, "properly inserted" to receive the impression of the type at the proper place—and is pressed down and held down, it will come in contact with the releasing mechanism and actuate it, so as to allow the impression mechanism, when set in motion, to act. The impression mechanism or platen and hammer is actuated by the operator or workman by pressing down upon an independent lever. This lever can be moved only when the card has been pressed down into contact with, and on a level with, the abutment on which the card, in effect, rests when in proper position to be printed upon, so as to unlock the lever, which is done by removing the obstruction to the free movement thereof. It became important in this art, therefore, to provide some "means" which would prevent the card from reaching the abutment on which it rests when the printing impression is to be made thereon, and thereby, or at that time, releasing or unlocking the impression mechanism, unless and until the card was inserted correctly,

in the correct position, properly; that is, right end up, and with the right face and space thereof presented to the type or recording mechanism. This, the complainant says, is accomplished by the device, etc., of the patent in suit. It also says it has a valid patent covering all means for doing this, and as the defendant has done the same thing by its device, although its means are essentially different from anything shown in the patent in suit, it infringes.

The claims of the patent in suit and in issue here are as broad as language can make them. They are not confined in terms to devices shown, illustrated, or described in the specifications. It is conceded that, although this patent was issued more than seven years ago, no machine or recorder embodying the device of the claims in question has ever been made or put upon the market by the patentee or complainant, or by any other person by their authority, or by any other person, firm, or company unless it be the defendant here. This is significant in more than one aspect of this case. The patent says:

"My invention relates to recorders, and particularly to time-recorders adapted to make an impression of the time upon a removable card or other suitable record-surface.

"It has for its object to provide means for preventing the actuation of the impression mechanism until after the card or other removable record-surface has been properly inserted into the machine, and for releasing the impression mechanism when the card or other record-surface has been properly inserted to permit a record to be made upon the card or other record-surface; also for preventing the incomplete operation of the impression mechanism; also for preventing the removal of the card or other record-surface after its insertion into the machine until the impression has been made upon the card or other record-surface; also to provide a new and improved record-card for use in a recorder; also to improve the mechanism by which a clock-movement imparts vertical movement to the card or other record-surface. \* \* \*

"My invention is shown in the drawings in connection with a time-recorder adapted to print an impression of the time of the operation of the machine upon a removable card or other removable record-surface. My invention may be used, however, in some of its aspects in recording-machines other than time-recorders, and in time-recorders varying greatly from the one shown in the drawings. \* \* \*

"14 is the card-holder or receptacle for the card. It is composed of a stationary framework and a movable shelf, 15. Shelf 15 forms the bottom of the card-holder; but the card is never adapted to rest upon it, even when fully and properly inserted into the card-holder, as will be presently explained. This shelf is made movable vertically in the card-holder, and is automatically actuated by the clock-movement at regular stated intervals to bring the different horizontal columns upon the card, when the latter is properly inserted in the card-holder, upon the printing-line, so that the impression will be made upon the horizontal line of the card representing the proper day of the month. \* \* \*

"Any suitable impression mechanism and any suitable mechanism for operating it may be employed. \* \* \*

"In order to prevent the operator from making an impression before his card has been properly inserted into the card-holder, I provide a lock which normally is adapted to prevent the operation of the impression-operating mechanism and means actuated by the card or other record-surface when properly inserted in place for receiving the impression and for removing the lock from its locking position. My improved mechanism for this purpose can be used in any suitable recording or time-recording machine. In the form shown in the drawings I show a locking-lever, 55, which occupies normally a position underneath operating-lever 47, to prevent the depression of that lever and means adapted normally to project into the path of the card as it is inserted into the card-holder and adapted to be struck and moved by the

card to remove the lock from operative position to permit the depressions of lever 47. In the preferred form shown in the drawings, the unlocking means consist of an abutment, 56, which forms one end of a bell-crank lever, 57, pivoted at 58 upon shelf 15. A rod, 59, is connected to the other end of bell-crank lever, 57, and passes through a support, 60, also secured to shelf 15, and engages with a sleeve, 61, which forms the head of the rod, 59. A set-screw, 62, enables sleeve, 61, to be moved one way or the other on rod 59, so as to adjust the length of rod 59 and sleeve 61. The end of part 61 is adapted to rest against a plate, 63. Plate 63 is free to swing horizontally a slight distance on hinges, 64, at the rear of the plate. Locking-lever 55 is pivoted at 65, and has a spring-pressed pin, 66, fitted in a cylindrical chamber, 67, of locking-lever 55. When the abutment, 56, is struck and pressed downward by a card, either through the weight of the card or by the pressure of the workman upon it, rod 59 presses head 61 against plate 63. The latter presses upon spring 66, and through it forces locking-lever 55 to the right, as shown in Fig. 5, withdrawing shelf 68 of locking-lever 55 from beneath operating-lever 47, permitting the operation of that lever by the workman. Spring 69 tends to hold locking-lever 55 in its locking position. I preferably make the surface of lever 55 just below shelf 68 of a bevel shape, as shown at 70, to enable the operating-lever, 47, to force locking-lever 55 farther to the right, if necessary. A notch in an arm, 71, pivoted to locking-lever 55, falls over the top of operating-lever 47, as shown at 72, as lock 55 is thrown to the right for the purpose of holding locking-lever 55 in its inoperative or unlocking position until the workman can grasp and depress lever 47 in order to prevent the return of locking-lever 55 to its locking or operative position before the workman can depress lever 47. \* \* \*

"The card or other removable record-surface may be brought into contact with the means for unlocking lock 55 in any suitable way and by any suitable means. In practice I prefer, however, to cut away a portion of the card, as at 83 (shown in Fig. 7), and so arrange the unlocking means and the cut-away portion of the card that the unlocking means will be struck and actuated by the card or other record-surface only when the latter is inserted in the card-holder with the card facing in the proper direction for receiving the impression. This may be accomplished in many different ways; but I prefer to accomplish it by placing in the path of the card a fixed stop, over which the cut-away portion of the card is adapted to fit when the card is properly inserted to allow the card to reach and strike and actuate the said means for removing the lock. In the form shown, 84 is the fixed stop. It is mounted upon shelf 15, and moves therewith. When the card is inserted with the face of the card shown in Fig. 7 facing the type on the hour and minute recording wheels, the cut-away portion, 83, will fit over stop 84, permitting the card to strike abutment 56 and operate lever 57, as above described, to unlock locking-lever 55 and permit the operation of the impression mechanism. If the card, however, is inserted facing the wrong way, or so that the cut-away portion, 83, will not register with stop 84, a portion of the card not cut away will strike stop 84, and the card will not strike the abutment, 56, or will not move it sufficiently to unlock lever 55. Preferably the cut-away portion is made so that in the position of the parts it will register with abutment 56. \* \* \*

"By means of my invention the workman is prevented from operating the recording mechanism until his card has been properly inserted in place, with the card facing in the right direction and inserted to the full extent to properly receive the impression, and after having once inserted his card he is unable to withdraw it or to return the impression-operating device to its normal position until he has properly operated the machine and made the proper impression upon the card. The shelf can also be manually moved to the proper position without the necessity of taking the mechanism, or part of it, to pieces."

Going to the prior art, we find that Mr. Hillard, complainant's expert, admits that, if the word "properly" be eliminated from claims 1 and 4, such claims would read upon the prior art. This, to me,

seems a concession that all that distinguishes the alleged device of claims 1 and 4 of the patent in suit from the prior art is "means" for compelling the insertion of the card in the card-holder "properly"; that is, right end up, and right side to the printing or impression mechanism. If such means are found in this or analogous arts, claims 1 and 4 are invalid. This patent is not for an improvement in such means, but, as stated, for all such means.

It seems to me that the prior art plainly discloses such means for such purpose, and that the combinations of the claims in suit disclose no new or novel means, no new mode of operation, no new result. The patent in suit adds to an improved time-recorder and to a recorder old devices somewhat changed and improved, perhaps, to adapt them to their new environments, but in no such way or to any such extent as to amount to patentable invention in view of the prior art, or to allow the owner of such patent to shut out all competitors from the use of such devices, especially when they do not copy or follow anything shown, illustrated, or described by the patent. Turning to defendant's Exhibit 12, patent to Charles C. Gale and others, dated July 28, 1891, No. 456,650, for car mileage register, which is nothing more nor less than a recorder, and we find that the object of that device was—

"to provide means whereby the mileage of a railway-car may be automatically indicated and registered, and the indicated mileage may be at any time recorded upon removable record-slips, with such other information as may be desired. \* \* \* while such indicating mechanism is capable of being made at any time to impress upon suitable record-slips introduced and brought in contact therewith the mileage indicated and other desirable information."

A case, A, is shown which answers in every way to the card-receiver of the patent in suit, and—

"space is provided for the insertion into the case, A, of a record-slip of paper, cardboard, or other suitable material."

It is upon this that the record is to be made. On this record-slip, or card—

"numbered or graduated dials, corresponding in size and position to the dials, c, c, are printed on the record-slip, and the location thereon of the punctures or impressions made by the points, d, d, gives the reading of the mileage on the record-slip. K is a block or projection on the frame, C, on which block a type plate containing any desired matter, such as the number of the car, its size, ownership, style, etc., is to be affixed, projecting in the same vertical plane as the points d, d, and consequently impressing the record-slip in the same manner when the cam, g, is revolved."

Also the following is found therein:

"In operating our invention, the procedure is as follows: When first attached to the car, the meter is set with all its dials at zero, or on any determinate number, which is noted. At any time afterward when it is desired to ascertain the mileage of the car, it is only necessary to insert the key, which action withdraws the guard-plate covering the opening, b. Then to insert the record-slip into its recess, turn the key, which causes the cam to force the meter-frame forward and impress upon the record-slip the type-plate and dial-points. Then to reverse the movement, withdraw the record-slip, and finally withdraw the key, allowing the guard-plate and its levers to close all the openings. The location of the marks made on the record-slip by the dial-points indicates the miles the car has run by comparison with

the original setting of the meter or a previous intermediate record of the mileage."

Then comes the following:

"As a means of insuring the correct position of the record-slip when inserted for impression, we prefer to form the same of rectangular form, notched on one edge or one corner, and to form the recess for its reception of the same shape, as shown in Fig. 9, so that the slip cannot be fully inserted in any other than the correct position."

In short we have the record-card or slip, the card-holder case, A, the means for printing the record on the card, and the "means" for insuring the correct or "proper" insertion of the card in the card-holder or case, A. The card is notched on the edge (as in the patent in suit), or at the corner thereof (as in defendant's recorder), and, as the holder has a corresponding formation, the card cannot go into the holder except in the correct position, that is, "properly." With this before him, any mechanic half skilled in the art would have devised the "means" for insuring the placing of the card in the card-holder of these time-recorders, or in recorders, "properly"; would have so arranged the holder that the card would be "properly inserted in place to receive the impression."

In fact, such devices in windows, boxes with sliding covers, mills, etc., are very old, and so well known to mechanics that a court ought to take judicial notice of them. It seems to me impossible to conceive of a mechanic so dull that it would not occur to him that a square or oblong card or record-slip with square corners would not pass—could not pass—a triangular piece of wood or metal placed anywhere in the groove of the card-receiver, apex up and next the frame, but so it could be pushed outwardly, and then by spring fixture resume its place when the pressure was removed, but that the same card would pass the moment you cut a corresponding triangular piece from the corner of the card so it would pass down by the side of the triangular piece in the frame and push it to one side if you inserted the card properly. So if you desire to insure the full entrance of the card into the full depth of the card-receiver when properly inserted, a notch at any point on the end of the card except the center, with a corresponding obstruction to register with it when properly inserted, would insure the desired result, and the obstruction would prevent such full entrance of the card when not properly inserted, as then the obstruction would prevent the entrance of the card to its full depth. Contact of the card, when pressed to its full depth in the holder or receiver, with the means for operating the lock, is a mere matter of mechanical calculation and arrangement, and, in view of the prior art, involved no invention.

But, turning from the Gale patent to the Bundy patent of September 6, 1892, No. 482,293, for workman's time-recorder, we find such a time-recorder, suitable recording mechanism and means for driving it, suitable impression mechanism and means for actuating it, a locked platen and hammer (or, what is the same thing, "impression mechanism"), and means for actuating it, and for both locking and unlocking it, and which means for unlocking are actuated by a check, the full equivalent of a card, which moves in the full equivalent of



the card-guide and receiver called the "check-chute." To insure the proper insertion of this check in the chute or receiver, with the printing number on the proper side, we have, as the specifications explicitly declare, a guide-groove in the check and a "short, vertical fin or rib, K, secured on one side of the chute and projecting into it," and "when the check is inserted it" (the fin) "fits into the guide-groove on the back thereof and guides it" (the check), "and also insures the proper insertion of the check with the printing number on the proper side." The prior art mentioned has shown two of the different means for insuring the proper insertion of the card; and, turning again to the specifications of the patent in suit quoted, we find:

"The card or other removable record-surface may be brought into contact with the means for unlocking lock 55 in any suitable way and by any suitable means. In practice I prefer, however, to cut away a portion of the card, as at 83, shown in Fig. 7, and so arrange the unlocking means and the cut-away portion of the card that the unlocking means will be struck and actuated by the card or other record-surface only when the latter is inserted in the card-holder with the card facing in the proper direction for receiving the impression. This may be accomplished in many different ways; but I prefer to accomplish it by placing in the path of the card a fixed stop," etc.

An old idea is not patentable. The patent in suit shows no new means—no improved means. The patent claims to add any one or all of the old and well-known devices for accomplishing the result stated in a combination of old devices, so that in the end we have a combination of old elements but accomplishing no new result, as is shown by the following from the prior Bundy patent, which fully describes the means for and manner of bringing the card, or, what is the same thing, the check, into contact with the unlocking means, and unlocking the impression mechanism so it will operate, strike, and cause the printing to be accomplished. It matters not in my judgment that the printing was not done in precisely the same way in the prior devices. The following is the quotation from the prior Bundy patent referred to:

"A slotway, 1, is cut in one side of the check-chute, and a pivotally-mounted lever, m, projects through it into the check-chute, so that the edge of the check engages with it and pushes that end down as the check is pushed into the chute, as shown in Fig. 4, and this raises the connecting-rod, m', the lower end of which is connected to the crank-arm, m'', which is secured upon the rock-shaft, n, which is journaled in the frame, n', and the back of the casing, as shown in Fig. 3. The arm, P, is also secured upon said shaft, and upon its upper end carries the impression-platen, r, so that when the connecting-rod m' is pulled up, as aforesaid, it partially rotates the shaft, n, and throws the platen away from the side of the chute, as shown in Fig. 2, and r' is the retracting-spring which gives the impulse to the platen to strike a quick blow to make an impression. Upon the crank, m'', an arm, s, is secured carrying a hammer upon its outer end, and therefore, when the rod, m', is raised, as aforesaid, said hammer is raised away from the bell, s', and the spring, r', causes it to strike a single blow upon the bell. Upon an arm upon the side of the check-chute I pivot a hook, l, the opposite end of which projects into the check-chute, Fig. 10, so that the dropping check strikes it, and, depressing this end, raises the hook, Fig. 5. When the rod, m', is raised, and the arm, s, with it, the hook, l, engages with the pin, 2, upon this arm, Fig. 10, and this holds the platen and hammer in the position shown in Fig. 2. Then, when the check drops and throws up said hook out of its engagement with said

pin, both the platen and hammer are released to make the impression and give the alarm. When the check has thus unlocked the platen and hammer, it rests upon the sliding stop, 3, and the figures, h", thereon are then in the printing-line. This stop is suitably mounted alongside of the hook, 1, and is provided with a slide-pin, 4, which extends out beyond the edge of the chute, and an arm, 5, secured to the platform, Figs. 1 and 2, is adapted to engage with this pin just as the platen is making an impression, and force said stop back and release the check, which then drops from the chute into a receiver, 6. \* \* \*

"An arm, 15, is secured upon the rod, m', and is raised therewith when the check is inserted, and then, when the rod is retracted, as aforesaid, the end of said arm will engage with a tooth of the star-wheel and rotate it one tooth, and thus through the train of gearing rotate the reel to wind the ribbon thereon from the spool and feed it. A spring-pawl, 16, engages with the teeth of said star-wheel.

"Upon the hammer-bar I mount a spring in such manner that it will bear upon the hook, 1, when it is in engagement with the pin, 2, and hold it in engagement, as shown in Fig. 10. Upon the hammer-bar I also secure a spring, 30, in such manner that when the hammer-arm is raised by the introduction of the check it will come into contact with the check-stop, 3, and force it into position to operate as a stop, as shown in Fig. 5 and also in Fig. 2.

"A spring, 31, is secured upon the check-chute, with its lower end projecting into it in such manner that a check will readily pass it downward; but after it has been sprung out above the check, the latter cannot be withdrawn, then being beyond the control of the workman. This also prevents fraud by a workman and false registering, as could be done without this spring-finger, in that he could attach a wire or cord to the check, drop it down to the printing-point, make the impression from it, and then pull it back out through the top of the chute. An arm, 32, is secured upon the back of the case, and it projects outwardly in such manner that the platen-arm, p, engages with or strikes against it in such a way as to cause said arm, after it has been set and released as aforesaid, to spring forward and strike an impression blow and then rebound and throw the platen away from the printing-line."

As to claims 1 and 4, in view of the prior art, I find no patentable invention. I think the claims are void, and so hold, irrespective of the question of the inoperativeness of the device shown in complainant's patent. While we must, I think, read a card into claims 1 and 4, it is not necessarily the card of claim 2.

As to claim 2, we have the element of a peculiar specific card. Now assume that claims 1 and 4 refer to some other or different card, or any card which will release the impression mechanism when properly inserted and will not when improperly inserted, I am inclined to hold claim 2, narrowly construed to cover what is shown and described, valid. Broadly construed, it is invalid. As to this claim, the defendant's witness, Arthur S. Browne, says:

"In other words, the card with its cut-away portion or notch is functional with the mechanical elements of claim 2 to produce the stated result, by reason of the fact that the cut-away portion registers with the abutment when the card is put in the receiver wrong side out, so that the recording mechanism is not unlocked, and can be unlocked only when the card is put in the receiver properly faced.

"So far as I know, the subject-matter of this claim, including the recited mechanical elements and the card so cut away as to register with the abutment by straddling it so as not to move the abutment when put in wrongly, was new with Bundy, and to this specific extent the subject-matter of claim 2 of the Bundy patent seems to me to possess novelty."

I think this claim must be confined to what is shown and described.

The means described in the patent in suit, including card, for insuring the insertion of the card "properly," or that it shall be "properly inserted" in order to reach and actuate the unlocking means provided, are as follows: (1) The card-holder consists of a stationary framework with two uprights having slots in which the card moves vertically; (2) in this framework is a vertically-movable shelf connected with and automatically actuated, moved up and down, by the clock-movement at regular stated intervals, to bring the horizontal columns on the card, when inserted, upon the printing-line. The proper or improper insertion of this card has no effect whatever on the movement of this shelf. Its position in the framework is determined absolutely by the clock-movement, except that it may be manipulated by the hand, but not by the hand of the workman, who cannot get at it. If we stop here and provide no means to prevent the free movement of the card when inserted in the framework, it will drop down when inserted and rest on the shelf itself and move with it; (3) to prevent the card from dropping too far down and coming in contact with the so-called "abutment," which forms one end of the lever connection which operates, when pressed upon at this end, to unlock the impression mechanism, and which abutment is marked "56" in Fig. 9 of the drawings, this shelf is provided with a "stop," 84 (Fig. 9), which is mounted on the shelf, attached thereto, and moves with it. This stop is nothing more nor less than a piece of wood or metal attached to and extending above the shelf, so that it prevents the straight-edged card from reaching the shelf. It is an obstruction to the downward progress of such a card. As shown and described, the abutment, 56, is merely one end of a bell crank lever (57), and is pivoted on the movable shelf, 15, so that the abutment itself is at or near the end opposite the end of the shelf to which is attached the "stop." This abutment extends a little above the movable shelf, and substantially as much above it as does the stop, 84, but the stop prevents sufficient pressure on the "abutment" to operate this bell crank lever. When the abutment is pressed upon from above, as by the card, it unlocks the impression mechanism, inasmuch as it moves the other end of the lever and pushes the lock, or locking-lever, 55, from its position under the operating-lever, 47, and permits the operator to push down or up the handle of lever 47, and thus cause the hammer and platen to strike its blow and do the printing. It is self-evident that any card made to fit the space in the frame of the card-holder will reach the stop, 84, and be supported by it and the movable shelf to which it is attached, and also to an extent or slightly by the abutment, 56, upon which it rests lightly, and this of course assists the frame in preventing the card from tilting. It is self-evident that no ordinary card can reach the abutment, 56, and, however hard pushed, press thereon sufficiently to operate it, and hence the card used must be so made or formed as to permit it to go further down in the frame and press upon the abutment, 56, so as to operate the bell crank lever. To permit this, it is only necessary to cut away that part of the card which meets this stop, 84, so as to permit the card to pass further

down and press upon the abutment, 56, located at or near the other side of the frame. Hence we have the cut-away portion of the card, as in the prior art, Figs. 9 and 11, of the Gale patent, No. 456,650, referred to. If the stop, 84, were located next to the left post of the card-holder, we would cut away a corner of the card, as in the Gale patent; but as the stop is at a distance to the right of that part of the frame, we cut out a small part of the card sufficient to allow it to straddle the stop, 84. As stated, the card thus cut away now presses upon the abutment, 56, and releases the lock. It is also self-evident that, in order to have the lines and spaces indicating the days of the week presented to the printing type, we must face the card that way—that is, present the face of the card having those lines to the type, right end up, of course—and that when this is done we have “properly” inserted the card. It is also evident that when the card is thus inserted we must have the cut-away portion of it meet or register with the stop, 84, so as to straddle it and allow the card to pass on and press upon the abutment, 56. Having located the stop in the machine, if we put in an ordinary card properly faced to the type, we determine where the cut-away portion shall be located, and the cut is made to correspond. It is self-evident that if the card is put in wrong end up or wrong face out, the cut-away portion will not register with the stop, 84; that the card cannot reach the abutment, 56, and press upon it, and so release the lock, 55, and allow the movement of the lever which actuates the impression mechanism. If the stop were located midway between the posts or uprights of the frame, it would make no difference which way the card faced, as it would straddle the stop and press the abutment in either event, hence the necessity of placing the stop to one side of the center line of the holder. To further insure the nonoperation of the unlocking mechanism when the card is wrongly inserted, it is wise to have the stop, 84, at the same distance from the left-hand post of the frame as the abutment, 56, is from the right-hand post, as then the cut-away portion of the card when wrongly inserted will register with the abutment, straddle it, and hence there is no possible danger of actuating the unlocking mechanism when the card is improperly inserted—that is, wrong face out—as the card cannot reach the abutment at all. Hence the expression in the specifications, page 4, second column, line 75:

“Preferably the cut-away portion is made so that in the position of the parts it will register with abutment 56.”

When properly inserted, the cutaway portion must register with the stop, 84, on the other side of the space between the posts of the frame of the holder; that is, on the side opposite that occupied by abutment 56. It is also self-evident that no card not having a cut-away portion to register with the stop will actuate the abutment, as it cannot reach it. It follows, I think, that the card referred to in claims 1 and 4 must be the same card specified in claim 2, and that claims 1 and 2 are the same and cover precisely the same combination and device.

The witness Browne says that there is novelty in having a card so cut away as to register with the stop when properly inserted and

with the abutment when wrongly inserted; that is, this, and this only, differentiates the patent in suit from the prior art. Concede this, and there is no substantial utility disclosed. The stop keeps the card from the abutment when wrongly inserted, and is all-sufficient for the purpose, as the frame prevents the card from tilting. The registering of the cut-away portion of the card with the abutment is a mere incident and only a preferred construction. No stress is laid upon this feature. However, it is unnecessary to decide that claim 2, narrowly construed to cover this feature, is invalid. It is all-sufficient that defendant does not make, use, or sell any such device or combination. To put this feature of properly facing the card into a recorder or a time-recorder so as to actuate the impression means and the recording mechanism, when and only when the card is properly faced, did not involve invention—required no mental conception amounting to patentable invention. In fact, it was not new or novel, unless it was new or novel to substitute a card for a metal check. To cut a notch in a card so it would straddle an obstruction was not a new idea, and to provide an obstruction or stop to prevent the movement of the card in the holder was no novel idea. A stop for the check, to prevent its passing far enough into the chute to actuate the locking mechanism, was old in the art, shown in the prior Bundy patent. To make the cut register with the stop, and thus insure the proper facing of the card in the holder, was not new or novel; and to keep the card from the abutment required only the affixing of the stop to the shelf—a simple proposition that would occur to any one. But the feature alluded to, that of having a stop, an abutment, and a cut-away card, and of having the cut-away portion register with the stop when properly inserted, and with the abutment when improperly inserted, is it seems, novel, even if not useful.

It is evident that neither claim in issue here includes the stop, 84, unless it is an integral part of the shelf. Claims 1 and 4 do not mention a card-holder, nor do they mention a card as an element of the combination. This stop is no part of a recorder of the kind mentioned as one element of the claims. The stop is no part of the recording mechanism, or of the impression mechanism, or of the means for actuating them, or either of them, as it is a distinct means to prevent their being actuated—to prevent their operation. The stop is not a part of the lock, and clearly not a part of the “means actuated by the card or other record-surface, when properly inserted in place in the machine,” as it is not actuated or moved at all, and is not intended to be, except as it moved up and down by the clock-movement at stated intervals as mentioned. The stop, on the contrary, is intended to prevent the card from reaching and actuating the means referred to. The stop is an important mechanical element, but is not included in either claims 1 or 4, and can be read into claim 2 only as a part of the shelf to which it is attached. But the specifications describe the shelf as distinct from the stop. The specifications do not speak of or mention a shelf provided with a stop. If the stop is omitted, the impression mechanism will be actuated by the card, and the recording mechanism brought into play whether the card is properly or improperly inserted, as in such case it will reach and actuate

the abutment and consequently such mechanism. The stop is specifically mentioned and claimed in claim 3, and is considered an independent and essential element thereof. The complainant's expert admits that the stop, 84, must be read into claims 1 and 4 to differentiate them from the prior art. I do not think there is any authority for reading the stop into either claims 1, 2, or 4. I do not think we can import into this claim an essential independent mechanical device or element not mentioned therein for the purpose of making effective the words at the end of claim 2, viz.—

"whereby the recording mechanism cannot be operated to make an impression until the card or other record-surface has been properly inserted in place to receive the impression."

If the means, or elements, mentioned and claimed in the claim itself, fail to accomplish this result, can we import an element from some other claim and add it to the elements of the first claim in order that the combination shall accomplish the result desired or indicated? I think not. And—

"means, adapted to be struck and actuated by the card or other record-surface only when the latter is properly inserted in the machine with the cut-away portion of the card in its proper position in the card-holder, for removing the lock from its locking position to permit the operation of the impression mechanism"—

refers to the abutment as it is "to be struck and actuated," and the expressions "properly inserted" and "cut-away portion in its proper position in the card-holder" do not import the stop into claim 2; as the card is "properly inserted" and the cut-away portion thereof is in "its proper position" whenever the card is faced properly and is inserted right end up.

The defendant's alleged infringing machine has the usual card-receiver with the movable shelf, old in the art, and at one end of the shelf, left hand, made integral with it as cut from the metal and forming a part of it, is a raised triangular piece fitting into the groove of the post of the frame, which of course prevents the card with a straight-end edge and square corners from dropping further down so as to come in contact with the lever which actuates the means for unlocking the impression mechanism. This triangular piece operates precisely as does a ruler or stick set up slanting in a window frame, when open, to prevent the sash coming all the way down to the bottom crosspiece of the frame. The corner of the card is beveled as in the Gale et al. patent referred to. Defendant has followed the Gale patent, as he has the right to do. The fact that such a triangular piece with a beveled card performs the function of compelling the proper facing of the card before it presses upon the abutment is not new, as Gale says, "so that the slip (card) cannot be fully inserted in any other than the correct" (proper) "position." All complainant did was to place a stop to prevent the card from being fully inserted when not in the correct position, and to locate his abutment where it would be pressed upon by the card when fully inserted in the correct position, and then so locate his abutment that the card which straddles the stop when properly inserted would also straddle the

abutment when improperly inserted. It became a mere matter of locating his abutment; that is, the end of the bell-shaped lever. Ordinary mechanical skill was fully competent for the undertaking. Defendant's abutment is a long arm with a flange for the card to rest upon, pivoted to the shelf, diagonally so that one end is above the shelf and the other below its upper edge, and here it connects with a perpendicular shaft which connects with a lever which, when moved, unlocks the impression mechanism and permits the workman, by pressing a lever, to print his time on the card. Defendant's card is not cut away to straddle the triangular piece or stop, or so cut as to straddle or refuse to come in contact with the abutment end of the first-mentioned arm. If the triangular stop fails to prevent the ordinary card from coming in contact with the abutment (as we will term it) of defendant's device, then defendant's card comes directly in contact with the abutment. No means are provided for such an emergency.

If there be anything new or novel in complainant's combination, it is absolutely lacking in defendant's alleged infringing device or machine. Defendant's machine is but a reproduction of the prior art. The same is true of complainant's, except in the particular mentioned which is omitted from defendant's. We have no new combination of old elements producing a new or an improved result, or having a new mode of operation.

Infringement is not shown, conceding the validity of claim 2, and the bill is dismissed, with costs.

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BLISS v. ANACONDA COPPER MINING CO. et al.†

(Circuit Court, D. Montana. January 25, 1909.)

1. EQUITY (§ 409\*)—REFERENCE WITHOUT CONSENT—FINDINGS OF MASTER.

Where an equity cause is referred to a master without the consent of both parties, his findings are merely advisory.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 921; Dec. Dig. § 409.\*]

2. INJUNCTION (§ 14\*)—GROUNDS OF RELIEF—DISCRETION OF COURT.

While there is no doubt of the jurisdiction and power of a court of equity to enjoin the continuance of a business, although lawful, upon the reasonable certainty of irreparable injury to the property or rights of another, the writ of injunction is not *ex debito justitiæ* for any injury threatened or done to land or rights of a person, but the granting of it must always rest in sound discretion, governed by the nature of the case, and the court in the exercise of such discretion will consider all of the circumstances, the consequences of its actions and the real equity of the case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 14; Dec. Dig. § 14.\*]

3. INJUNCTION (§ 1\*)—GROUNDS OF RELIEF—DISCRETION OF COURT.

The maxim that one must so use his rights as not to infringe upon the rights of another must be upheld by preserving the absolute right to recover judgment for damages, wherever substantial injury is shown; but

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† On apportionment of costs, see 167 Fed. 1024.

there is no inconsistency between this principle and that which makes the writ of injunction a matter for the sound discretion of the court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 1; Dec. Dig. § 1.\*]

4. INJUNCTION (§ 208\*)—REMEDIES OF OWNERS OF PROPERTY—DECREE.

Where there are two citizens, each of whom is engaged in a lawful business, one in mining and the other in farming, and there comes a conflict when neither can enjoy his own property without interfering to some extent with his neighbor in the enjoyment of his, the court in determining their respective rights should, where possible, so frame its decree as to avoid the destruction of the rights of either.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 427; Dec. Dig. § 208.\*]

5. NUISANCE (§ 80\*)—ENJOINING LAWFUL BUSINESS—COMPARATIVE INJURIES.

Complainant, the owner of a farm, which he rented, situated in Deer Lodge valley, Montana, brought suit to enjoin the maintenance and operation by defendants of the Washoe copper smelter, on the edge of the valley, on the ground that the fumes and the arsenic precipitated from the smoke from the smelter injured the crops and forage on the farm and poisoned the stock thereon, as well as on the other farms in the valley, and made it a public nuisance. The suit was in reality brought as a test case on behalf of a large number of farmers who were joined in an association. The evidence showed that some injury had resulted to complainant's and other farms in the valley, within the so-called "smoke zone," but that it had been lessened to a large extent by a reconstruction of the plant some two years prior to the suit at large expense, and that since that time the injury to farms in the valley had not been so serious as to render farming and stock raising thereon unprofitable. The smelter was built at a cost of nearly \$10,000,000, and treated about 7,000 tons of ore per day, being practically all of that produced in the Butte district, and its production of copper was from 17 to 20 per cent. of that in the United States. The operation of the smelter and the mines tributary thereto constituted one of the chief industries of the state, on which a large part of the population of Butte and Anaconda and the farms in the vicinity were dependent for a livelihood. It appeared that no better location for the smelter, if as good, could be found elsewhere, and that it was essential to the successful operation of the mines; and it also appeared that the result of granting an injunction as prayed would be to put the complainant and other landowners and farmers in a position where they can compel the defendants either to buy all the lands of the farmers at their own price or lose their own vast property. *Held*, that an injunction restraining the operation of the smelter would not be granted on the facts shown, but that, if it appeared that any equitable adjustment of the rights of the parties could be made, the case would be retained for that purpose.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. § 80.\*]

In Equity. On final hearing.

R. L. Clinton and C. M. Sawyer, for complainant.

C. F. Kelley, Forbis & Evans, and A. J. Shores, for defendants.

HUNT, District Judge. Fred J. Bliss, a resident and citizen of Idaho, instituted this suit on the 4th day of May, 1905, against the Anaconda Copper Mining Company and the Washoe Copper Company, Montana corporations, and prayed for permanent injunction forever restraining and enjoining the defendants from operating a certain smelting plant situated near the city of Anaconda, Mont., and from

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



treating ores described as containing poisonous and deleterious substances, and for general relief.

The substance of the more important allegations of the bill is: That complainant owns about 320 acres of land, situated about five miles in a northeasterly direction from the Washoe copper smelter, operated by defendant Anaconda Copper Mining Company, in Deer Lodge valley, Deer Lodge county, Mont. That before the construction of the said smelting plant, Deer Lodge valley, and a large area thereof designated by complainant as the "smoke zone," was a rich and fertile farming country, well watered, adapted to the raising of all live stock, and that there was a ready sale at good and profitable prices for all farming products and live stock raised in the valley. That commencing about September 1, 1903, and ever since, defendants have been treating and reducing in the Washoe smelter about 7,000 tons of ore a day, containing large quantities of arsenic, sulphur, and other noxious and poisonous substances, and that the said smelter was constructed so near to the farming neighborhood described that large quantities of sulphur, sulphuric acid, sulphurous acid, arsenic, copper, and other poisonous substances were carried out through the flues connected with a large smelter stack and discharged into the atmosphere, which substances were carried by the wind over and upon the said farming region in Deer Lodge valley, depositing large quantities of acids and poisons over the said portion of the Deer Lodge valley, and more especially upon complainant's lands, poisoning the pastures and burning and dwarfing the crops growing on his premises during the summer of 1904, and poisoning all the soil of said premises and of Deer Lodge valley in the "smoke zone," and the hay, grasses, and grain growing thereon, poisoning all the live stock in the said area, causing large numbers of horses, sheep, cattle, and swine, so poisoned, to sicken, and a great many to die, so that the said area of Deer Lodge valley is rendered wholly worthless for stock raising or farming purposes. That more than 100 farmers live in the said "smoke zone" and own and possess more than 50,000 acres of improved farming lands therein. That all of said farmers are situated as is the complainant, and are similarly affected by said smoke and fumes from the Washoe smelter, and that the smoke and smelter fumes affect at the same time all of said farming neighborhood. That no one farmer could prepare his case for trial without great expense, and that, as several suits would have to be instituted from year to year to recover damages for loss of crops and live stock, complainant would not be able to institute or maintain the same, owing to the great expense entailed. That, if the smelter continues to operate, the lands and soil in the "smoke zone" will each year become more highly impregnated with such poisonous substances, until no crop or vegetation can be produced. That more than \$2,000,000 worth of real and personal property owned by the farmers is situated in the said "smoke zone" and is being damaged and destroyed by the smelter fumes and poisonous ingredients contained therein, and that all will ultimately be entirely destroyed by the continued operation of the said smelter. That the homes of the farmers will be destroyed, and that they will be compelled to leave the Deer Lodge valley, because they will not be able to make livings for their families. That the smelter fumes and the

poisonous ingredients have killed nearly all of the trees in the said "smoke zone," as well as injured and killed the timber and trees for many miles around the smelting plant, rendering the valley barren. That the rental value of the complainant's lands prior to the construction and operation of the smelter was \$1,000 per annum, but that the present rental value would not exceed \$300 per annum. That since 1903 the lands of complainant have been damaged to the extent of \$20 per acre, or a total permanent damage to said lands of \$6,400. That complainant and the other farmers similarly situated have no adequate remedy at law. That, if the smelter should close its operations, the farms, in the course of time, could be restored to their former productivity. That there are many places in Montana where smelting plants could be operated without damage to the adjacent country. And that the poisonous substances complained of can be precipitated and impounded at the said smelter plant with very little extra or additional cost to the defendants in the treatment of said ores.

The defendants, by answer, plead, among other things, that some quantities of the poisonous and noxious substances mentioned in the bill are discharged into the air through the stack of the Washoe smelter, and that the smoke containing such substances is carried and disseminated over a very large area of country, including, at times, the area termed by the complainant "smoke zone." They deny, at length, that since 1903, any injury of any kind, whatsoever, has been done or will be done to the complainant's property, or to the property of anybody in the Deer Lodge valley, by the smelter emanations. They plead that they have no other works available for smelting ores mined by them, that they have adopted the most modern methods for treating ores, and they aver their willingness to continue to do all within their power to prevent possible injury or annoyance to the inhabitants of the valley. They allege solvency, and set up in detail equitable defenses, saying, in effect, that, if the works were to be closed, great injury would be done to the cities of Anaconda and Butte, and to Deer Lodge and Silver Bow counties, and to the interests of the people residing in those and other parts of the state, and that the revenues of the state would be affected; deny that the deleterious substances mentioned in complainant's bill could be precipitated or impounded with better results than at present; and say that, if the plant should have to be removed, it would amount to a practical destruction of their property, and that, if the smelter is not allowed to operate, it will be impossible for the ores which are now treated at the Washoe smelter to be treated profitably elsewhere, and that it is impossible to select any more convenient or suitable site than the present. Complainant filed a replication, averring that he would maintain and prove the allegations of his bill.

After the presentation and decision of motions, trying the form and substance of various averments of the pleadings, the court, against the objection of the complainant, on December 18, 1905, referred the cause to the standing master in chancery, O. T. Crane, with directions to take the testimony and to find the material facts and report the same to the court. In pursuance of this order, the taking of testimony commenced on January 15, 1906, and continued from time to

time thereafter until about March 20, 1907. Thereafter, arguments were had before the master, and on June 1, 1907, the case was submitted to him. On January 10, 1908, the master filed his findings.

The most important of the master's findings are: That the sulphur in the smoke from the smelter stack has caused no damage or injury to the crops on complainant's land since the remodeling of the Washoe smelter in 1903; but that arsenic was deposited at times upon complainant's farm in a way to injure the fodders grown thereon. That live stock was poisoned from the effects thereof, and a portion of the Deer Lodge valley was less valuable for stock raising and grazing purposes than it otherwise would be, by reason of the operation of the smelter. That the complainant, Bliss, has suffered special damage in the sum of \$350, in the depreciation of the rental value of his land. That the farmers in the Deer Lodge valley constitute a neighborhood, and that arsenical fumes emitted by the smelter more or less injuriously affect all hay, grass, and fodder in the neighborhood. That, if the smelter continues as now operated, the future crops will be more or less poisoned, and the live stock will be sickened; but that, if the smelter should close, the effect of the poisonous matters would cease. That there has been no injury to the soil of any permanent character. That in 1901 complainant's land was worth not to exceed \$8,000, and at the time of the suit it was worth not to exceed \$4,000, because of the improper farming done, and because of the injury from the arsenical emanations from the smelter. He finds that in 1904 the farmers of Deer Lodge valley formed themselves into an association to procure evidence and prosecute claims and suits against the defendants on account of the maintenance and operation of the smelter, that this suit was brought mainly for the benefit of the farmers' association, that Bliss himself was not a member thereof, and that the control of this action has been exercised by Smith, president of the farmers' association, in the interest of the association. The findings set forth: That the present processes used at the Washoe smelter are the only practical ones that can be followed in the reduction of the ores treated; that there is no site in Montana that could be selected where operations could be carried on with less damage and inconvenience; that the mines in Butte have their ores smelted principally at the Washoe smelter; that, if the smelter were to close, two-thirds of the mining operations in Butte would stop; that irreparable injury would be done to the complainant and others owning property in Deer Lodge valley, because of the loss of markets for the products of their lands; that the value of their lands would be depreciated; and that the damage which would accrue to them would be greatly in excess of the damage they would sustain by reason of the continuance of the smelter, as it is now operated.

Thereafter counsel for complainant and for defendants, respectively, filed exceptions and objections to the findings and report of the master. The exceptions amounted, in substance, to this: That some of the findings of fact were against the weight of evidence, that some were not supported by the evidence, that the findings were defective

in not covering certain issues, and that others were upon immaterial and irrelevant issues.

The case, having been referred to the master without the consent of the parties, is conceded to be one where the findings reported are merely advisory, and where the court may adopt the information communicated by the master's findings upon the evidence, and may accept the same or disregard it, in whole or in part, according to its judgment, as to the weight of evidence. Such is the rule as declared by the Supreme Court in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, and as recognized by this court when it denied this complainant's motion for an order to require the master to file his findings of fact without setting a time to receive exceptions to his report. *Bliss v. Anaconda Copper Min. Co. et al.* (C. C.) 156 Fed. 309.

Having accepted the view therefore that the case is for final decision upon the pleadings and proofs, counsel for the respective parties, in their elaborate and able arguments, have addressed themselves to the whole record, referring however, to many of the findings of the master as correct and acceptable to both sides, yet alluding to others as foundation aids only upon the issues involved, not casting the burden upon either of the parties in their exceptions, and not like the findings of an independent tribunal, to be taken as presumptively correct, only to be disturbed where clearly in conflict with the weight of the evidence upon which they were made. These considerations are the law applicable to the method of approaching the investigation of the record. The learned master, himself, took this view of the effect of the reference; and it is just to him to say that his work has been of such a helpful character that counsel, throughout their arguments, have recognized the vast amount of painstaking study which he has evidently given to the testimony, and have accorded to his findings the most respectful attention.

Two hundred and thirty-seven witnesses testified. The evidence covered a very wide scope, reaching out, not only to the substantive question whether the single complainant, Bliss, has suffered special injury because of the smelter fumes blowing over his land, but whether, as a truth, because of the fumes blowing over the farms of others, injury has been done, and the Washoe smelter is a public nuisance, as defined by the law. Farmers and stock raisers from within the neighborhood of the Deer Lodge valley gave evidence as to what they observed or knew, and scientists of the widest experience advanced their views in the general and technical diseases of live stock, and in agriculture, chemistry in its various technical branches, toxicology, pathology, pathological histology, anatomy, botany, bacteriology, zoology, mineralogy, metallurgy, and in forestry.

Exhaustive examinations of each technical expert followed careful special study and preparation in the particular subject testified to, and nearly every assertion claimed to rest upon scientific learning and research was challenged by cross-examination, and disputed by experts produced upon the opposite side. Under the circumstances, we can well understand that jealous regard which many of them observed for

nicety of distinction, and why, too, a number of them were exceedingly cautious in declining to give opinions which called for expert knowledge one whit outside of the technique of their respective specialties. Among the expert witnesses who testified may be mentioned: Prof. Joseph Blankenship, of the Agricultural College of Montana; Prof. Charles A. Doremus, of New York; Prof. M. J. Elrod, of the University of Montana; Dr. Robert J. Formad, of the United States Bureau of Animal Industry; Prof. W. D. Harkins, of the University of Montana; Dr. M. E. Knowles, state veterinarian of Montana; Dr. Duncan McNab McEachran, of the Canadian government veterinarian service; Dr. V. A. Moore, of Cornell University; Dr. Leonard Pearson, of the University of Pennsylvania, and state veterinarian of Pennsylvania; Dr. D. E. Salmon, formerly head of United States Bureau of Animal Industry; Dr. Harry Snyder, of the University of Minnesota; Dr. Ralph E. Smith, of the University of California; Dr. Theobald Smith, of Harvard University; Dr. R. E. Swain, of Leland Stanford, Jr., University; and Prof. F. W. Traphagen, of the Colorado School of Mines.

Exhibits, more than 800 in number, accompany the record. There are numerous specimens of bones, animal tissue, consisting, in part, of stomachs, noses, sections of arteries, livers, kidneys, etc., flue dust, of normal and abnormal plant life of the Deer Lodge valley, and of portions of trees and shrubs; while hundreds of photographs were used to illustrate varieties of conditions relevant to the issues.

To enter upon a detailed statement of the testimony, which alone covers over 25,000 pages, would be to extend this opinion far beyond what is necessary. It would require copious extracts from the direct and cross examinations of many witnesses. Conflicts of reason would have to be set forth, apparent and real inconsistencies would have to be pointed out at length, and the train of reasoning which formed the bases for the seriously conflicting conclusions, and sometimes irreconcilable differences of opinion among scientific witnesses, could only be well and fairly set forth by lengthy and exact quotations from the elaborate, technical explanations. Therefore, to reduce the facts directly to as brief a statement as the record reasonably justifies, I have thought it proper to adopt the substance of those findings of the master which have not been excepted to, and, in a narrative way of my own, simply to state the case and to comment thereon as the weight of evidence warrants.

The Deer Lodge valley in Montana, where complainant's lands are situated, lies north and west from Butte, and northerly and easterly from Anaconda. The valley is high, (over 5,000 feet in altitude), between two ranges of the Rocky Mountains. It is generally regarded as extending from the Northern Pacific Railroad near Garrison southerly toward Butte for a distance of about 40 miles. Its average width is about 10 miles. The mountains about the valley have been extensively exploited by prospectors and miners. Settlements were made as far back as 1864, and during the years thereafter ranches were taken up by stockmen and farmers, so that now the valley is quite well settled; many farmers owning lands and homes therein. In the ear-

lier days, stock raising was the principal occupation of the ranchmen, but from 1880 on, as settlement increased, the ranges became poorer, fences became more common, larger herds of range stock were driven out to more open ranges, and, in a great measure, since about 1881, diversified farming has superseded stock raising. The valley is quite well watered, and is generally adapted to dairy and stock farming, and to the growing of hay, grain, alfalfa, and such garden produce as grows in the mountain valleys of this latitude. The city of Anaconda is in the southwesterly part of the valley upon Warm Springs creek, a mountain stream that flows into the Deer Lodge river. The Washoe smelter, which is said to be the cause of injury to complainant and others, stands on a slope of the mountains west of the valley, a mile and a half southeast of the city of Anaconda.

In 1883 and 1884 a corporation styled the "Anaconda Mining Company," not a defendant, operated a smelter near to the site of the Washoe smelter. The Anaconda Mining Company owned valuable properties in the vicinity of Butte, about 30 miles distant from Anaconda, and was working and developing mining claims which produced large quantities of low-grade ores, only capable of successful treatment by reduction works. These ores were in large part of such a character that, in order to reduce the same and extract the metal contents thereof, it was necessary to concentrate the same by the use of large quantities of water. It being deemed necessary for the Anaconda Mining Company to construct reduction works, extensive investigations were made by its agents for the purpose of fixing points where sufficient water could be obtained, and other natural facilities afforded, for the operation of such proposed works, and a place near where the city of Anaconda now stands was chosen as the best site.

The Anaconda Mining Company, without objection on the part of any one, proceeded to construct its smelting works, and expended in connection therewith several millions of dollars. In 1884, when the works were completed, the company began to treat, and did treat, down to the year 1895, thousands of tons of ore per day. The works of the said company were located upon the north bank of Warm Springs creek, at a point one mile in a northerly direction from the present Washoe smelter, and are spoken of throughout the testimony of the witnesses as the "old works," in contradistinction to the Washoe smelter. Between 1884 and 1895 the Anaconda Mining Company operated the works, but in 1895 transfer of the property was made by the Anaconda Mining Company to the Anaconda Copper Mining Company, a defendant herein.

Thereafter it was determined by the defendants to construct a new smelting plant upon more modern and economical lines than the old works had been constructed upon, for the purpose of reducing the ores mined by the defendant companies and other mining companies at Butte. Investigation was had, and the present site of the Washoe smelter was chosen as being the most available and suitable within Montana, and the Washoe smelter was constructed by the Washoe Copper Company, defendant, for the purpose of taking the place of the old works, heretofore referred to. The Anaconda Copper Mining

Company transferred its smelting operations to the Washoe smelter, and thereafter demolished the old works, and at the time of the hearing of the testimony in this suit had no other available means of smelting or reducing the ores then being treated and smelted by it than the Washoe smelter. Several years were consumed in erecting the Washoe smelter, and about \$9,500,000 expended in its construction.

The ores treated and smelted at Anaconda since 1884 are sulphide copper ores, containing large quantities of sulphur and arsenic, quantities of which substances, in various forms during the processes of smelting have been and are being released and discharged into the atmosphere, and disseminated by the changing air currents over various and indeterminate areas of territory. About 7,000 tons of such ores are treated each day at the Washoe smelter.

Between February and September, 1903, the defendants remodeled the Washoe smelting plant. Before the remodeling, the sulphur and arsenic fumes had been carried out into the atmosphere by means of four chimneys, each of which was about 225 feet in height, and constructed on a level approximately with the smelting plant, but in the remodeled construction defendants built a large brick stack, and connected the same by means of flues with the smelting plant. Prior to 1902 there never was any complaint by farmers or property owners that there was any damage being done by the smelter fumes.

Between February, 1902, and February, 1903, when the construction of the new flues and stack was commenced, many of the farmers of the Deer Lodge valley complained that such quantities of sulphur and arsenic were discharged into the air through the several smoke stacks, with which the smelting plant was then being operated, that the crops and live stock in the valley were being poisoned and injuriously affected, to the great damage of the owners. Claims for damages on account of such poisoning, aggregating several hundreds of thousands of dollars, were presented by the farmers to the defendant Anaconda Copper Mining Company. The company's representatives investigated the matter and reported that damage was being done to the farmers, whereupon the defendant Anaconda Copper Mining Company made settlements and paid out to different persons sums amounting in all to more than \$330,000. The company, intending as far as possible to prevent any further damage and any further claims for damage, had investigations made to determine methods and means by which the noxious substances emanating from the ores in smelting could be caught and retained from the gases and smoke, and that the remainder might be so scattered and disseminated as to cause no damage, if possible. As a result of such investigations, it was determined that the best way to accomplish the purpose was to construct large flues with dust chambers to collect the solid particles, so far as possible, from the smoke, and to erect a high stack upon an elevation at some distance from the smelting plant, in order that the fumes escaping into the atmosphere might be discharged at as high an elevation as possible, and thus become widely disseminated and diluted before coming in contact with any of the soil in the valley.

In order to carry out the results reached through the investigations, the use of the old smokestacks at the smelting plant was dis-

continued, and the defendant companies began to build a large stack, and to construct enormous flues to connect the stack with the various portions of the smelting plant wherein gases and other emanations were created in the operation of reducing the ores treated. In the execution of the plans, an elevated point was chosen as the site for the chimney, and a new chimney was put up, 300 feet above base, and at an elevation of about 1100 feet above the Deer Lodge valley proper. The diameter of the chimney at its base is 31 feet and 6 inches, and its diameter at the top 30 feet inside. The chimney is connected with the smelting plant proper by a double system of flues running from the base toward the smelting plant for a distance of about 1,000 feet. These double flues are connected with the chimney at opposite sides, at the base of the stack, and are constructed partially by excavating cuts in the hill, lining the same with brick, and by arched overhead construction, and are 60 feet in width and about 35 feet in height. At the end of the 1,000 feet of construction of double flues, and connected therewith, is a single flue, which is 60 feet in width, and 35 feet in height. The single flue is about 1,300 feet long, and at the end farthest from the stack is connected with separate flues and dust chambers, running to what are known as the "reverberatory," the "roaster building," the "blast furnaces," and the "converter plant," respectively; these being the several plants in which all the gases and emanations from the smelting operations are produced. Under the main flue and the double flues, tunnels have been excavated, through which cars run, and the flue dust catching capacity of these large flues remains practically unimpaired.

The respective plants in which the gases and fumes are generated are connected with this large flue by dust chambers and separate flues, which are of the following dimensions: A blast furnace chamber 250 feet long, by 40 feet in height, by 40 feet in width; a roaster dust chamber 290 feet long, 40 feet in height, by 40 feet in width; a converter dust chamber 260 feet long, by 40 feet in height, and 40 feet in width; a reverberatory dust chamber of the same dimensions as the blast furnace flue. All of the smoke and gases and other emanations from the smelting plant pass through these various dust chambers and flues up to the main stack, and go to the top of the stack, and thence into the atmosphere.

There is a dust catcher at the rear of the blast furnace building, the McDougall building, and the converter building; its purpose being to remove the dust from the smoke, the dust being removed for its valuable metal contents, and to prevent its going out to do damage to land.

The company also constructed an arsenic plant adjacent to the large flue, containing three furnaces, with a capacity of about 10 tons each, for treating arsenic, for the purpose of separating the arsenic, which collects and settles in the main part of the flue, from a portion of the flue dust before the flue dust is returned for treatment in the smelting plant. Arsenic is a by-product of the ores treated for commercial purposes. The portion of the dust which is high, about 90 per cent., in arsenic, goes to the arsenic plant, and as much as two tons a day is collected and sold for commercial purposes. The portion of dust not



treated for arsenic, approximately 160 tons daily, goes directly back to the reverberatory smelting furnaces in the form of flue dust, and is treated for the extraction of copper, silver, and gold. Some of the arsenic found in the ores treated in the blast furnaces and roasters goes out in slag, and part in volatile substances that is left in the smoke goes up the chimney and out into the air.

The only possible conclusion from the evidence is that, as a result of these briefly described improvements, the defendants built their plant in accordance with the best known methods and processes for accomplishing the purposes intended, and that the endeavor of the defendants has been, through these methods, to render the smoke, fumes, and emanations from the smelter harmless. Furthermore, as the case is submitted, the evidence discloses that the steps taken by the defendants are far greater and more extensive in character than those taken by any other copper smelter, and that the effect of the remodeling of the plant, and the use of the flues, dust chambers, and stack described, has been to prevent and to discontinue, proportionally to the ore treated, the discharge into the atmosphere of much of the dust containing the noxious substances complained of, which, before the improvements, had been discharged into the air from the smokestacks of the plant; and that a resulting effect has been that the fumes, and whatever dust the same contains, which was not removed therefrom, have been disseminated and scattered by air currents at a great height over a large area of country, thus rendering less harmful, in proportion to the ores treated, the smoke, fumes, and emanations from the plant, than was the case before the improvements were made.

Profs. Swain and Harkins, expert chemists, made some experiments by pitot tubes, introduced for ten hours into the big stack, 50 feet above the base, to ascertain the volume of smoke thrown out from the stack every 24 hours, and the milligrams of arsenious oxide contained in one cubic foot of the smoke. But Prof. Swain stated, in substance, that it was impossible to carry out the experiments as attempted by him, without introducing some errors, and that the slightest mistake in the chemical analyses in trying to arrive at the amount of arsenic would be multiplied by millions and millions. So much depended, too, in the experiments, not only upon accuracy in obtaining velocity and the ratio of volume of the sample taken to the total volume going out of the stack, but also upon the character of ore treated, and upon the temperature and other conditions at the very time of the experiments, that the court is not warranted in saying what was the exact volume of gas, and what its correct analysis is; and, as the case develops, it does not become of great importance.

At this point we may well turn to the evidence concerning complainant's relation to the case. He owns 320 acres of land about 5 miles easterly from the Washoe smelter. Before he acquired his farm, it had been occupied and cultivated by his predecessors in interest since about the year 1866 or 1867. The lands of complainant's farm are not of the best class of lands in the Deer Lodge valley. They are known as cold land, are in part low, and moist and partly contain alkali, are best fitted for raising wild and redtop hays, for stock grazing, and for dairy purposes, and are not very well adapted for crops of timothy or other

cultivated hay or grain. Moreover, the complainant has not taken good care of his premises, but has permitted them to run down, and has allowed a part of the land to remain without seeding, so that foxtail and other weeds have been allowed to grow, to the substantial depreciation of the value of the land.

Mr. Bliss acquired his farm in this way: About March, 1903, while he was in business in Butte, his health was not good, and he desired to leave the state of Montana. In making business arrangements, looking to that end, he accepted title to the farm in Deer Lodge county, in lieu of the sum of \$8,000, to be applied upon the general transfer of his property. When he bought the farm, a contract of sale had been made between the predecessor in interest of the complainant, a man named Daniel James, and one John Smith, who was at that time in possession of the farm, and who had used it for pasture purposes, under and by virtue of which said contract the said Smith was to purchase the ranch at a stipulated sum. The complainant, Bliss, entered into an agreement with Smith, by which the terms and conditions of the contract of sale were changed so that Smith, instead of becoming a purchaser from James, was to become the purchaser from complainant, upon payment to the complainant of \$5,000, and assuming the burden of a certain mortgage, which had theretofore been given by the predecessor in interest of the complainant, secured by the said premises, in the sum of \$3,000. It was in this way that the valuation of \$8,000 was put upon complainant's farm. The valuation, however, was a fair one in 1903, though since then the value has fallen to about \$4,280. The investment in the farm was made by complainant under the belief that he would be able to sell it in accordance with the provisions of the contract of sale which had been entered into with respect to the property. It was not Mr. Bliss' intention to live upon the place. He never has lived upon it, and never has attempted to improve or cultivate or farm it, or to raise any live stock upon it. Moreover, he knew, when he bought, that the farmers in the Deer Lodge valley, including the occupant in possession of the farm, had made complaint against the defendant companies on account of the Washoe smelting and reduction works.

Reverting to the value of the Bliss land: Inasmuch as complainant, in 1904, rented the ranch to K. D. Smith for \$750 and the making of some improvements worth about \$200, the rental value that year was practically 12 per cent. of the then value of the land. Estimating 12 per cent. of the value as a fair rental, if it had not been damaged through any cause, complainant ought to have received \$950 rental in 1905; whereas, the best offer he had in that year was \$500 a year for two or three years' lease. This offer represented 12 per cent. of approximately \$4,200, which sum is therefore a just estimate of the value of the place in 1905 and 1906 and 1907. From these figures it is shown that the depreciation in the value of the land was \$3,800, and in rental value \$450 per annum, or a total of \$900 for 1905 and 1906.

It is very hard to reach a satisfactory conclusion as to the principal special causes for the depreciation in the value of complainant's land. Farmers who have known the land for 30 years differ radically, some ascribing the deterioration to poison of fodders by smelter fumes, and

consequent danger to live stock and to crops, while others say that the value is reduced because in 1902, 1903, and 1904 the natural hay meadow was plowed and never seeded thereafter, that the land has been neglected, has much alkali, is injured by sunflowers, foxtail, and other weeds, and that there has been no injury at all to the pasture or to animal life thereon by the smelter smoke. The experts also disagree in most positive terms as to the condition of the fodder and the soil. But, after considering the evidence concerning some of the live stock that fed upon the pastures of the ranches in the immediate vicinity of the Bliss place, together with that bearing upon the condition of some of the animals that were upon the pasture in the Bliss ranch itself, my opinion concurs with the master's in finding that both of the causes ascribed, lack of proper farming and smelter fumes, existed and contributed more or less to the lessened value.

The fact is deducible, though, that the lesser injury was done by the smelter, and for these reasons: As heretofore stated, when Mr. Bliss bought his land, its principal value was for dairying purposes. It is entirely certain, too, that thereafter, in 1905, while he owned the place, the offer to rent that he received was made by a man who wanted it for a dairy. Now, if it were true that the cattle and horses of the dairyman who might rent would be exposed to poison in eating the grass in the pastures, and to the consequent sickness, falling off of milk production, loss of calves, and other effects of ingesting grass or hay that has been poisoned with arsenic, we naturally inquire why it was that Boone, who knew all the conditions that existed about the place in 1904, and whose good faith in offering to rent from Mr. Bliss was beyond question, wanted to rent the farm for dairy purposes and was willing to pay \$500 a year rental for several years? The answer would seem to be a simple one, in the light of ordinary human experience. Common knowledge tells us that the last place a dairyman would seek would be a farm where cattle would be exposed daily to the peril of poison from arsenic in the pasture where they would feed; while, on the other hand, there would be nothing unusual in his taking a farm adapted for pasture and dairy purposes if the only objection was that it had been badly cultivated, or was unsuited for general agriculture. Thus we are irresistibly forced to the conviction that, as a fact, viewed from the standpoint of the experienced dairyman, the injury to Mr. Bliss' pasture from arsenic was not of the most serious character, and hence it follows that the larger depreciation must be attributed to some cause other than injury from poisoned fodders.

And, in support of this, there is further evidence of telling force. A dairyman, named Sweeney, of years of experience in Minnesota and Montana, who also knew the Bliss ranch well, rented part of it in 1905 from Mr. K. D. Smith, president of the farmers' association, and agent of Mr. Bliss. This dairyman testified that he had 68 head of cattle on the Bliss ranch, that they did well, that every milk cow had a calf, that the calves were the "finest" he had had since he had lived in the valley, that his 60 milk cows gave a general average of  $21\frac{1}{2}$  gallons of milk a day per cow, that the cattle ran in the pasture, that he had lived near the Bliss place since 1903, when the new stack was operated, and had not been injured in any way by smoke, and that he had made money

in his business until March, 1906, when he sold his cattle at \$40 a head to another dairyman named Verlaine, who lived upon an adjoining ranch.

But, furthermore, Wolfe, a dairyman, who was called by the complainant, and who had rented the northern part of the Bliss ranch from Smith, agent, in 1906, admitted that his 24 cows on the Bliss place gave an average quantity of  $2\frac{1}{2}$  gallons of milk a day for each cow. He said that he took them up to the stables in the fall, that he fed them meal and some alfalfa which was raised upon a ranch only a mile away from the Bliss ranch, and that he had lost one calf which was sick when we went to the ranch, and one after he went there, and that two of his cows aborted after he went there. It is in evidence that the calf that died after he was on the place had white scours caused by feeding upon sour milk. Still further, another dairyman, named Blaine, who, like the others concerning whom mention has been made, was familiar with the conditions and locality, said: He went to the Bliss ranch in June, 1906; that Wolfe's cattle looked well, and that Wolfe wanted \$60 a head for them; that he (Blaine) agreed to buy the cattle from Wolfe at \$55 per head, and tried to rent the Bliss place for dairying, but that Mr. Smith, president of the farmers' association, ordered him off the ranch and prevented the consummation of his plans.

In the light of this evidence, how can the court find that there was very serious injury done to the foddors on the place by arsenic? Much less, too, can a conclusion be reached apportioning the damages.

No summary of the facts would be complete without reference to the attitude of many of the farmers of Deer Lodge county. Some time during the latter part of 1904, about 100 (approximately one-half) of the farmers and residents of that part of Deer Lodge valley called by complainant the "smoke zone," adjacent to the city of Anaconda, representing an ownership of over 50,000 acres of land, formed an association for the purpose of procuring evidence and prosecuting claims and suits against the defendants in this action, on account of the maintenance and operation of the Washoe smelter. Mr. K. D. Smith, who owned a ranch adjoining complainant's place, was elected president, and ever since 1904, has acted as the head of said association. Bliss, this complainant, is not and never has been a member of the said farmers' association, and appears to be the only nonresident owning farming lands in the so-called "smoke zone." Although he is the sole complainant herein, the suit has been prosecuted mainly for the benefit of the members of the farmers' association. It appears that, before the present suit was instituted, the farmers, seeking settlement for damage claims, wrote to the representatives of the defendant Anaconda Copper Mining Company. The company, through its agent, replied, asking the farmers' association to specify, by bill of particulars, the damages claimed by each and every farmer who felt that his property had been injured by the smelter fumes. To this letter the farmers' association replied at length, demanding cash purchase of their lands before May 1, 1905, in the following language (*italics mine*):

"Anaconda, Montana, March 4, 1905.

"Anaconda Copper Mining Company, Anaconda, Montana—Gentlemen: The Deer Lodge Valley Farmers' Association, consisting of 107 members, repre-

senting over ninety per cent. of the lands and property of the Deer Lodge valley, comprising practically all of Deer Lodge county and the southerly portion of Powell county, did on February 21, 1905, call a meeting of said association to be held at the Willow Glen schoolhouse, in Deer Lodge county, at which nearly all the members of the said association were present. The undersigned committee, consisting of nine members, were duly elected by said meeting for the purpose of receiving all claims for damages resulting from the operation of your smelting plant, known as the Washoe smelter.

*"At said meeting it was understood by all the members of said association that they would present their claims for the lowest cash settlement which they would be willing to consider by way of compromise for all of said damages, and that said committee should be empowered to exclude any unjust claim or claims for damages, as well as reduce the amount of any claims which would be considered too high after an investigation by said committee. \* \* \**

*"The claims which the committee approved are presented for settlement after a very careful investigation, and as the committee was selected from all portions of the valley, the committee were in a position to pass on most of these claims from personal knowledge of the property of the claimants. In fixing the damage, if any part or portion appeared unjust or was in doubt, the committee eliminated that part or portion of such claim. It would therefore follow that the committee would not care to consider any counter proposition from your company on approved claims.*

*"As to the claims which are presented without recommendation, if your company does not see its way clear to adjust them on the basis on which they are presented, you are at liberty to enter into personal negotiations with these claimants. These personal negotiations, however, and the delay arising therefrom, shall not in any manner interfere with the association from filing suits in equity and bringing actions at law for damages, it being the sense of the association, as expressed through the committee, that unless an early settlement can be reached, that suits in equity will be filed and actions at law will be commenced, which would not prevent a settlement, unless the company should consider such action on the part of the farmers to be a withdrawal of the offer of compromise. No suits of any character will be filed before the 7th day of April, 1905, but from that date it will be optional with the members of the association to institute legal proceedings unless the company has signified, through its proper officers, acceptance of the settlements proposed.*

*"Claims have been presented for damages aggregating \$2,300,000.00, as the damages actually sustained by members of this association. These claims have been reduced to about \$1,750,000.00, and for this amount the committee has instructed suit to be brought in the individual names of the parties, unless a settlement is reached.*

*"The cause of this reduction has been owing to the fact that the company settled with most of the farmers two years ago for personal damages; that claims for damages to crops and personal property have been eliminated except for the past two years, excepting in three instances, which are N. J. Bielenberg, Quinlan Bros., and Austin De Rosier. These claims have been included for a greater period than two years for the reason that no settlement was reached between these parties and the company two years ago. The farmers, however, contend, after having been advised by counsel, that five years is the statutory period in which action for damages of this character can be maintained. Whether or not the company will accept this contention will be immaterial, for the reason that all claims except the three mentioned have been restricted to the two-year period.*

*"All unjust, inequitable and slight claims for damages have been rejected. This also accounts for the difference between \$2,300,000.00 and \$1,750,000.00.*

*"When the farmers were called upon to place the lowest cash valuation of the damages which they had sustained, they presented to your committee damages aggregating \$1,536,876.00. Your committee, after careful and thorough investigation, reduced these claims to \$1,120,731.00 approved claims, and \$127,979.50 claims to be submitted without recommendation. It is understood and agreed that if the company makes settlement of these claims as presented,*

*this includes title to all of this property, including land, water rights and improvements, and that the farmers will surrender possession of these properties not later than November 1, 1905, provided settlements are made and money paid on or before May 1, 1905.*

*"The real property damage included in this settlement consists of 60,525 acres of patented lands, together with all water rights and improvements, all being under fence, and generally all improved farms, for which is demanded the sum of \$918,147.00, which insures the company title to all of these lands, water rights and improvements for the sum of \$18.17 per acre. The committee also suggests that if a settlement can be reached, that the company shall be allowed in every instance to withhold whatever amount of money may be necessary to perfect title or remove liens or encumbrances. That in a few instances, some of the farmers have indicated that if the company would deed back the land and improvements, they would be willing to allow a certain stated amount by way of reduction in the amount presented, if allowed to keep the property.*

*"Almost all of the claims for personal property damaged were rejected, as nearly all the stock were settled for two years ago, and the committee refused to allow any damages except on new stock which has been brought into the Deer Lodge valley since the settlement. In place of any new stock having been brought in, nearly all of the stock has been removed from the valley, owing to the general sickness and death of the stock.*

*"The committee also desires that no settlement be made with the individual members of the association, and that in the event of a settlement, that the same be made through the Daly Bank & Trust Company, of Anaconda, Montana, through the committee of farmers, as certain advances, attorney fees and expenses have been incurred which it would be impracticable to collect if individual settlements were made in the absence of any member or members of the committee. \* \* \**

*"The farmers are anxious to have an early disposition of the matter on the part of the company, as they will attempt to protect the coming crop provided settlements cannot be made.*

*"The committee, by way of explanation, desires to call the attention of the company to the fact that the farmers have not presented their claims for damages since the settlement two years ago up to the present time, for the reason that when said settlement was made, the company promised, and the farmers believed, that the construction of a large stack would prevent further injury and the farmers decided to wait until they became fully satisfied as to what would be the result of the operation of the smelter after the construction of a large stack. It has now become apparent to the farmers of Deer Lodge valley that stock raising and farming cannot exist there so long as the smelter is being operated on its present large extensive scale, and treating the class and character of ores which are produced by the mines of Butte. The farmers also feel that having settled in the valley long prior to the smelting plant, they perhaps have prior rights which the smelting interests are bound to respect, and which should be taken into careful consideration by your company in attempting to reach an amicable settlement.*

*"The members of the association and the committee have kept constantly in view the fact that the company, in operating its smelter, has at all times used the latest and most improved methods for smelting, and that the damages which have arisen have been the natural and usual result of the smelting operations; that the company two years ago made prompt settlement of the damages which had been occasioned by the operation of the smelter; that the company immediately thereafter spent a large sum of money in good faith in attempting to avoid further damages to the farmers of Deer Lodge valley. The farmers have at all times been anxious to remain on good terms with the smelting interests, fully realizing the importance of the mining industry to the state of Montana, and that mining cannot be conducted without smelting and the conducting of smelting plants and that there is not a single farmer who is a member of this association who is desirous of in any manner interfering with the operations by the company of its mining properties or its smelting plant, until it becomes apparent that the company intends to con-*

tinue its smelting operations without regard of the total destruction of the stock raising and farming interests of the Deer Lodge valley.

"Acting in view of these important considerations, the committee has felt that the farmers should stand at least one-third of the entire loss accruing to them by reason of the operation of your smelting plant, in order that an amicable settlement between the farming interests and the smelting interests may be reached. It has therefore been the effort of the committee in adjusting these claims to present them at approximately two-thirds of the damages sustained, and not to approve a claim where the individuals would not submit to the one-third reduction. \* \* \*

This letter was signed by nine persons, as members of a committee of the farmers' association.

The defendants seem to have made no reply to this demand, and, as said, this suit was instituted on May 4, 1905. It does not appear that any action at law has ever been filed by complainant, or that any judgments for damages have been obtained by any members of the farmers' association, though two or three suits are pending for damages claimed to have been done before the new stack was built. It is a circumstance that, although no member of the farmers' association is a party to this suit, yet the association has been directly responsible for the presentation of the evidence, and, through assessments levied upon its different members, has raised funds through a committee. Bliss, the complainant, prior to bringing this suit, put his farm in the hands of Mr. Smith, president of the farmer's association, for rental purposes, appears to have paid little attention to the matter, and has not contributed any portion of the expenses of conducting the same, except the rent of his ranch, which was turned over to his counsel. He has really given control to the farmers' association, in the interest of prosecuting this suit, and has allowed his name to be used to try a "test case," admitting that he is the person through whom the other farmers are trying to establish their contentions. Mr. Bliss himself refused to consider an offer of purchase made to him in June, 1906, by an agent of the defendants having given as a reason for such action the pendency of this suit, and that he had yielded management of his place to Mr. K. D. Smith and to Mr. Clinton, who was counsel for the farmers' association.

Now, inasmuch as we have ascertained that some damage, the amount of which is not susceptible of correct ascertainment from the evidence, has been done to complainant's farm by the operation of the Washoe smelter, attention is next appropriately addressed to what, if any, abnormal conditions existed in the Deer Lodge valley before the evidence in the present suit was submitted, which are due to acts of these defendants. It is established that there was more or less spotting on the vegetation, caused by the smoke from the stack. The spotting is explained by one of the expert botanists as due to the dropping of substances in the smoke stream on the vegetation, which kill the immediate section they fall upon. Technical botanists disagree radically as to the extent of the area so spotted; some, called by defendants, confining it to within 5 miles of the stack, while those called by complainant say it was observable as far away as 13 miles north-westerly. By the botanical evidence, including the exhibits, it is made

apparent how very difficult it is to distinguish between the spotting of vegetation by sulphur and certain other injuries, for instance, alkali, sun scald, insect, hail, or fungus growths. To one unskilled in technical plant life, the only way to resolve the divergent views of the scientists is to form an opinion of the existing conditions, as they actually appeared to intelligent, practical farmers and dairymen, and as practical agricultural results may reflect upon the matter, and then to consider and correlate the scientific evidence to such conditions. This I have done with great care, and my best judgment is that there has been no substantial injury done to Mr. Bliss' land, or to the crops thereon, by the sulphur discharged into the atmosphere since the big stack was built, and that there has been no general, substantial, harmful effect from the smoke upon the quantity of the crops produced upon the Bliss or other lands, and that no permanent injury has been done to complainant's or other lands in the valley. There was evidence showing past injuries to coniferous timber on the hills back of the smelter, and it was made quite clear that damage is now being done in the hills right back of the smelter along Mill creek, where the smoke spreads through a draw, the bottom of which approaches the level of the top of the chimney; but, apart from this special damage in this immediate vicinity, the weight of the evidence is to the effect that the principal damage to timber was done before the new stack was operated—some by the fumes, and some, which is attributed to smoke, was done by fires at different times in years gone by.

Let us now briefly inquire into the conditions of animal life upon the farms within a few miles of the smelter. After the Washoe smelter commenced to operate, many horses, that were in pastures in the valley, suffered from sore noses. Sore noses were observed in some horses on the Bliss ranch. Stated in ordinary language, the sore nose ailment consists of a sort of ulcer, from one to three inches in length, on the septum in the direction of the upper lip, and appears as if it were produced by a burn, or an irritating medicinal blister, or acid; the ulcer often containing a large piece of dead skin tissue, in a few instances involving the lining membrane of the nose, and penetrating the partition between the nostrils. The horses affected, generally speaking, also had garlicky breaths, rough coats, and suffered from diarrhoea; some were thin, some were quite easily exhausted, and many appeared to be unthrifty. The ulcers would heal with ordinary stable care, and the animals would nearly always recover if taken away from the valley pastures. Numbers of horses so affected were killed for examination, and post mortem investigations disclosed lesions affecting the stomach, intestines, liver, kidneys, spleen, heart, respiratory organs, and membranes of the brain. Chemical analyses of certain animal tissues were also made by experts, and more or less arsenic trioxide found. Many cattle were affected. None of the cattle had sore noses; witnesses saying that this was because cattle can clean their nostrils with their tongues, while horses cannot. Some of the symptoms manifested in cattle were garlicky breaths, rough coats, coughs, tucked up bellies, scouring, and drooling. Eliminating the sore nose, the lesions found in the cattle examined after



death were generally similar to those found in the horses. In one of a number of steers that had been kept by defendants for experimental purposes upon the Bliss pastures, which was killed for examination by Dr. Formad, of the government service, there were found vascular changes, epithelial changes, and connective tissue changes, which were evidently caused by an irritant poison.

By again reasoning from facts seen and testified to by plain witnesses, and weighing what things were so actually seen with what experts have said, and with what experiments have been made, out of the mass of evidence, I must conclude that the lesions observed were caused by the irritant or corrosive poison arsenic. This arsenic was deposited, to a greater or lesser extent, upon the fodders of the pastures, and when ingested by live stock caused ailment and sickness. The most rational view is: That the volume of the smoke stream, with its arsenic contents, is at times carried by air currents upon the lands adjacent to the smelter; that sometimes the volume is much more dense than at other times, depending upon atmospheric conditions, but that when the smoke is dense and low there is a precipitation of more or less arsenic upon the fields; and that a sufficient quantity is precipitated to poison the pastures, and that animals feeding thereon are poisoned. Naturally, owing to variable winds, there is no rule of distribution of the smoke, so that there is no uniform extent of the results of the smoke upon animal life. Hundreds of animals which grazed in the vicinity near to the smelter have never shown the slightest symptoms of poison. Cows in the city of Anaconda have thrived in the highest degree. Perhaps but a few animals out of a large number grazing in the same field have been affected at all. Yet, after all, when the facts, as well as expert opinions, are assembled and harmonized, the strength of the whole proof is such that it practically excludes any general cause for animal unthriftiness other than arsenical poisoning.

But, while the conclusion just reached is the only accurate one under the evidence, still it must not be taken that it has been arrived at without overruling a strong challenge to every single issue pertaining to live stock conditions. To some of these matters it is proper to advert briefly. For instance, it is not to be inferred that the complainant has sustained his contention that the sickness in animals has been fatal, or that it has been so general through the Deer Lodge valley as to make the raising of live stock either impossible or unprofitable in all parts thereof. Complainant called as witnesses less than half of the farmers in the farmers' association; whereas, defendants introduced the testimony of a number of farmers, not members of the association, who have lived for years in the vicinity of the smelter, within the so-called "smoke zone," and who said that they had had no trouble with their stock or crops since 1903, and that their ranches were profitable. Nor can it be doubted that upon the cross-examination of many of complainant's witnesses it was developed that there has been not a little confusion between live stock conditions which existed prior to 1903, and those that have existed since. These dates are most material, because, without doubt, great damage was done by the smoke

before 1903 (partly to remove the cause of which the smelter was remodeled, and the high stack built), and because the gist of the present suit is to close the smelter to prevent future damage reasonably certain to continue.

It would appear, too, as showing that the sickness is not fatal, that, notwithstanding the somewhat abnormal condition of animal life that has existed since 1903, the percentage of death rate among live stock through the valley in 1906 was normal, in that, out of about 9,384 head of cattle and 1,632 horses accounted for, the total loss was 54 cattle and 38 horses. Animals seem to sicken slowly, and often fail to show their true condition without careful examination. As apposite to this statement, the student of animal diseases and of pathology and toxicology will be especially interested in reading of the elaborate experiments made by the experts in the case, and will be enlightened by the precision of learning displayed in their testimony; but it is the whole evidence, lay and expert, practical and theoretical, that has led to the finding of arsenical poisoning, as heretofore ascertained.

A fair conclusion of fact is that there has been exaggeration by some of complainant's witnesses of conditions since 1903, and, as already indicated, much carelessness of statement in defining injury done before and since the new stack was put into use. It is to be remarked, too, that the evidence tends to show an improvement in animal conditions in 1906 over 1905, but exactly why this is so does not appear. It may be that there is less stock near to the smelter, and that the animals that were poisoned in 1903, before the new stack was built, continued to be ill through 1904 and 1905, and then recovered, or it may be that, in 1906, defendants, by the construction of another arsenic furnace, or otherwise, took additional measures to eliminate arsenic from the flue dust at the smelter. No satisfactory reason can be gathered, and the mere fact that there was a betterment is left standing, not to be overlooked, though, among the things that aid in final solution.

Fortunately, I have been helped to a better understanding of much of the testimony in the record—indeed, of the whole case—by a visit of two days to the valley, during which time I rode many miles in an automobile in various directions from the smelter. The trip was made in August, 1905, in company with the master in chancery, counsel for complainant, and defendants herein, and one or more expert witnesses for the respective litigants. As I had asked the several counsel to call my attention to anything they thought worthy of particular notice, it is fair to say that I had an excellent opportunity to gain a general, though, of course, somewhat superficial, insight into conditions. Upon the first day, which was bright, the smoke from the big stack rose high into the air, and seemed to be carried far away, so high that its diffusion would seem to have been too general to do injury to any land; but, on the second day, the weather was rainy, and the clouds were lower. The smoke then was more dense, and its stream was carried down toward the Bliss ranch and southerly, and northerly for a few miles toward the center of the floor of the valley, and was there dissipated. The trip impressed one main thing very firmly upon me that neither the eye nor the training of an experienced or scientific agriculturalist was required to ascertain. It was that the allegation of com-

plainant's bill, to the effect that the Deer Lodge valley, and the country adjacent to the smelter, is barren and desert like, is grossly inaccurate. It is true that the land and vegetation lying within, say, a quarter of a mile of the smelter, is visibly affected; but, outside of this limited area, there was the appearance of healthy natural conditions, of successful cultivation, and of such crop growths as are usually seen in the valleys of the state. The harvest was going on. We saw hundreds of healthy looking shade and fruit trees about farm houses, while the grain fields and pastures looked as others in Montana generally do during or just after harvest. We walked over a portion of complainant's place, noticed the foxtail and inferior quality of the grasses growing, and, except for the smoke on the second day, there was nothing in the physical appearance of the complainant's farm or of the valley that indicated unusual or abnormal conditions. Prof. Jones, of Utah, one of the botanical experts representing complainant, showed me some spots on vegetation just beside the smelter, and in gardens upon ranches, and also upon some leaves of trees growing on a ranch about 10 miles away, which he said were due to smoke. I saw spots also upon apples on the trees at another ranch, but there is evidence tending to show that the marks on the fruit were due to hail. We saw cattle and horses in the fields, and particularly noticed a number of fine looking cows within the pasture on complainant's place. My attention was also called to several horses that had been driven into a corral at the Staffanson ranch for me to see. One or two had sore noses, and one or more seemed sick and paralyzed; but just when these animals became sick is uncertain, for a witness called by the defendants testified concerning them as follows:

"Q. Did you see some horses that were exhibited to Judge Hunt that had sore noses on that trip? A. I saw a bunch of horses in Mr. Staffanson's corral that they had picked especially, I think, for Judge Hunt's benefit, that they showed there, and I saw Dr. Cheney point out a black horse that we paid Hi Staffanson the full price for as a horse being 'smoked,' when Judge Hunt was with us. Q. When had the companies paid for that horse? A. They paid for it some time in 1903, paid Staffanson. \* \* \* Q. Was this collection of prize horses the derelicts that had been left over from 1902 and 1903? A. I know some of them were. There was a brown mare from Tom Boland's that we paid Duncan for. That was one of the left-over horses. And several there from Mr. Staffanson, I could not name them, that had been settled for. They had evidently picked every poor horse in the country that they could get, and brought to that corral. They did not show any good ones, though there were some in the stable."

I also saw a small band of cattle that were at a corral in another part of the valley. A few of them looked unthrifty and as if they had not shed their winter coats.

The purely equitable defenses next demand attention. To particularize some facts: When the site of the old works was chosen, the land now occupied by the city of Anaconda was vacant and unoccupied, but at the time of the commencement of the construction, and the employment of many persons in the construction work, a community was established, and in time the city of Anaconda grew until it now has a population of about 12,000. This city owes its growth and prosperity to the conduct of the smelting business at the Washoe smelter, and its population is dependent for subsistence, directly or indirectly, upon the

continued operation of the smelter. It is a well-built city, where many people have made homes for themselves, has a superior class of business buildings, and had an assessed valuation in 1906 of \$3,300,000. The people living there have made their investments, believing that the smelting works would continue to operate, and, as would be natural, the products of the Deer Lodge valley—hay, vegetables, garden truck, grain, alfalfa, live stock, and other farm products—have generally found ready market at good prices in Anaconda. In 1905, though, there were some complaints made against Deer Lodge valley hay, and sales were not as ready as they would have been had buyers not believed the hay was "smoked"; but in 1906 there was quick sale for it all at current market prices.

It is proven that, even if the defendants could find a more suitable location for the smelter, in order to avail themselves of it a new railroad track system would have to be built to convey the ores from the mines at Butte, and in the construction of new works, which would take five years to build, the salvage from the present plant would not be worth more than \$1,000,000. Furthermore, the natural advantages for a smelting plant, on account of the favorable grades from the mines at Butte to the Washoe smelter, and on account of the water and lime rock, and other facilities necessary in the economical and profitable operation of a smelting plant, could not be found elsewhere, and, as a result, transportation cost would be increased, and mining of a very large percentage of the ores now treated at the Washoe smelter could not be successfully carried on. No known site exists in Montana where the operations of the Washoe smelter can be carried on with less damage and inconvenience to surrounding property and inhabitants than the present site.

As further evidence of the importance of the defendant's works to the communities of the state, it is proven: That the total assessed valuation of the property in Deer Lodge county, within which Anaconda is situated, in 1904, was \$8,120,826; that of such amount \$4,058,573 was assessed against the property of the defendants; that from 1902 to 1906 the defendants have paid more than 51 per cent. of the total taxes of the county; and that if an injunction were to be issued, as prayed for, the property of the defendants would be practically valueless, and necessarily there would be such a reduction in the assessable property within the county as to make it impracticable to continue the county organization of Deer Lodge county. To show the great harm that would be done by the closing of the smelter, it is established that Butte, with a present population of over 70,000, has grown within the last 30 years from a mining camp, because of the development of the copper mines, many of which belong to and are operated by the defendants herein. Practically the whole population of Butte depends upon the continued operation of the copper mines, and about two-thirds of all of the ores mined at Butte are treated and reduced at the Washoe smelter. The effect of stopping the works at Anaconda would be to deprive Silver Bow county, wherein Butte is situated, of at least 30 per cent. of the total taxes collected, and, as a consequence, there would be a great depreciation in the value of all property in that county, which is now subject to assessment, and that, because

of the revenues paid to the state by the counties of Silver Bow and Deer Lodge, the income of the state would be materially affected.

It is in evidence, also: That the defendants use vast quantities of coal, coke, and lumber, which are supplied from points within Montana, other than Butte and Anaconda, and that in supplying them employment to a large percentage of the population is furnished; that during 1906 there were 4,548 men employed in the mines which furnished ore to the Washoe smelter; that in the same year there were about 2,500 men employed in the reduction works; that the railroads operating within Montana derive their earnings largely from the freight handled in connection with the operations of the defendant companies; that, in the first six months of 1906, the defendant companies paid to the men employed directly by them, including the money paid out by the companies which ship ores for treatment to the Washoe smelter, over \$5,000,000; that the railroad freight paid during the first six months of 1906 exceeded \$1,400,000; and that the defendant companies paid out for material, largely furnished from different points within Montana, and elsewhere, yearly amounts of about \$4,000,000.

As further evidence of the magnitude of the interests involved, it appears: That the defendants' works, since 1902, have expended over \$7,000,000 in labor, over \$4,000,000 for coal, over \$4,000,000 for coke, over \$740,000 for lime rock, over \$1,300,000 for machinery, and over \$53,000 for lumber; that up to June 30, 1906, the ores treated at the Washoe smelter yielded over 590,000,000 pounds of copper, over 25,000,000 ounces of silver, and over 164,000 ounces of gold; and that annually from 17 to 20 per cent. of the supply of copper in the United States has been produced by the Washoe smelter.

It now remains for me to apply to all these facts as stated principles of real justice. Speaking precisely, there is but one record party complainant, and two defendants, whose rights can legally be adjudicated by any decree herein. As a single complainant, Mr. Bliss is not suing on behalf of himself and others similarly situated, but relies upon a right to injunction as a consequence of his proof of public nuisance, and of the showing that it has been of special injury to himself. The evidence of the effects of the smelter smoke upon others besides Mr. Bliss is relevant, but its purpose is to show that the smelter interferes with the comfortable enjoyment of property of an entire neighborhood; while the evidence of the individual damage that Bliss has sustained, and is still sustaining, and will sustain, is material in fixing his status as a private party who can maintain the bill. In this sense he can be said to act in behalf of others who may be injured. *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 492, 17 L. Ed. 311. The case, however, has in fact so obvious a bearing upon the interests of many others who live in the Deer Lodge valley near to the Washoe smelter that complainant was expressing the general situation when he testified that he had become the instrument through which a test case is being tried between the farmers and the smelting company.

There is this feature in the concrete case: Bliss will not be driven from his home if the operation of the smelter is not enjoined, for he never has made his home on his land, and never intends to—that is

to say, there is no sentimental concern involved; there is not and will not be personal inconvenience or physical discomfort, or even annoyance, to him or his family, on account of the smelter fumes. To him the special damage which he has suffered or will suffer is an absolute pecuniary matter. Of such as he has suffered in the past there could be exact ascertainment, and, for recovery thereof, there appears to be no reason why he cannot bring his action at law with trial before a jury and obtain a verdict and judgment. He says however, it is unjust that, as an injured party, he should be compelled to try actions at law to recover for his special injuries, because they will be repeated for an indefinite period, or are continuous in character. In fact, he goes farther and insists with earnestness that to prevent future injury his only effective remedy is by resort to a court of equity, and that there is no alternative to injunction which will forbid defendants from operating the Washoe smelter. Although he alleged in his amended bill that he could show that the poisonous substances emitted from the smelter could be precipitated and impounded at the smelter with very little extra cost to the defendants, he offered no proof, whatsoever, to support the allegation, but chose to put himself on the ground that injunction must issue, which will stop the works and prevent the treatment of the only ores that defendants now smelt. Thus we are confronted directly with the underlying question whether injunction must issue without regard to all the circumstances existing in the particular case.

I need not dwell on the question of power, for it is too well established that, from an ancient date, with regard to nuisance, courts of equity have jurisdiction, based upon the reasonable certainty of irreparable mischief, that sort of material injury by one to the comfort of another, which requires the application of a power to prevent, as well as to remedy, the evil (Jeremy's Equity Jurisdiction, § 310; Daniell's Chancery Pleading & Practice [6th Ed.] § 1636), but will pass to the point of close bearing upon the original question, that of discretion where injury of the character proved in this case is threatened to be continued.

In my opinion, where there is presented a conflict of rights, it is the duty of a court of equity, in protecting those of the complainant, to consider those of the defendant, and in doing so it may consider also the injuries that may result to others by issuing the writ of injunction. Put broadly, then, the proposition is this: The writ of injunction is not *ex debito justitiæ* for any injury threatened or done to land or rights of a person; but the granting of it must always rest in sound discretion, governed by the nature of the case. To sustain this rule I need refer to but a few cases.

In *Parker v. Winnipiseogee Lake Cotton & Woolen Company*, 67 U. S. 545, 17 L. Ed. 333, the Supreme Court held that, although the right of a complainant has been established at law, a court of chancery will not "*as of course*" interpose by injunction, but will consider *all the circumstances, the consequences of such action, and the real equity of the case*. A comparison of injury with the damage which would result by injunction was made by the court in *Atchison v. Peter-*

son, 87 U. S. 507, 22 L. Ed. 414. The Supreme Court there held that injury sustained by accumulation of sand in water used for mining by one of the parties to the litigation was hardly appreciable in comparison with the damage which would result to the other parties from an indefinite suspension of work on their valuable mining claims, and that it was right for the court not to interfere by injunction to restrain their operations, and to leave plaintiffs to their remedy at law. And again, in *Osborne v. Missouri Pacific Railway Co.*, 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155, the court recognized a distinction between the instance of an actual invasion of private rights which might be assumed to be essentially irremediable, and one where there is no direct physical taking of the estate itself, in whole or in part, but the infliction of damage in respect to the complete enjoyment of the estate, and implied that probably injunctive relief would be awarded *ex debito justitiæ* in the one case, while the court would decline to interfere in the other. And again, in the *Debs Case*, 158 U. S. 564, 19 Sup. Ct. 900, 39 L. Ed. 1092, the court refers to the frequency of suits where the necessity for the exercise of equity jurisdiction of public nuisance has depended upon the circumstances of the particular case, and, speaking through Justice Brewer, remarks:

"Of course, circumstances may exist in one case, which do not in another, to induce the court to interfere or refuse to interfere by injunction, but the jurisdiction, the power to interfere, exists in all cases of nuisance."

In *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, the Supreme Court held that there was no absolute right to an injunction; and they so held in *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, notwithstanding the finding that "perceptible injury" was done by diminution of streams in Colorado to portions of the lands belonging to the state of Kansas. "It cannot be denied," said the court, "in view of all the testimony, that the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation."

A like general rule was clearly recognized in the case of *Georgia v. Tennessee Copper Company*, 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038. Indeed, the court there prefaces its observations as to the peculiarities that mark a suit where a state in its capacity of quasi sovereign sues for injunction against citizens of another state, and says that, if the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be, and thereafter observes:

"This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of health, the character of the forests as a first or a second growth, the commercial possibility or im-

possibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place."

Comparison of injury was held proper, too, in *Dun v. Lumbermen's Credit Ass'n*, 209 U. S. 20, 28 Sup. Ct. 335, 52 L. Ed. 663.

Additional authority, directly pertinent, is found in *Mountain Copper Company v. United States*, 142 Fed. 625, 73 C. C. A. 621, where the Court of Appeals of the Ninth Circuit decided that an injunction would or would not be issued as the exercise of sound discretion warranted, guided always by certain established rules which meant a consideration of all the circumstances of each case. And in the very recent case of *McCarthy v. Bunker Hill & Sullivan Mining & C. Co.* (C. C. A.) 164 Fed. 927, decided since the Supreme Court decisions in *Kansas v. Colorado* and *Georgia v. Tennessee Copper Company*, supra, after a very careful investigation and consideration of the importance of the principle involved, the Court of Appeals for this, the Ninth, circuit, reaffirmed the rule established in *Mountain Copper Company v. United States*, supra; Judge Ross saying:

"To an injunction, however, even on final hearing, no one has an absolute and unqualified right. Such an application appeals to the conscience of the chancellor, to the exercise of a wise and sound discretion, and should be granted or withheld according to the equities of the case as made to appear by the record. Each case must be considered and made to depend upon its own particular facts and circumstances, in the consideration and determination of which the general rules governing courts of equity are to be borne in mind and applied. \* \* \* Nor should an injunction be granted in any case where it will necessarily operate contrary to the real justice of the case. Furthermore, where, as in the present case, it is sought to enjoin a lawful business, the court should give due consideration to the comparative injury which will result from the granting or refusal of the injunction sought."

Among the leading cases quite like that at bar, which sustain the proposition as heretofore laid down, is *Madison v. Copper Company*, 113 Tenn. 335, 83 S. W. 658; while, of these which are relied upon as holding to a different doctrine, *American Smelting & Refining Co. v. Godfrey* (C. C. A.) 158 Fed. 225, is undoubtedly the most important. The facts in that case made a much stronger showing for injunction than in this. There, 409 farmers, who lived upon their lands as their homes, joined in the bill as complainants, asking injunction against certain copper smelting companies in Salt Lake county, Utah. The fact was that the operation of the smelters resulted in very great damage to, if not the total destruction of, complainants' property, and the fumes were impairing or injuring the health of those living upon their farms. Under such conditions the rule which permits a balancing of injuries and benefits, or of comparative convenience or inconvenience, was held to be of no avail to defendants, and hence injunction in a modified form issued. The case may therefore, on its facts, be distinguished from the one under investigation; but if the learned court intended to lay down as a principle that, when there has been any invasion of right, by one in the conduct of a business lawful in itself, there can be no consideration of comparative losses and benefits, and of circumstances of consequence to defendant and to others in issuing the writ of injunction, then the decision is not in harmony with the cases of *Mountain Copper Co. v. United States*, supra, and



McCarthy v. Bunker Hill & Sullivan Mining & C. Co., *supra*, decided by the Court of Appeals of this, the Ninth, circuit. But the decision in the Utah case must be taken with its special facts. I repeat, too, that the rule of the McCarthy Case, *supra*, was established after the decisions of the Supreme Court in *Kansas v. Colorado*, *supra*, and *Georgia v. Tennessee Copper Company*, *supra*, to neither of which cases does the opinion in *American Smelting & Refining Company v. Godfrey*, *supra*, refer. Believing, then, as I do, that the doctrine of the McCarthy Case, *supra*, accords with the principles of equity, as expounded by the Supreme Court in its most recent expressions, it becomes authority for this court. A clearly announced reason for the general rule is Story's statement:

"Courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts thus operating by way of special injunction is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence. At the same time, it must be admitted that the exercise of it is attended with no small danger, both from its summary nature and its liability to abuse. It ought therefore to be guarded with extreme caution and applied only in very clear cases; otherwise, instead of becoming an instrument to promote the public as well as private welfare, it may become a means of extensive and perhaps of irreparable injustice." Story's *Equity Jurisprudence*, § 959b.

The discussion next easily leads me to inquire how this judicial discretion should be used. No one would contend, for instance, that a discretion would be well exercised which would withhold injunction at the request of one injured, against one conducting a business in itself unlawful, no matter how vast were his interests, or what the consequences might be; nor would the exercise of a discretion be sanctioned which would refuse to abate a nuisance solely because the business, out of which the nuisance has arisen, is lawful and extensive, while the right of the person wronged is insignificant, or his estate humble, for this would be abuse. And the writ would be equally unwisely issued on the petition of one who, no matter how weak he might be, has sought it to extort his own terms, from an individual or corporation, by way of damages to his property; or, stated more comprehensively, in its scope the principle is that the courts should not issue the writ in any case where its operation is really oppressive and destructive of a lawful occupation, and where its issuance would work vastly more harm to a defendant and many others than it would benefit the complainant. Judge Cooley, in *Edwards v. Allouez Mining Co.*, 38 Mich. 46, 31 Am. Rep. 301, said:

"An injunction is not a process to be lightly ordered in any case. Where the effect will be to present to the owners of a valuable mill the alternative either to purchase complainant's lands at his own price or to sacrifice their property, any court having the power to order it ought very carefully to scrutinize the case and make sure that equity requires it. In theory its purpose is to prevent irreparable mischief; it stays an evil, the consequences of which could not adequately be compensated if it were suffered to go on. \* \* \* 'There is no power,' says Mr. Justice Baldwin, 'the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of an in-

junction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages.' *Bonaparte v. Camden, etc.*, R. R. Co., *Baldw.* 218, *Fed. Cas. No.* 1,617. All the cases referred to show that the court looks beyond the actual injury to contemplate the consequences, and, however palpable may be the wrong, it will still balance the inconveniences of awarding or denying the writ, and adjudge as these may incline the judicial mind. *Grey v. Ohio, etc.*, R. R. Co., 1 *Grant, Cas. (Pa.)* 412; *Varney v. Pope*, 60 *Me.* 192; *Bosley v. McKim*, 7 *Har. & J. (Md.)* 468. Even in the case of a palpable violation of a public right to the annoyance of an individual, he must show the equity which requires this summary interference as the only adequate means of obtaining justice. *Sparhawk v. Union Passenger Railway Co.*, 54 *Pa.* 401."

Fundamental and inexorable in its equality is the law that no person can have more rights than his neighbor, because fortune has so shaped conditions that the one owns more money or land or chattels than the other; but when there are two citizens, each of whom is engaged in a lawful business, one in mining, the other in farming, and there comes a conflict where neither can enjoy his own property without interfering to some extent with his neighbor in the enjoyment of his, then it is that the problem is presented how to fix the rights of each so as to secure to each the largest measure of liberty possible under all the circumstances of the particular case. Then it is that the court should so frame its decree as to avoid the destruction of the rights of either. In the western states, questions of such a nature often arise with respect to the uses of the waters of the streams where placer and quartz miners have to pollute the water to some extent before it flows down to the ranchmen, to be used by them in irrigation of the valley below; but the courts have solved them without compelling either to suffer irreparable damage, although, in the solution, each has to suffer a certain amount of inconvenience, and perhaps recurring damage. Equitable arrangements may often be made when we recognize the principle that, as a philosophic condition of the complexities of society, to some extent men must yield the full enjoyment of certain individual rights.

We therefore ask: Can both industrial and agricultural welfare be preserved under the exigencies of the whole case before us? If they may, the court will meet the situation by evolving a rule of conduct whereby both can exist together. The maxim, one must so use his rights as not to infringe upon the rights of another, must be upheld by preserving the absolute right to recover judgment for damages wherever substantial injury is shown; but there is no inconsistency between this principle and that which makes the writ of injunction a matter for the sound discretion of the court.

In reflection upon the intricacies of the suit, I cannot overlook the historical fact that Congress, through its beneficent legislation, invited the exploitation of the Rocky Mountains by prospectors for the precious metals, and that, as a result of the value and extent of the mines discovered in this and other mining states, population has increased, labor has been in demand, cities have been built, business has expanded, commerce has thrived, transportation facilities have changed and improved. What was a wilderness less than half a century ago has, principally through the development of mineral wealth, become a scene of energy and restless activity. With the miners there came ranchmen, who went into the valleys to raise produce and live stock, so that, grad-

ually, along with the mineral development has come a large measure of agricultural prosperity. Not many years since, under the progress of scientific learning, processes for the treatment of the lower grades of ore were discovered; mills to extract the metals became features of economical mining; and, in time, superseding the more primitive forms of reducing ores, smelting became practicable, and was only made available within Montana by the investment of large capital in industrial plants. In this forward movement defendants joined by the erection of their smelter, and it is a demonstrated fact that in its extensive ramifications the Washoe smelter and its operation have been a significant force toward the material development and upbuilding of the state of Montana, including the valley where complainant's lands are situated. Of course the business of copper smelting, like that of farming, is in itself lawful, though, in its conduct, some injury to others in the immediate vicinity of the smelter would seem to be unavoidable because of the arsenic in the smoke.

The result of testing the rights of Mr. Bliss, apart from his connection with the farmers' association, is this: That he can go into a court of law and recover ample compensation for his losses of 1905, 1906, 1907, and 1908, and up to the time of a verdict, no matter how great his damage might be. If he there recovered substantial damage for injury done him by the acts of the defendants, thus having separated the damages so done to his premises from those which are due to his own neglect, and thereafter should make a fit case to be followed by such an injunction as he prays for, the injunction would be in time to arrest the further progress of mischief; and I doubt if a ruling accordingly would be unjust in itself, while it would have highly valued precedent, for the Lord Justices of England, in *Salvin v. North Brancepeth Coal Co.*, 9 Chancery Appeals, 705, made such an order in a suit where plaintiff sought a writ on the ground of smoke nuisance, to stop a large commercial work. Or, when we go to the farthest extent in treating this suit as really one which includes as quasi parties the farmers in the association, we still find that it might not be harsh to deny him any equitable relief herein, inasmuch as he refused to consider an offer of purchase of his place, not because the offer would not have afforded him complete satisfaction (for presumably it would), but because he had surrendered the control of his own affair to the farmers' association, and thus aligned himself with them in carrying out their threat that they would enforce their rights in equity unless defendants bought their lands and property outright for full values (which were the sums they deemed the measure of their damages), and unless such purchase was consummated by payments of such values in cash within 60 days after demand, and that, too, without according to defendants the privilege of having possible counter proposition entertained. So, from the view point of the relation of the farmers' association toward the defendants, a court of equity should be very reluctant to put defendants in the position the association would put them in.

In this respect, the case finds some analogy with that of *New York City v. Pine*, supra, where injunction was sought to restrain the city of New York from maintaining a dam on a river, and diverting the waters thereof from their natural flow through the farm of plaintiffs. The dam as completed damaged the property of plaintiffs in a substantial

sum. Injunction was issued, but ordered dissolved by the Supreme Court. Among other things, the court said:

"It is true the testimony discloses that the plaintiffs and the city had been trying to agree upon the amount of compensation, but that shows that the plaintiffs were seeking compensation for the injuries they would sustain, and were not insisting upon their alleged right to an abandonment of the work. It is one thing to state a right and proffer a waiver thereof for compensation, and an entirely different thing to state the same right and demand that it should be respected. In the latter case the defendant acts at his peril; in the former he may well assume that payment of a just compensation will be accepted in lieu of the right. In the latter the plaintiff holds out the single question of the validity and extent of the right; in the former he presents the right as the foundation for a claim for compensation, and his threat to enforce the right if compensation is not made is simply a club to compel payment of the sum he deems the measure of his damages. \* \* \* If this injunction is permitted to stand, the city must pay whatever the plaintiffs see fit to demand, however extortionate that demand may be, or else abandon the work and lose the money it has expended. While we do not mean to intimate that the plaintiffs would make an extortionate demand, we do hold that equity will not place them in a position where they can enforce one."

Finally, in the last analysis, when, in connection with the attitude of Mr. Bliss, direct and vicarious, we weigh the uncertainty of his proof as to the amount of past damages done to his land, or of future damages to be done to his pastures by the acts of these defendants, together with the fact that he has not resorted to a court of law to recover any damages at all, and balance these matters against the stern fact that, if defendants are enjoined as prayed for, they must either buy the lands of the farmers at their own prices, or sacrifice their property; that, if enjoined as prayed for, their smelter must close; that, if it does close, their business and great property will be practically ruined; that a major part of the sulphide copper ores of Butte cannot be treated elsewhere within this state; that thousands of defendants' employes will have to be discharged; that the cities of Anaconda and Butte will be injured irreparably by the general effect upon internal commerce and business of all kinds; that professional men, banks, business men, working people, hotels, stores, and railroads will be so vitally affected as to cause unprecedented depression in the most populous part of the state; that the county government of one county of the state may not be able to exist; that the farmers of the valleys adjacent to Butte and Anaconda will not have nearly as good markets as they have enjoyed; that the industry of smelting copper sulphide ores will be driven from the state; and that values of many kinds of property will either be practically destroyed or seriously affected—remembering, always, that the courts of law are open to Mr. Bliss, I hold that, under the evidence, as he has submitted his case, discretion, wisely, imperatively guided by the spirit of justice, does not demand that injunction, as prayed for, should issue.

It does not necessarily follow, however, that his bill should be dismissed. This has been a litigation of over-much expense. Its consequences are of interest to many people, and, keeping in mind the essential fact that animal health is being affected, if there can be any reasonable preventive remedy applied by a court of equity, every larger consideration demands that it should be; that is to say, notwithstanding the denial of the writ, as prayed for, if a measure of

relief less than that which complainant has proved he is entitled to can be awarded to him, he should have it by some form of judicial order. Equity, having jurisdiction of the parties and the subject-matter, will therefore retain the bill, in diligent effort to afford all the relief reasonably possible under its allegations. Where the defendant has a clear ultimate right to do the act sought to be enjoined upon certain possible conditions, the courts will endeavor to adjust their orders so on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights. *McElroy v. Kansas City (C.)* 21 Fed. 257.

I am always deeply sensible, too, how especially important it is, in the practical preservation of the equality of the law, that, when a man of limited means seeks relief against a corporation or individual of very great wealth, his property rights must be protected with scrupulous care against threatened or continuing unlawful encroachments, without unnecessarily forcing him into litigation so expensive or protracted that it may mean impoverishment or denial of substantial justice. Let it not be understood that, in saying this, I mean to imply that defendants herein have assumed any unfair attitude toward Mr. Bliss or others in the Deer Lodge valley. On the contrary, as the case is submitted, it appears that they were ready to treat with him and other landowners, and were willing to buy his land, and consider claims of injury; but their advances were checked by Mr. Bliss' refusal to sell, and by the ultimatum of March 4, 1905, from the association. Nevertheless, the court will not peremptorily turn the complainant away, but will use its power, already invoked in this suit, to give him such relief as may be reasonably possible, without destroying defendants' business; but, for lack of information, the court can now make no such specific order as will be just to both sides. Accordingly, after a study of the evidence of Mr. Mathewson, superintendent of the Washoe smelter, I take it upon myself as a chancellor to say that I am not satisfied that the construction of additional arsenic furnaces will not help the situation, or that there may not be some system of spraying the smoke and cooling the gases which will aid in settling flue dust, or that a greater width and height to the chambers may not be effective aids, or that a further system of filters may not be devised, or that briquetting flue dust may not be of help, or that an arrangement of bags may not be made, or other means applied, perhaps discovered since this suit was instituted, which will materially reduce the quantities of escaping arsenic. I therefore think the more equitable course to pursue is to call for further evidence with respect to the subject of adopting other or additional means to prevent the release of arsenic, to the end that I may be more fully advised in the premises before making final disposition of the case.

The order in the case is that the injunction, as prayed for, is denied; but the bill is retained for the purpose of enabling the court to receive further testimony as to possible means of so treating the flue dust as to reduce the quantities of arsenic now suffered to be released from the stack, and thereafter making any such specific order as may be equitable and right. As it is important that the matter be

disposed of before spring, the court will set the hearing of further evidence for Monday, February, 15th, at 10 o'clock a. m., and hereby directs that a subpoena be issued for Mr. Mathewson, requiring him to appear and testify at that time. Complainant and defendants may produce any witnesses they please, to testify upon the point stated, and the court reserves the right to call for others. Counsel for complainant and defendants will be notified of this order, and are requested to be present on the 15th of February to aid in the investigation, and in suggesting such further orders of court as may be justified. Costs to abide final order.

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### HOLEPROOF HOSIERY CO. v. WALLACH BROS.

(Circuit Court, S. D. New York. November 11, 1908.)

#### 1. TRADE-MARKS AND TRADE-NAMES (§ 59\*)—INFRINGEMENT—NAMES SIMILAR IN MEANING.

The word "Holeproof," used as a trade-mark for hosiery, conceding its validity, is not infringed by the use by another manufacturer for a similar article of the name "Knotair."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. § 59.\*]

#### 2. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—UNFAIR COMPETITION—IMITATION OF PACKAGES.

The use by defendant, in packing hosiery for the retail trade, of boxes and labels similar in color and appearance, and in the kind of type and color of printing thereon, to those previously in use by complainant for its own product, together with a similar mode of dressing the packages, and the fact that defendant's salesmen in some instances palmed off its goods on customers as those of complainant, *held* to constitute unfair competition, which entitled complainant to a preliminary injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.\*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]


In Equity. Bill to restrain trade-mark infringement and unfair trading. On motion for a preliminary injunction.

The Kalamazoo Knitting Company, which was engaged in the manufacture of knitted products at Milwaukee, Wis., about the year 1897 began the manufacture and marketing of hosiery of peculiar wearing qualities, to which it applied as a name the word "Holeproof," and a device, consisting of the words "Holeproof Socks," or "Holeproof Hosiery," inclosed in a circular garter surmounted by a crown. This hosiery was sold under a printed guaranty that each pair of socks or stockings would wear for six months without holes or would be replaced. The business increased, and in 1904 complainant, Holeproof Hosiery Company, was organized under the laws of Wisconsin for the purpose of selling and dealing in the product manufactured by the Kalamazoo Knitting Company and sold under the name "Holeproof," the device, and with the guaranty above referred to. The persons organizing and conducting the Holeproof Hosiery Company were the same as those who conducted and operated the Kalamazoo Knitting Company; the organization of the complainant being merely a matter of business convenience. Complainant acquired from the Kalamazoo Knitting Company the business of selling hosiery under the name "Holeproof" and the good will of such business, the exclusive right to the name "Holeproof," the trade-mark device, and all other trade-marks, labels, and indicia. Complainant continued the marketing of the product,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which was and still is manufactured exclusively for the complainant by the Kalamazoo Knitting Company, and continued the use of the name, trade-mark, and devices. In 1904 complainant adopted a form of guaranty, consisting of a strip composed of a series of coupons separated by perforations. The guaranty provided that if any pair of Holeproof socks or hose needed darning within six months, if surrendered with one of the coupons showing the date of

## Defendant's Coupon Ticket.

GUARANTEE	
<p>WE HEREBY GUARANTEE that these Six Pairs of Hose, if worn alternately will wear, stay whole and need no darning for six months. If, for any reason they should require darning within six months of date of purchase, return to us in accordance with the instructions on bottom, and we will replace them by new ones immediately.</p>	
<p>Signature of Dealer _____</p>	
<p><b>WALLACH BROS.</b> NEW YORK, N. Y.</p>	
	
<p>WEST PHILADELPHIA, PA., U. S. A.</p>	

See that this Guarantee is dated and signed in INK by dealer on date of sale

Coupon No. 1422

A Date of Sale \_\_\_\_\_  
Write in ink

**Knotair Hose**

"Little quality soft as silk"

Coupon No. 1422

B Date of Sale \_\_\_\_\_  
Write in ink

**Knotair Hose**

"Not a seam to hurt the feet"

Coupon No. 1422

C Date of Sale \_\_\_\_\_  
Write in ink

**Knotair Hose**

Serviceable: Wear Resisting Hose!

Coupon No. 1422

D Date of Sale \_\_\_\_\_  
Write in ink

**Knotair Hose**

Inter-laced heel and toe

Coupon No. 1422

E Date of Sale \_\_\_\_\_  
Write in ink

**Knotair Hose**

"Soft and soothing for the feet"

Coupon No. 1422

F Date of Sale \_\_\_\_\_  
Write in ink

**Knotair Hose**

"Vegetable dye won't come off"

## DIRECTIONS FOR EXCHANGE OF HOSE

Customers must surrender the damaged Hose, the Guarantee Ticket, and one Coupon for each pair of Hose returned. Under no other circumstances can we replace them with new goods. With the first pair of damaged Hose we require the original Guarantee Ticket and Coupon A attached thereto; the remaining coupons must be retained and one returned with each subsequent pair of damaged goods.

**WALLACH BROS.**  
NEW YORK, N. Y.

Will cheerfully exchange "Knotair" Hosiery at all their stores

**Knotair Hosiery Co.**  
WEST PHILADELPHIA, PA., U. S. A.

Name, address and item required must accompany goods as for exchange

## Complainant's Coupon Ticket.

WE GUARANTEE	
<p>that these Six Pairs of "Holeproof Hose" will need no darning for six months. If they should, we agree to replace them by new ones upon the surrender of this ticket with the worn pair and Coupon A, provided they are returned to us within six months from date of sale to wearers</p>	
<p>Signature of Dealer _____</p>	
<p><b>Holeproof Hosiery Co., Manufacturers</b> Milwaukee, Wis., U. S. A.</p>	

See that this Guarantee is dated and signed in INK by dealer on date of sale

Coupon No. 330141

A Date of Sale \_\_\_\_\_

**Holeproof Hosiery Co.**

Milwaukee, Wis., U. S. A.

Coupon No. 330141

B Date of Sale \_\_\_\_\_

**Holeproof Hosiery Co.**

Milwaukee, Wis., U. S. A.

Coupon No. 330141

C Date of Sale \_\_\_\_\_

**Holeproof Hosiery Co.**

Milwaukee, Wis., U. S. A.

Coupon No. 330141

D Date of Sale \_\_\_\_\_

**Holeproof Hosiery Co.**

Milwaukee, Wis., U. S. A.

Coupon No. 330141

E Date of Sale \_\_\_\_\_

**Holeproof Hosiery Co.**

Milwaukee, Wis., U. S. A.

Coupon No. 330141

F Date of Sale \_\_\_\_\_

**Holeproof Hosiery Co.**

Milwaukee, Wis., U. S. A.

## Directions for Exchange of Hose

Customers must surrender the damaged Hose, the Guarantee Ticket, and one Coupon for each pair of Hose returned. Under no other circumstances can we make the exchange. With the first pair of damaged Hose we require the original Guarantee Ticket and Coupon A attached thereto; the remaining coupons must be retained and one returned with each subsequent pair of damaged goods.

Mailed to us direct, and we will replace the same, charges prepaid.

**Holeproof Hosiery Co.,**  
Milwaukee, Wis., U. S. A.

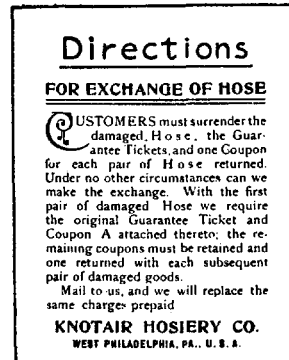
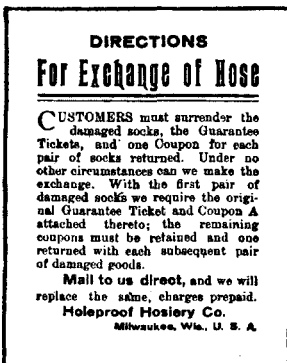
Name, address and item required must accompany goods returned to us for exchange

purchase, a new pair would be supplied without cost to the purchaser. This method of guaranteeing hosiery against wear was, as far as appeared, original with complainant and its predecessor, and the form of guaranty used was distinctive. Complainant also adopted as a container for six pairs of hose a yellow box bearing the name "Holeproof," the trade-mark device, and printed matter and directions in red and black type arranged in a characteristic manner. Attached to each pair of socks was a tag or ticket bearing certain printed advertising matter in red and black, the name "Holeproof," and the trade-mark device. Around each half a dozen pair of socks or stockings was placed a band showing the word "Holeproof" and the trade-mark device in red and black, and placed in each box was an advertising

Wrapper on inside of Complainant's Boxes.



Wrapper on inside of box of Defendant Wallach Bros.





slip and one of the guaranty coupons above described. Complainant's product has been extensively advertised, and it appeared that it was asked for and referred to on the market as "Holeproof Socks" and "Holeproof Hosiery," and by reason of the guaranty to some extent as "Guaranteed Hosiery" and "Guaranteed Socks." It also appeared that complainant's product was identified by the appearance of the guaranty coupons or tickets and the general get-up of the package, as well as by the names above given. Defendant, Wallach Bros., was a New York corporation operating a number of retail haberdashery shops in New York City. Shortly before the institution of this suit defendant began dealing in hosiery manufactured by the Knotair Hosiery Company and sold under the name "Knotair Guaranteed Hose," and put up in yellow boxes containing half a dozen pairs and bearing devices and printed matter like complainant's, printed in red and black and with bands, tags, slips, and guaranty coupons or tickets closely resembling those of complainant in color, arrangement, and appearance. It was also shown that on several occasions at defendants' stores persons asking for "Holeproof Hosiery" had been furnished with "Knotair Guaranteed Hose," without explanation.

King & Booth (Reed & Rogers, of counsel), for complainant.

Gardenhire & Jetmore (Mr. Jetmore, of counsel), for defendant.

HOUGH, District Judge. The motion, as shown by the moving papers, is to obtain pendente lite an injunction "in manner and form as set forth in the bill of complaint." An analysis of the prayer for relief in the bill, taken in conjunction with the answer and the body of the bill and the affidavits submitted on this motion, leads me to think that the relief demanded may be fairly stated under the following heads:

Complainant wishes to prevent defendant (1) from using in connection with hosiery the word "Holeproof," or any like word; (2) from using in like connection the words "guarantee," "guaranteed hose," or "guaranteed hosiery," or words similar thereto; (3) from employing in like connection boxes, labels, guaranty tickets, bands, or devices identical with or deceptively similar to those referred to in the bill and produced on this hearing; and (4) from selling or offering for sale as guaranteed hosiery, or "Holeproof" hosiery, or otherwise as a product of the complainant any product not the complainant's.

First. The first branch of the prayer for relief raises the question whether "Knotair" is a like word to "Holeproof," or so similar thereto as to be likely to deceive the average purchaser of the product to which it is applied; i. e., hosiery for men and women of no very high grade. By this I mean hosiery which may reasonably expect purchasers from among persons in moderate circumstances. This is to be regarded as a question of trade-mark, and the point should not be obscured by simultaneously considering suggestions of unfair competition. Laying aside the question (not raised at bar) whether "Holeproof" is not a descriptive word, and one descriptive of qualities which no pair of wearable stockings can ever really possess, and whether the word "Knotair" is not open to the same criticism, the question is this: If there were absolutely no similarity in the dressing, advertising, wrapping, and method of selling these two brands of hosiery, except the use of the trade-mark "Holeproof" by one proprietor, and of the trade-mark "Knotair" by the other, could infringe-

ment be declared? To me it is quite plain that there would be no infringement, and the matter is assuredly not so clear as to warrant the issuance of a preliminary injunction under this branch of the relief prayer.

Second. As interpreted in argument, the second item of relief prayed for means that defendant should be restrained from selling "Knotair" hose as guaranteed hose or guaranteed hosiery. Since it is admitted that as a business method the guaranteeing of hosiery or any other article of merchandise is open to the world, this line of argument suggests the query whether any development of the business of selling hosiery with a guaranty can so effectually appropriate to one manufacturer or merchant the right to call his product "guaranteed hosiery" as to prevent other persons from doing the same, provided they do nothing else objectionable. But this inquiry need not be pursued, because in my opinion the complainant has not shown that it has so completely appropriated and made its own the business of selling guaranteed hose as to render the use of that phrase (without more) suggestive to the general public of their "Holeproof" product. Assuming the answer to the legal question to be in favor of complainant, the evidence is not strong enough to warrant this relief pendente lite.

Third and Fourth. In my opinion the evidence is overwhelming that in the packing, labeling, dressing, use of colors, and arrangement of type defendant has used and is using unfairly competitive methods. The weight of evidence is also in favor of complainant in asserting that defendant, through its salesmen, has palmed off its goods upon customers as the goods of complainant.

The injunction as prayed for will issue, except that defendant will not be enjoined from using the word "Knotair," as applied to hosiery, provided such use be not accompanied by the deceptive competitive method above indicated, and excepting, also, that defendant will not be enjoined from advertising, naming, or describing "Knotair" hosiery as guaranteed hose or hose sold with a guaranty, provided that such expression of warranty be not contained, printed, set forth, or advertised in words, letters, or figures calculated to induce belief that defendant's guaranteed "Knotair" hosiery is complainant's guaranteed "Holeproof" hosiery.

The injunction order will be settled on a notice of four days.

## HOLEPROOF HOSIERY CO. v. FITTS et al.

(Circuit Court, D. New Jersey. November 18, 1908.)

## TRADE-MARKS AND TRADE-NAMES (§ 70\*)—UNFAIR COMPETITION—IMITATION OF NAME AND DRESS.

Complainant, the Holeproof Hosiery Company, was a manufacturer of stockings and socks sold and extensively advertised under the name of "Holeproof Hosiery." They were put up in boxes containing six pairs each, in each of which was a card on which was a printed guaranty against holes resulting from wear for a period of six months, with a coupon for each pair. After such business had been conducted for a number of years and had become profitable, defendants established a similar one under the name of "No-Hole Hosiery Company," putting up their product in boxes similar in size and color to complainants, with the name of the company thereon, although having different printed matter, and each containing a guaranty card similar in general style and appearance and having thereon a verbatim copy of complainant's guaranty. *Held*, that such simulation of the name and the guaranty card was evidently with design, and constituted unfair competition, which, it being shown that it in fact deceived purchasers, entitled complainant to a preliminary injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.\*]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

## In Equity.

McDermott & Enright (Frank F. Reed and Edward S. Rogers, of counsel), for complainant.

Vreeland, King, Wilson & Lindabury, for defendants.

CROSS, District Judge. The complainant by its bill of complaint charges the defendants with infringement of its trade-mark and with unfair competition in trade. The matter comes before the court on an application for a preliminary injunction, upon bill and affidavits and answering affidavits. The proofs do not satisfactorily show infringement of the trade-mark, but do show unfair competition in trade with sufficient clearness to warrant at least a portion of the relief prayed for. The defendants, or one of them, the other actively participating, are transacting the same kind of business as the complainant under the name and style of the "No-Hole Hosiery Company."

It appears that the complainant and its immediate predecessor in business have for the past 10 years been engaged in selling socks and stockings known as "Holeproof Hosiery." Its trade therein has been largely advertised and a successful business established. One of the features of its trade consists in guaranteeing its product against holes resulting from wear for a period of six months. Each package which it puts out comprises six pairs of socks or stockings, and inclosed in the package is a guaranty of the character above stated. The

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

card on which the guaranty is printed is of a size and shape to very nearly fit the interior of the pasteboard box in which the stockings are put upon the market. There is more or less printed matter at the beginning and end of the card expressing the terms of the guaranty, and intervening this printed matter are six numbered coupons, designed to cover, respectively, the six pairs of stockings which accompany the guaranty. The defendants use a guaranty card which in general style and appearance is the same as the complainant's, while its language is a verbatim copy. No such imitation could happen by accident. It was manifestly designed. Furthermore, the complainant's product and the defendants', for the most part, is put upon the market in a yellow pasteboard box of the same general size and appearance, although the printed matter upon the two boxes is not the same. The defendants' box, nevertheless, does advertise the contents as "no-hole hosiery," or as made by the No-Hole Hosiery Company.

As already stated, the boxes, although of the same color, are not identical, although similar, but, taken in connection with the words "no-hole" and the guaranty card, are susceptible of being confused, in the public mind, with the packages and product of the complainant. That this is so is not open to argument at this time, since the complainant's affidavits show specific instances of such confusion. It is apparent that, while the package and guaranty card as accessories aid in producing this confusion, it is the use of the hyphenated word "no-hole" which is the culminating and controlling factor therein. Holeproof hosiery and no-hole hosiery convey to the casual purchaser the same idea, or at least leave upon his mind the same general impression. The defendants have been in business but a few months, and the affidavits permit the inference that they had the complainant's name, package, and guaranty card before them when they conceived their own. If they had intended to carry on a bona fide business, they certainly would not in so many important respects have copied or closely imitated the complainant's name and methods.

I am unwilling, however, to enjoin the defendants, at this time, from the use of the word "guarantee" or "guaranteed," or from the use of a yellow box in connection with the packing and sale of their hosiery, but nevertheless unhesitatingly reach the conclusion that the defendants upon this application should be enjoined against the use of the words "no-hole," both in their business name and style, and also in connection with the advertising, packing, and sale of their product. A multitude of cases in which more remote approximations have been enjoined might be cited, were it at all necessary. The principles upon which the complainant herein is entitled to relief are clearly laid down in *Fuller v. Huff et al.*, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332, and cases therein cited. They should also be enjoined from the use of a guaranty card like or similar to that of the complainant. An injunction upon these lines imposes no undeserved hardship upon the defendants, since they had no right to trench, as they have done, upon the established rights and good will of the complainant, and under the guise of artifice and simulation acquire in a

few weeks what the complainant had achieved only after years of effort and expense.

In these respects an injunction will be allowed. In all others it will be denied.

#### Defendant's Coupon Ticket.

<p align="center"><b>WE GUARANTEE</b></p> <p>that these Six Pairs of "NO-HOLE HOSE" will need no darning for six months. If they should, we agree to replace them by new ones upon the surrender of this ticket with the worn pair and Coupon A, provided they are returned to us within six months from date of sale to wearers.</p> <p><i>Signature of Salesman</i>.....</p> <p align="center"><b>No-Hole Hosiery Co., Manufacturers</b> Newark, N. J.</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

See that this Guarantee is dated and signed in INK by salesman on date of sale

**Coupon A 12 983**

*Date of Sale*.....

**No-Hole Hosiery Co.**  
Newark, N. J.

**Coupon B 12 983**

*Date of Sale*.....

**No-Hole Hosiery Co.**  
Newark, N. J.

**Coupon C 12 983**

*Date of Sale*.....

**No-Hole Hosiery Co.**  
Newark, N. J.

**Coupon D 12 983**

*Date of Sale*.....

**No-Hole Hosiery Co.**  
Newark, N. J.

**Coupon E 12 983**

*Date of Sale*.....

**No-Hole Hosiery Co.**  
Newark, N. J.

**Coupon F 12 983**

*Date of Sale*.....

**No-Hole Hosiery Co.**  
Newark, N. J.

#### Directions for Exchange of Hose

Customers must surrender the damaged Hose, the Guarantee Ticket, and one Coupon for each pair of Hose returned. Under no other circumstances can we make the exchange. With the first pair of damaged Hose we require the original Guarantee Ticket and Coupon A attached thereto; the remaining coupons must be retained and one returned with each subsequent pair of damaged goods.

Mail to us direct, and we will replace the same, charges prepaid.

**NO-HOLE HOSIERY CO.,**  
Newark, N. J.

Name, address and size required must accompany goods returned to us for exchange.

#### Complainant's Coupon Ticket.

<p align="center"><b>WE GUARANTEE</b></p> <p>that these Six Pairs of "Holeproof Hose" will need no darning for six months. If they should, we agree to replace them by new ones upon the surrender of this ticket with the worn pair and Coupon A, provided they are returned to us within six months from date of sale to wearers.</p> <p><i>Signature of Dealer</i>.....</p> <p align="center"><b>Holeproof Hosiery Co., Manufacturers</b> Milwaukee, Wis., U. S. A.</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

See that this Guarantee is dated and signed in INK by dealer on date of sale

**Coupon No. 330141**

*Date of Sale*.....

**Holeproof Hosiery Co.**  
Milwaukee, Wis., U. S. A.

**Coupon No. 330141**

*Date of Sale*.....

**Holeproof Hosiery Co.**  
Milwaukee, Wis., U. S. A.

**Coupon No. 330141**

*Date of Sale*.....

**Holeproof Hosiery Co.**  
Milwaukee, Wis., U. S. A.

**Coupon No. 330141**

*Date of Sale*.....

**Holeproof Hosiery Co.**  
Milwaukee, Wis., U. S. A.

**Coupon No. 330141**

*Date of Sale*.....

**Holeproof Hosiery Co.**  
Milwaukee, Wis., U. S. A.

**Coupon No. 330141**

*Date of Sale*.....

**Holeproof Hosiery Co.**  
Milwaukee, Wis., U. S. A.

#### Directions for Exchange of Hose

Customers must surrender the damaged Hose, the Guarantee Ticket, and one Coupon for each pair of Hose returned. Under no other circumstances can we make the exchange. With the first pair of damaged Hose we require the original Guarantee Ticket and Coupon A attached thereto; the remaining coupons must be retained and one returned with each subsequent pair of damaged goods.

Mail to us direct, and we will replace the same, charges prepaid.

**Holeproof Hosiery Co.,**  
Milwaukee, Wis., U. S. A.

Name, address and size required must accompany goods returned to us for exchange.

## HOLEPROOF HOSIERY CO. v. RICHMOND HOSIERY MILLS.

(Circuit Court, N. D. Georgia, N. D. November 21, 1908.)

## TRADE-MARKS AND TRADE-NAMES (§ 92\*)—INFRINGEMENT—SUIT FOR INJUNCTION—SUFFICIENCY OF BILL.

Where a bill states a cause of action which entitles the complainant to relief against the use by defendant of certain trade marks and names in combination, it will not be held demurrable because he may not be entitled to enjoin their use separately, or to relief to the full extent prayed for.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 102; Dec. Dig. § 92.\*]

In Equity. On demurrer to bill.

Slaton & Phillips, Frank F. Reed, and Edward S. Rogers, for complainant.

Smith & Carswell, for defendant.

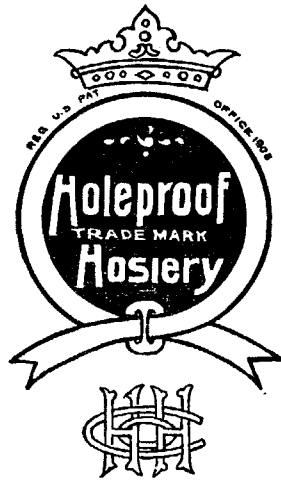
NEWMAN, District Judge. This bill is brought by the Holeproof Hosiery Company against the Richmond Hosiery Mills to enjoin the latter company from using on boxes of hosiery and on wrappers around the hose certain trade-marks adopted and used by the complainant company on hosiery put on the market by it. It alleges that prior to 1897 the Kalamazoo Knitting Company, of Milwaukee, Wis., was engaged in the manufacture of gloves, hosiery, and similar articles, and that about 1898 this company devised hosiery of a peculiar manufacture and material, which possessed unusual wearing qualities, and which was given the name "Holeproof." At the same time the Kalamazoo Knitting Company adopted an original trade-mark device, consisting of the name "Holeproof," accompanied by the word "Sox" or "Hosiery," inclosed in a circular garter, surmounted by a crown, below which appeared a characteristic monogram. Also that about 1898 the said Kalamazoo Knitting Company devised other hosiery of peculiar manufacture and material, which also possessed unusual wearing qualities, which product was given the name "Toeproof." At the same time the said company adopted an original trade-mark device, consisting of the name "Toeproof," accompanied by the word "Sox" or "Hosiery," inclosed in a Maltese cross.

It is alleged that the Kalamazoo Knitting Company continued in the manufacture and sale of said product, and the use of said trade-mark names and devices from about July, 1898, until July, 1904, at which time the complainant company, Holeproof Hosiery Company, was organized under the laws of the state of Wisconsin. This organization was accomplished by substantially the same persons who had theretofore operated and controlled the Kalamazoo Knitting Company, for the purpose of handling said hosiery; and for valuable consideration the Kalamazoo Knitting Company sold, assigned, and transferred unto the complainant company the trade-mark names and devices and all trade indicia, so that the complainant company is the sole and exclusive owner thereof. Also that, in order to further individualize its

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

product, the complainant company packed said hosiery in boxes of a yellow color with gilt edges, holding six pairs each of socks or stockings, with the trade-mark name and device stamped upon the top and ends of the boxes. It is alleged that it is also the custom of the complainant company to stamp the trade-mark device upon the feet of the socks or stockings. Further, that at the time the Kalamazoo Knitting Company inaugurated the manufacture of said hosiery said company conceived the idea of guaranteeing the same against wear for six months, and offered to replace, and did replace, any socks or stockings in which holes appeared within six months from the date of purchase, under the terms of a guaranty ticket which was attached to each pair of socks or stockings. This idea of guaranteeing hosiery against wear was original with the Kalamazoo Knitting Company. It is alleged that the right to all of the above was obtained by the complainant company from the Kalamazoo Company. That in connection with the guaranty by the Holeproof Hosiery Company of its hosiery it has used the words "Guaranteed Sox," "The Hose Sold with a Guaranty," "The Sox Sold with a Guaranty," and other similar phrases, and that the public is in the habit of asking at retail stores for complainant's product under the name of "Guaranteed Socks," meaning solely the product of the complainant company, and that the company is frequently spoken of as "Guarantee Hosiery Company." That long after the complainant company's product had become widely known and established under its trade-mark names and devices the defendant, Richmond Hosiery Mills, in conjunction with one M. D. Stevenson, manufactured hosiery which is in appearance in close and intended simulation of complainant's product, packing the same in yellow boxes holding a half dozen pairs each, these boxes bearing the words "Stahol Sox," which is alleged to be a colorable imitation of complainant's trade-mark name, "Holeproof Sox." That M. D. Stevenson operates a retail men's furnishing store at Kansas City, Mo., and for a considerable period handled complainant's product. Later on said M. D. Stevenson, with the knowledge and acquiescence of the defendant company, sold and palmed off the product of the Richmond Hosiery Mills as "Holeproof Hosiery," and by reason of the imitated name, devices, etc., the public and purchasers have been and are now being misled and deceived, and are purchasing the product manufactured by the defendant for the product of the complainant. That the defendant company, in connection with one E. E. Hogue, of Chattanooga, Tenn., manufactured hosiery in close and intended simulation of complainant's products, and packed in boxes holding half dozen pairs, and bearing the words "Toeproof Hosiery," which is a trade-mark name long heretofore used by complainant, and which words "Toeproof Hosiery" is in close simulation of the complainant's trade-mark name "Holeproof Hosiery," and that the boxes also bear conspicuously the word "Guaranteed" and the name "Guaranteed Hosiery Company," and a device closely approximating the trade-mark device of complainant's "Holeproof Hosiery." That E. E. Hogue sold the defendant's product in Chattanooga with the knowledge and acquiescence of said company and substituted and palmed off to the trade as

Complainant's Box Top.



The Hose Sold With a Guarantee



Manufactured by

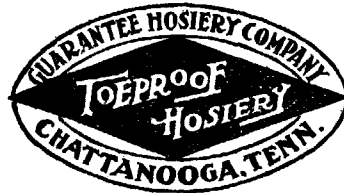
**Holeproof Hosiery Co.**

Milwaukee, Wis U.S.A

Box Tops of Defendant Richmond Hosiery Mills.

**GUARANTEED**

SIX MONTHS WEAR WITHOUT REPAIR



A PERFECT PRODUCT

**\$1.50**

PER BOX



THE HOSE SOLD WITH A GUARANTEE

Manufactured for  
**STAHOL HOSIERY CO**  
KANSAS CITY MO.  
U.S.A.



the genuine product of the complainant company. That the value of the exclusive right to the trade devices of the complainant, and the damage inflicted upon this company by the conduct of the defendant, exceeds, exclusive of interest and costs, the sum or value of \$2,000.

Complainant then prays:

"That the defendant, its officers, agents, servants, and employes, and all those holding under or through it, may be enjoined at first during the pendency of this suit, and afterwards perpetually, from using or employing, in connection with the manufacture, advertisement, or sale of hosiery, the words 'Holeproof,' 'Toeproof,' 'Stahol,' or any like word or words, the words 'Guaranteed,' 'Guaranteed Socks,' 'Guaranteed Hosiery,' 'Guaranteed Hosiery Company,' or any word or words similar thereto in sound, appearance, or suggestion; from using or employing, in connection with the manufacture, advertisement, or sale of hosiery, boxes, names, labels, tags, bands, guaranty coupons, printed matter, or devices identical with or like those shown in and by complainant's exhibits, \* \* \* or any or either of them, and further from doing any act or thing which may be calculated to pass off or enable others to pass off the product of the defendant as and for the product of your orator; and, further, from doing any act or thing, or using any name or names, boxes, tags, labels, bands, stamps, coupons, devices, or other contrivance which may be calculated to induce the belief that any product not your orator's is your orator's, and for such other and further relief as to the court shall seem just."

To this bill a demurrer is filed. The principal point made by the demurrer and in argument is that the bill is objectionable and insufficient to the extent that it asks for relief as to the separate acts of the defendant company. It is not denied that what is alleged in the bill as to the use of the words "Holeproof," "Toeproof," "Guarantee," etc., taken in the manner and combination in which the defendant uses "Stahol," "Toeproof," "Guarantee," etc., makes a case entitling the complainant to relief so far as this combined use of the devices, trademark, labels, tags, boxes, etc., are concerned. But it is earnestly contended that the defendant might properly and legally use some one of the words or phrases complained of separately without encroaching upon the complainant's rights. I do not think it is necessary to decide this at the present stage of the case. It is sufficient to say that the complainant makes a case entitling it to relief, and how large that relief should be or to what extent it should be restricted may well be determined when a final decree shall be entered in the case.

I was much impressed with the argument as to the prayer for injunction against the use of the word "Guaranteed." This is a word of such common use, and in all lines of trade, that of itself it would hardly seem the subject of appropriation by a manufacturer; but there may be force in the suggestion that, considering the relation in which it is used with other words, and the fact that the method of guaranteeing for a definite period the wearing qualities of the hosiery, using the "guarantee coupons" to render the guaranty effective, so that the complainant's hosiery has come to be known as "Guaranteed Hosiery," the complainant has peculiar rights even to the use of this word. But it seems to me, as stated, that all this can very well be settled on final hearing and in the final decree, and that, as the complainant clearly makes a case by his bill entitling him to some relief, the demurrer should be overruled.

## SWEENEY v. SMITH et al.

(Circuit Court, E. D. Pennsylvania. February 5, 1909.)

No. 173.

**TORTS (§ 12\*)—INTERFERENCE WITH CONTRACTUAL RELATIONS—GROUNDS OF LIABILITY.**

The mere fact that a purchaser of bonds from a committee of bondholders authorized to sell the same at the time of the purchase had knowledge that the committee had previously contracted to sell them to another does not render him liable to such other in damages because of the sellers' breach of contract.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 13; Dec. Dig. § 12.\*]

In Equity. On demurrers to bill.

George Demming and Wm. L. Royall, for complainant.

Reynolds D. Brown, for J. W. Van Dyke and F. D. Zell.

Henry C. Boyer and Wm. A. Glasgow, Jr., for E. B. Smith and others.

J. B. McPHERSON, District Judge. The defendants in this action may be arranged in two groups, one composed of the partners in the firm of Edward B. Smith & Co., and the other composed of John W. Van Dyke and Frank D. Zell. The bill does not pray for the same, or even similar, relief against each group, but asks for different, and, indeed, for only distantly related, decrees, as will be seen in a few moments. It is not altogether easy to summarize the charges of the bill, for the complainant has chosen the unusual and undesirable course of including much of his evidence and not a few argumentative statements, with the result of presenting for examination a document of more than a hundred printed pages. After attentive consideration, however, it is possible, I think, to condense his cause of action against Edward B. Smith & Co., at least into a comparatively small compass:

In the fall of 1905, the Bay Shore Terminal Company, a Virginia corporation operating a street railway in and near the city of Norfolk, passed into the hands of receivers. A majority of the bondholders, uniting for their own protection, agreed to put their interests into the hands of a committee, to whom was given plenary power to act. On September 12th this committee entered into a contract with the complainant by which he was to acquire a large part of the company's bonds and stock, and was to pay therefor 40 per cent. of the par value of the bonds. Other covenants were contained in the contract; among them, an agreement that a certain cloud on the title to the company's right of way should be cleared off and adjusted. On November 11th this agreement concerning the title to the right of way was modified, but the change is not material in the present dispute. It is only essential to notice that the complainant was to obtain a controlling interest in the company's stock and bonds. No limit of time was fixed within which the respective engagements of the parties were to be fulfilled. For reasons not now important to consider, the contract of September 12th was not carried out. On

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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January 25, 1906, the same committee made a second contract with D. L. Groner and Tazewell Taylor, who were acting as agents for E. B. Smith & Co. This agreement covered substantially the same ground as the contract of September 12th with the complainant, and practically transferred to Smith & Co. the option upon the bonds and stock that had previously been given to the complainant. There are differences between the two contracts, but none, I think, that calls for attention in the present aspect of the controversy. The agreement of January 25th was carried out in essential particulars. The bonds were delivered to Smith & Co., and were used by them at par and interest in paying the purchase price of the terminal company's property, which they bought at foreclosure sale in the following May. The complainant now prays that Smith & Co. account to him for the profit made by this use of the bonds, proceeding upon the theory that Smith & Co. in effect have in their hands this profit, or its equivalent, which they refuse to give up, although in equity it belongs to the complainant. The only ground set forth in the bill to support this theory is the following sentence from paragraph 12:

"The said Edward B. Smith & Co. knew before they entered upon their negotiations of your orator's contract, as is shown by their answer to a certain petition filed by B. W. Leigh and M. C. Ferree, to be more particularly referred to hereafter, and their negotiation with said committee was conducted through one D. L. Groner and one Tazewell Taylor, both of whom knew of your orator's said contract before they entered upon the said negotiations."

The answer referred to in this quotation is not included among the numerous exhibits, but I shall assume that its contents justify the complainant's averment, and that Smith & Co., being chargeable either with their own knowledge or with the knowledge of their agents, Groner and Taylor, were aware of the complainant's contract before they made their own agreement of January 25th. There is no other relevant averment in the bill on this subject. No charge of deceit or false representation or fraud in any form or degree is made against Smith & Co. The bill does not even state that they used any means whatever, fair or unfair, to induce the committee to break the contract of September 12th with the complainant, and there is no averment that they entered into the agreement of January 25th with the intention of injuring the complainant, whether such intention was deliberately malicious or fraudulent, or was only such intention as would be inferred by the law from the fact that injury actually followed. In other words, while it may be supposed that the complainant meant to charge that Smith & Co. interfered with the carrying out of his contract of September 12th, and persuaded or induced the committee to break that contract, no such charge appears in the bill. The only complaint is that Smith & Co. had prior knowledge of the complainant's contract when they began the negotiations that resulted in the agreement of January 25th.

Under all the authorities the bill is fatally defective on this point. The complainant's cause of action does not rest upon contract, for he had no such relation with Smith & Co. It must be founded on a tort, on a wrong done by Smith & Co., and must be supported by

the proposition that it is an actionable wrong to make a second contract with a promisor if he is known to have had a prior contract upon the same subject with another promisee. In my opinion, this proposition is not sound. The promisor may have excellent reasons for declining to be bound by the earlier contract, and these he need not disclose. If he chooses to take the risk of breaking the first agreement, that is his own affair, which may make him liable on that agreement, but imposes no obligation on the second promisee. It is enough for the second promisee that the agreement is now offered to him without his own procurement or persuasion. If he has done nothing to bring the situation about, the mere fact that he knew of the first contract is no bar to his entering upon the second. Mere knowledge of the first does not make the second an actionable wrong; he is under no legal obligation to insist upon being told why the promisor declines to carry out the first contract, and is not bound to weigh these reasons and decide at his peril whether they are good or bad. Before he can be called to account, some legal ground of liability must appear; he must participate in the breach before he can be held to blame; and the mere knowledge that the promisor intends to break the contract with the first promisee is not wrongful in itself, and does not disable the second promisee from making the subsequent contract. To be blameworthy, he must take some active step to bring about the breach. At the least, he must induce or persuade the promisor to abandon the earlier agreement, and even this he may sometimes do with impunity, unless the decisions in several jurisdictions are to be regarded as erroneous. Take the case of two trade competitors: One makes a contract with a customer; the other, knowing that the contract has been made, persuades the customer by fair and legitimate arguments that his wares are better than his rival's, and thus induces the customer to cancel the contract. In such a situation, I am not aware of any decision that would support a suit against the second merchant, although he has unquestionably interfered actively to supplant his rival. But if the pending bill states a cause of action against Smith & Co., as soon as the second merchant knew of the contract with the customer he could not present the merits of his own goods except at the risk of being sued for interference if his presentation should be successful.

It is no doubt true, as already intimated, that the courts have differed in opinion concerning the scope of the rule that should be applied in determining when it is an actionable wrong for a third person to interfere with a contract between two other parties. Many of the cases are collected and discussed in a note to *Boysen v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233, to which I refer as a comparatively recent summary. See, also, *Glencoe Land Co. v. Hudson Bros.*, 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 560. Without deciding now between the conflicting views, it is enough to say that no case can be found, I think, in which the action has been sustained unless the interference has been wrongful in a legal sense. At the least, the interferer must have induced or persuaded the breach complained of. If he accomplish his purpose by fraud in any of its forms (as was the case in *Angle v. Railroad*, 151 U. S.

1, 14 Sup. Ct. 240, 38 L. Ed. 55), his liability is undoubted; but I have been referred to no decision, and I have found none, in which mere knowledge of the earlier contract was held to be the equivalent of inducement or persuasion or (still less) of fraudulent conduct. The general subject of interference is further pursued in the first part of the note to *Passaic Print Works v. Ely, etc., Co.*, 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673; and what is probably the latest discussion of interference with the contract between master and servant will be found in the note to *Thacker Coal Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091. The subject is also considered in chapter 61 of the third volume of Page on Contracts, § 1323, a treatise published in 1905. In none of these elaborate considerations of the subject will there be found the slightest intimation that mere knowledge by a third person of a prior contract exposes him to suit if he shall in effect agree to take the place of the first promisee. In my opinion, therefore, the bill under consideration fails to set forth a cause of action against Edward B. Smith & Co.

It will also be observed, in the examination of the cases referred to, that, where an actionable wrong has been suffered by unlawful interference with a contract, the form of action to redress the injury is a suit at law. The proceeding here is in equity, and, while it is not necessary (if I am right in what I have heretofore said) to decide that the complainant has an adequate remedy at law, it may not be improper to add that this ground of demurrer by Smith & Co. would deserve serious consideration if it required decision.

It is also objected, both by Smith & Co. and by Van Dyke and Zell, that the bill is multifarious. The complainant attempts to support the proceeding in equity against Smith & Co. mainly upon the grounds that he cannot sue them at law until he regains the legal title to his contract of September 12th, which is now vested in the other defendants, Zell and Van Dyke, and that the object of the bill is twofold: First, to compel Van Dyke and Zell to reassign the contract, for the reason that the transfer to them (so it is averred) was brought about by false promises or representations; and, second, after the legal title has thus been regained, to compel Smith & Co. to account. No doubt the bill is framed with this double aspect, but as nothing whatever is stated therein to connect Smith & Co. with the transactions that resulted in the assignment to Zell and Van Dyke, it becomes increasingly difficult to see how the complainant can avoid the charge that his bill is multifarious. The two groups of defendants are not averred to have been acting in concert. Smith & Co. have no interest in the litigation to compel Zell and Van Dyke to reassign; Zell and Van Dyke have no interest in the litigation to compel Smith & Co. to account; and apparently the principal reason for joining the two groups is simply because it would be convenient for the complainant to dispose of both controversies in one proceeding. Upon his own concession, however, he has no right to ask Smith & Co. to account until his assignment to Zell and Van Dyke has been adjudged to be invalid; and, as the two subjects—reassignment by one group, and subsequent account by the other—are dis-

tinct and only distantly related, the objection of multifariousness would perhaps be entitled to a good deal of weight, if the court were compelled to determine it. But, in the view that I take of the matter, this objection does not need further attention. If I am right in the conclusion that the complainant has no cause of action against Smith & Co., the bill should be dismissed so far as they are concerned, thus leaving Zell and Van Dyke the sole defendants, against whom the relief prayed, namely, that they may be compelled to reassign the contract of September 12th to the complainant, is a single subject, and may properly be considered by a court of equity. The charges made in the bill to support this prayer need not be set out in detail or summarized. Upon demurrer I am bound to regard them as true, and (while I admit the strength of the argument that has been made in favor of deciding the case now against the complainant on the ground that the parol testimony on which he must rely is inadmissible to contradict the writings that are set out in the bill) at present I shall only say that I do not see my way to sustaining the demurrer of Zell and Van Dyke. Questions may perhaps arise—I do not say that they must arise—concerning the effect of certain conduct of the parties after the execution of the last writing; and, if these questions are to influence the final decision, it is necessary that the court should be fully informed about them. The situation presented in the bill is too complicated, I think, to admit of a satisfactory ruling upon this point without further light.

The demurrer of Smith & Co. is therefore sustained, and the bill is dismissed so far as they are concerned. The demurrer of Zell and Van Dyke is overruled, and they are directed to answer within 30 days so much of the bill as is relevant to the relief prayed for against them.

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#### MELLWOOD DISTILLING CO. v. HARPER et al.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. December 9, 1908. On Motion to Amend, January 29, 1909.)

#### 1. TRADE-MARKS AND TRADE-NAMES (§ 60\*)—INFRINGEMENT—IMITATION OF NAME AND LABELS.

Complainant and its predecessors in business for 50 years had owned and conducted a distillery at Louisville, Ky., known as the "Mellwood Distillery," and had made and sold a brand of whisky under the name "Mellwood" as a trade-mark, by which it became widely and favorably known as a high-grade whisky and attained a large sale. Defendants, who were dealers in liquors, caused labels to be prepared similar in general appearance to those used by complainant on its bottles, which they placed upon bottles of cheap whisky sold by them. Such labels contained the names "Mill Wood" and "Kentucky," a picture of a large distillery having the name "Mill Wood Distilling Co." thereon, and statements to the effect that the contents was a celebrated handmade sour-mash whisky bottled after being matured in barrels for eight years, etc., all of which representations were false, the fact being that there was no such distillery nor company, that the whisky was not celebrated, nor a handmade sour-mash, but was a cheap blend put up by defendants. *Held*, that such labels were clearly intended and calculated to mislead the public into the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

belief that the whisky so labeled was complainant's, and constituted infringement of trade-mark and unfair competition, which entitled complainant to equitable relief by injunction and otherwise.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 74; Dec. Dig. § 60.\*]

**2. EQUITY (§ 118\*)—PLEADING—AMENDMENTS.**

It is within the discretion of the court to permit the correction by amendment of a clerical error in the name of a corporation complainant, both in the caption and body of the bill, even after the case has been tried on the merits and a decision handed down, where no prejudice can result to defendant, and where no plea in abatement was filed, but the answer went to the merits.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 118.\*]

In Equity. On final hearing.

Hopkins & Eicks, James L. Hopkins, and Read & McDonough, for complainants.

Youmans & Youmans, for respondents.

ROGERS, District Judge. The bill in this case was filed by the Mellwood Distilling Company, a corporation organized under the laws of the state of West Virginia, and having its principal place of business in the city of Louisville, in the state of Kentucky, against Samuel R. Harper and Cyrus F. Reynolds, citizens and residents of the Ft. Smith division of the Western district of Arkansas, partners, doing business under the firm name of the Harper-Reynolds Liquor Company, and alleges that complainant is the sole and exclusive owner of a certain trade-mark for whisky, consisting of the word "Mellwood," which has been applied to whisky by the complainant and its predecessors since 1855; that said trade-mark has been applied to whisky by being marked or branded upon packages containing the whisky, or containing the bottles in which said whisky was contained, when bottled, and by the same being imprinted upon labels affixed to bottles containing the whisky; that whisky bearing the trade-mark "Mellwood" has been extensively sold throughout the United States, and particularly in the state of Arkansas, and has been extensively advertised by complainant throughout the United States; that said trade-mark is an integral part of the good will of the complainant, and is one of its principal assets, and is of large value; that the whisky to which said trade-mark is applied is of superior excellence and of uniform quality, and that its reputation for such excellence and quality is owing to the labor and expenditure of money by the complainant and its predecessors, extended throughout the United States; that the value of the trade-mark is \$500,000, and that complainant's right to be subjected to none but fair and lawful competition is of that value and upward; that complainant is the proprietor and sole owner of distillery No. 34, Fifth internal revenue district in the state of Kentucky, and said distillery is known as the "Mellwood Distillery." The bill then alleges that the defendants, well knowing these facts, on the 2d of January, 1905, and has continuously since, availed themselves of the reputation of said whisky designated by said trade-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mark, fraudulently intending to invade complainant's good will and divert its trade, made or caused to be made, or sold and caused to be sold, in the city of Ft. Smith, Ark., and elsewhere, a certain spurious liquor, not produced by complainant, to which they have caused the trade-mark "Mill Wood" to be affixed; that in and by said fraudulent traffic the defendants have diverted to themselves the trade of complainant, and have invaded its good will, and have instituted and maintained, and are now maintaining, a fraudulent and unfair competition with complainant. It further alleges that said whisky, to which the words "Mill Wood" have been affixed by the defendants, has been further marked and branded by them with the words "Kentucky Mill Wood Distilling Company," and complainant avers that there is not now, and never has been, in the state of Kentucky any distillery company doing business under the name of the "Kentucky Mill Wood Distilling Company," or "Mill Wood Distilling Company." It further avers that said names "Kentucky Mill Wood Distilling Company" and "Mill Wood Distilling Company" have been adopted and used by defendants solely for the purpose of fraud and deceit, in order to enable them to pass off their whisky as the whisky of complainant. The bill further avers that the whisky sold under this name by the defendants is not produced in Kentucky, and is a compound of spirituous coloring matter, and other ingredients, prepared by them in the city of Ft. Smith. It then avers, in substance, that this misconduct on the part of defendants has resulted to the complainant in the loss of the sales of its own whisky, and in great injury to the reputation of complainant's product; that said liquor has been bought by the public and consumers under the belief that they were purchasing complainant's whisky and that the same was deteriorating in quality. It then alleges no adequate remedy at law, and prays for an injunction perpetually enjoining the defendants and their privies from making, keeping, offering for sale, and selling any liquor not produced by the complainant bearing the mark or the words "Kentucky Mill Wood Distilling Company," "Mill Wood," or "Mill Wood Distilling Company," and for an account of gains and profits thus unlawfully made and received.

In short, the defendants deny all fraud and deceit, and all purpose upon their part to injure the complainant, or avail themselves of the brand of its whisky; and, to all intent and purposes, all the other allegations in the bill. They set forth and make a part of their answer the label which complainant used on the whisky it sold, and also a copy of the label on the whisky which they sold, deny any infringement, and insist that in the use of the words "Mill Wood" no deceit or fraud was practiced against complainant, and allege that none was intended. It can be of little use to set forth more fully the specific allegations in the answer. The facts upon which the case will turn will largely depend upon an examination of these labels, and the proofs in the case.

The following facts are uncontradicted: The "Mellwood Distillery Company" is a corporation organized under the laws of the state of West Virginia, and doing business at Louisville, Ky., where its principal office is located. It has owned, since July 21, 1902, the Mell-



wood Distillery, located at Mellwood and Frankfort avenues, Louisville, Ky., and it and its predecessors have owned the "Mellwood" brand of liquors since 1869, and it has remained in continuous use by them ever since. The "Mellwood" brand was well known to the trade, and its sales were large, and the very high grade quality of the whisky well established. The brand and good will of the business is estimated by the witnesses to be very large. About 10,000 barrels and 50,000 cases (some of the cases being filled out of the 10,000 barrels) were sold annually, and was manufactured at an annual cost of \$200,000, and the distillery is estimated to be worth \$600,000. The brand "Mellwood" was originated by the late George W. Swearingen, a farmer (who ran a small distillery on his farm, which he called "Millwood"), and after selling the farm he removed to Louisville, Ky., and engaged in the whisky business, and concluded to name this brand after the old farm, "Millwood," but by error of the man who made the brand the name was misspelled "Mellwood," which Mr. Swearingen concluded to adopt. By mesne conveyances, on July 21, 1902, the "Mellwood Distilling Company" became the owner of the distillery and all appurtenances, including the name "Mellwood," and has owned and used it since as a brand on its whisky.

The defendant Cyrus F. Reynolds testifies that prior to 1894 he was an employé of M. C. Wallace, a liquor dealer at Ft. Smith, Ark., who carried complainant's "Mellwood" brand of whisky in stock; that he first became familiar with it while an employé of said Wallace; that about that time his partner, Danner, and himself bought out Wallace, and they continued to carry the same brand, but did not buy it in bottles; that later Danner and himself dissolved, and he became a partner and a member of the firm of Harper Bros., who also had the same brand in stock. Later Harper Bros., was succeeded by defendants, and they too carried the same brand, and had it on the shelves when this bill was filed; that they also had in stock on the shelves the "Mill Wood" brand, which it is alleged infringes the "Mellwood" brand. Reynolds' explanation as to how he came to adopt the word "Mill Wood" as a brand is this: He says that a competitor in Dayton, Ohio, was shipping into their territory a four-quart package which he sold at \$3.20 a package; that his firm could not compete with him with anything it had in stock; that he determined to get up a similar package with which they could compete with him, and accordingly made known their wish to the traveling solicitor of the Stevens Lithographing & Engraving Company, of St. Louis, Mo., who suggested to his firm the name "Mill Wood" as good brand; that the suggestion appealed to him, because that was the name of his old home in Indiana; that he adopted the suggestion, and ordered 5,000 labels through the solicitor; that the "Mill Wood" brand was gotten up by the solicitor after consultation with his firm, and when executed it was so sent out for his approval, which he gave, and then the labels followed, 5,500 in all; that he used about 3,400 of them on quarts, pints, and half pints, and destroyed the others when this bill was filed against his firm; that the liquor sold under this label was in four-quart packages, price \$3.20, delivered, and some was sold in pints

and half pints from the shelves; that he had no idea of infringing the "Mellwood" brand; that it had never occurred to him; that he sold both brands at the same counter, but some 35 feet apart; that he never represented the "Mill Wood" as the "Mellwood" brand, and also that when 75-cent whisky was called for he offered the customer the "Mill Wood" and some other similar priced whiskies, and let him make his choice; that he never explained the difference between the two, and had no occasion to, as no inquiries were made as to that, and no information volunteered; that the "Mill Wood" brand sold at 75 cents per quart, and "Mellwood" at \$1.25 per quart. Both liquors were sold in quart bottles, on which were pasted the respective labels. The "Mellwood" bottle is amber-colored and smooth; the "Mill Wood" bottle is clear glass, with fluted neck. They are the same size, and the labels approximately so, the "Mellwood" label being a little smaller, with rounded corners, while the "Mill Wood" label is square cornered, both being white. On the "Mellwood" label, at the top, in large, square, black letters, is the word "Mellwood." Immediately beneath, and in the center of the label, in a small red circle perhaps an inch in diameter, are the words "Kentucky's Mellwood Whiskey," in medium-sized red letters and within the circle, in smaller red letters, the words, "Trade mark. Fire doubled copper." On the left of the circle, in large black letters, are the words "Distilled and," and to the right of the circle, in the same sized black letters, the words "Bottled in bond." Underneath the circle, in large, square black letters, the word "Whiskey," and beneath that, in large script, "Mellwood Distillery Company, Louisville, Ky.," and beneath that, "Distillery No. 34, 5th District, Ky.," and beneath that, "Bottled in bond under Government supervision. Age and purity guaranteed by the U. S. Internal Revenue Stamp." The internal revenue stamp is over the top of the bottle, containing the usual inscriptions. The defendant's label has at the top, in square black letters of medium size, "Kentucky." Just beneath, in large, red script letters, "Mill Wood." Just beneath that is a picture of an extensive distillery, containing various small inscriptions upon it, "Mill Wood Distilling Co.," "Malt House," "Warehouse" and "Cattle Pens," and just beneath, and to the right and left, in medium-sized black letters, "Hand Made," and below that, in red letters of large size, "Sour Mash." Just beneath that are the following words:

"This celebrated whiskey is made exclusively by the sour mash fire copper process, employed only in the distillation of the finest whiskeys, from carefully selected grain, and bottled only after being matured in barrels for 8 years."

Beneath that the words "Mill Wood Distilling Co. Harper-Reynolds Liquor Co., Distributors, Fort Smith, Arkansas." The above is a fairly accurate description of the two labels.

It is admitted by Mr. Reynolds that, so far as he knows, there is no such distillery as the "Kentucky Mill Wood Distilling Company," or "Mill Wood Distilling Company"; that the whisky contained in the bottle is a blend. He does not claim that it is handmade, or sour mash, or that it is made by the "sour mash fire copper process," or that such process is used "only in the distillation of the finest whiskeys,

from carefully selected grain, and bottled only after being matured in barrels for 8 years." He does not claim that the whisky is eight years old, or even that "Harper-Reynolds Liquor Co. of Fort Smith, Ark.," were "distributors," of this whisky. He does not claim that the picture represents any distillery. It is established by the proof that there is no such distillery as this picture represents; that it was gotten up by the lithographing company, and placed upon the label simply as a part of it.

It thus appears that everything that enters into the make-up of this label used by defendants is untrue, except, perhaps, the word "Mill Wood," which appears to have been the name of the old home of defendant Reynolds. Even that, according to the proof, appears to have been suggested by the solicitor of the Stevens Lithographing & Engraving Company. If this label was gotten up by the Stevens Lithographing & Engraving Company, as contended, without design or purpose of infringing on complainants' trade-mark and label, it furnishes a most remarkable and singular coincidence. Had it been gotten up for that distinct purpose by some one familiar with the law governing such matters, such person would hardly have ventured nearer to an imitation of complainant's label. If the purpose had been to sell a spurious article to unsuspecting customers as the "Mellwood" brand, it may be considered a work of art. Unless defendants intended to infringe complainant's rights some one has gone to an unusual trouble in imitating their trade-mark and label for no purpose. It is a strain upon the court's credulity to ask him to accept the contention that this label, thus gotten up, was purely accidental. This label was intended to make it appear to the consumers that there was such a distillery as the "Kentucky Mill Wood Distillery," and such a company as "Mill Wood Distilling Company," that the distillery was located in Kentucky, that the whisky was put up there, that it was a very large distillery, and used the "fire copper process," that the whisky was "celebrated," and that the "fire copper process" was only used in the "distillation of the finest whiskeys, from carefully selected grain, and bottled only after being matured in barrels for 8 years," and that this whisky was of this character, and that the "Harper-Reynolds Liquor Company" did not put it up, but were "distributors" of it. What are the facts? There was no such distillery; the whisky was put up and owned by defendants at Ft. Smith, Ark., and was a blend, and certainly a cheap whisky; it was not put up by any fire copper process; it was not made in Kentucky; it was not celebrated; it was not made of selected grain; it was not matured eight years in barrels before being bottled; it was not distributed by the Harper-Reynolds Liquor Company; it was both owned and sold by that company; it was not sour mash; it was not handmade; the picture on the label of a distillery was not the picture of any distillery; the inscriptions on the picture were untrue. If any of these recited things were true, the proof does not show it, and the defendant did not know it. On the other hand, the "Mellwood" brand was a celebrated brand; it was a high-grade whisky; it was made by the fire doubled copper process; it was made in Kentucky; it was made by the "Mellwood Distilling

Company." All these facts were known to the trade and to the defendants. Here, at least, was a reason to inspire others to imitate its brand under which to sell a cheap blend of inferior whisky. I think the facts in this case justify me in holding that the label adopted by defendants is well calculated to mislead the public into the belief that in purchasing the "Mill Wood" brand of whisky they were purchasing complainant's whisky; and I think I am also justified in holding that the selection by the defendants of this brand "Mill Wood" was due to the fact that the "Mellwood" brand of whisky was well known to the trade as a high-grade whisky, and that complainant has built up a large trade in it.

This is unfair competition, and an infringement of complainant's rights, such as a court of equity will protect, without regard to the purposes defendants had in mind in adopting the label. In applying the test recognized by the authorities, i. e., the likelihood of deception of "an ordinary purchaser exercising ordinary care," regard must be had to the class of persons who purchase the particular article for consumption, and to the circumstances ordinarily attending their purchase. In determining whether packages are so dressed up as to be calculated to deceive purchasers, equity regards the consumer, as well as the middleman, for it is to him more than the jobber or wholesale purchaser that the various indicia of origin appeal; and the courts will not tolerate a deception devised to delude the consuming purchaser by simulating some well-known and popular style of package.

If the court was satisfied that the defendants' label was not devised with the view of appropriating the well-established reputation of complainant's whisky in order to sell their own, still, if the label adopted is of that character which is well calculated to mislead an ordinary purchaser, exercising ordinary care, it would be the duty of the court to grant the relief prayed, upon the ground that the label conveys a false impression to the public mind, and is well calculated to mislead and deceive the public. *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. 869, 23 C. C. A. 554. The case at bar comes within the principle decided in *Pillsbury-Washburn Flour Mills v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162. A large number of cases have been cited by counsel on both sides. None of them militate against the conclusion reached, and nearly all of them sustain it.

An injunction will be granted restraining the defendants from the use of the label, as prayed in the bill, and the case will be referred to the master to ascertain the profits and the damages and for the costs of suit.

#### On Motion to Amend.

The bill of complaint in this case was filed June 15, 1905, in the name of the "Mellwood Distilling Company." The answer was filed July 10, 1906. The delay was, no doubt, the subject of agreement by counsel to suit their own convenience. March 25, 1907, plaintiff filed depositions, to which its articles of incorporation were made an exhibit, and they show distinctly that the name of the plaintiff corporation was "Mellwood Distillery Company," instead of "Mellwood Distilling Company," in which latter name the suit was brought. Other

testimony was taken, and on December 4, 1908, the case was argued and submitted, and eight days afterward an opinion was handed down granting the relief prayed. Whereupon, for the first time, the court's attention was called to the discrepancy referred to in the name of the plaintiff corporation. Presumably it had been overlooked by counsel for both parties, as it had by the court. Thereupon the complainant filed a motion for leave to amend the bill of complaint in its caption and body by substituting the correct name, as shown by the articles of incorporation, and the defendant filed a motion to set aside the submission, and for leave to file a plea in abatement, which they tendered with their motion, and wherein they alleged that there was no such corporation as the "Mellwood Distilling Company," and urged that the bill should be dismissed.

Should the court allow the complainant to amend its bill of complaint by inserting its correct name? Proofs were taken, and the case prepared and tried, upon the theory that the name in which the suit was brought was the correct name. The name was correct, except the word "Distilling" was used for "Distillery." No one was misled or could have been prejudiced in the preparation of this case by this error. The original error was doubtless that of the plaintiff's counsel or stenographer. There could be no motive for the error, since nothing could be gained by it. It must be treated, therefore, as an inadvertence, or clerical mistake. The failure to discover it when the articles of incorporation were produced, filed, and read in evidence was an oversight of counsel, as it was of the court at the hearing. Had plaintiff discovered the error before any copy of the bill had been taken out of the clerk's office or answer filed, as a matter of right he could have made a correction without leave of court. The error was a mere misnomer, no plea in abatement or bar was filed, and the rules as to pleas were not observed. Equity Rules 31 to 33, inclusive. The defendant answered to the merits, and the case was tried accordingly. The case advanced to that stage without being brought to the notice of the court, where the rules make no provision for amendment, but the right to amend was not thereby lost.

It is a matter within the sound discretion of the court, and should only be exercised when no substantial prejudice would result by reason thereof. In *Neale v. Neale*, 9 Wall. 1, 19 L. Ed. 590, this question was before the court in a much stronger case than the one at bar. Mr. Justice Davis, delivering the opinion of the court, said:

"It would seem clear, from the manner in which the court below, of its own motion, and without assigning any reasons for this action, gave the complainants leave to amend their bill, that on the original hearing it was satisfied that the evidence made out a case for relief, but a case different from the one stated in the bill, and that, as the pleadings must correspond with the evidence, it was necessary either to dismiss the bill without prejudice, or to give them leave to amend. The court adopted the latter alternative, doubtless with a view to save expense to the parties, and because such a course could not, by any possibility, work any harm to the defendants.

"It is insisted that this proceeding is erroneous; that, after a cause has been heard, the power of allowing amendments ceases, or, if it exists at all, it cannot go so far as to authorize a plaintiff to change the framework of his bill, and make an entirely new case, though on the same subject-matter, as, it is contended, was done in this instance under the leave to amend.

"This doctrine would deny to a court of equity the power to grant amendments after the cause was heard and before decree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case; but this power would often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms that the party not in fault would have no reasonable ground to object to. That the court has this power, and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities.

"Necessarily, in a federal tribunal, the matter of amendment at this stage of the progress of a cause rests in the sound discretion of the court. At an earlier stage, this discretion is controlled by the rules of equity practice adopted by this court; but not so upon the hearing, for there is no rule on the subject of amendments applicable to a cause which has advanced to this point. As, therefore, the leave to amend in this instance was within the discretion of the court, we will proceed to dispose of the case on its merits."

That case was affirmed.

In *Nellis v. Pennock Mfg. Co.* (C. C.) 38 Fed. 379, the Circuit Court of the United States for the Eastern District of Pennsylvania had the question before it as to whether or not the plaintiff should be allowed to amend his bill by including an additional claim inadvertently omitted, and after the evidence on which it rested had been mainly taken. Butler, J., said:

"I have no doubt of the power to allow the proposed amendment to the bill. Such an amendment is not contemplated by the rules prescribed by the court, governing amendments generally. *Tremaine v. Hitchcock*, 23 Wall. 518, 23 L. Ed. 97; *Neale v. Neale*, 9 Wall. 1, 19 L. Ed. 590; *Mittf. Eq. Pl.* 326, 331; *Story, Eq. Pl.* §§ 904, 905; *Daniell, Ch. Pr.* 436, 466; *McArtee v. Engart*, 13 Ill. 242. It is quite clear that the claim covered by the amendment might have been joined originally in the claim embraced in the bill. *Henry v. Soapstone Co.*, 2 Ban. & A. 221, Fed. Cas. No. 6,382; *Packer Co. v. Eaton* (C. C.) 12 Fed. 865; *Spring v. Sewing-Machine Co.* (C. C.) 13 Fed. 446; *Grim's Appeal*, 105 Pa. 375; *Hoyt v. Sprague*, 12 Chi. Leg. N. 25; *Sage v. Woodin*, 66 N. Y. 578; *Kimball v. Lincoln*, 99 Ill. 578; *Id.*, 5 Ill. App. 316; *Brooks v. Brooks*, 12 Heisk. (Tenn.) 12; *Mead v. Raymond*, 52 Mich. 14, 17 N. W. 221. The claim was omitted by oversight. The evidence, however, on which it rests has been mainly taken. If the amendment was not allowed, the parties would be subjected to delay and expense, with no possible advantages to either of them. It will therefore be allowed, subject to any defense which defendant might have presented if the claim had been embraced in the bill when filed. If additional costs result from the omission to so embrace it, they will be placed on the plaintiff."

In *Verplanck v. Mercantile Insurance Co.*, 1 Edw. Ch. (N. Y.) 47, the prayer in the original bill is against the "President and Directors of the Mercantile Insurance Company of New York," whereas the style of the company, by the act of incorporation, was "The Mercantile Insurance Company of New York." An injunction was granted and a receiver appointed, and the property of the Mercantile Insurance Company of New York was taken from it when it was not a party defendant in the bill, and the process of the court was only against the officers of the corporation. This order was made by the vice chancellor. On appeal the chancellor reversed the order of the court be-

low, and the appointing of the receiver was vacated, but permission was given to the plaintiff to apply to the vice chancellor to amend the bill of complaint so as to make the corporation of the Mercantile Insurance Company of New York defendant in the bill, and otherwise as they might be advised, and upon due notice to apply to the vice chancellor for an injunction and a receiver. In that case the court said:

"If, then, as respects amending an answer, the court is to be thus watchful to prevent anything from being stricken out, though introduced unintentionally and through mistake, is it not necessary to be equally particular in regard to a sworn bill which a complainant may seek to amend in an important and material part? In some respects, the comparison may not hold good; for the occasions are much more frequent for amending bills than answers, and therefore a greater latitude should be given in the former cases. Yet it will be perceived that the occasions for amending bills, in which it is necessary to exhibit a greater indulgence, generally arises from a discovery of a defect in the proper parties, in the prayer for relief, or in the omission of some fact or circumstance rendered necessary to be introduced in consequence of the defendant's answer (and which a complainant may be permitted to introduce, especially where the defendant, upon exceptions, is bound to make further answer), and where the matter for amendment does not affect the substance of the case made by the bill. Where the object of the amendments is to alter or change the substance of the bill, I hold that the same strictness should be required as where an answer is in question. The complainant may amend by introducing new parties, and by making such new charges, allegations, and statements, in addition to the former, as he can verify by his oath, and which are not inconsistent with his former allegations. These are the true and legitimate purposes for which leave to amend may be granted; and it cannot be extended, with any sort of propriety, to the striking out of former allegations and substituting others, although they may not be very different in substance and effect."

This case was approved in the case of *Shields v. Barrow*, 17 How. 143, 15 L. Ed. 158.

In 1 Enc. Pl. & Pr. p. 482, par. 4, the author says:

"If the plaintiff has occasion to amend his bill after replication merely by adding new parties, he may obtain leave to do so as a matter of course. Orders of this nature may be obtained without withdrawing the replication." 2 Story, Eq. Pl. (10th Ed.) § 887.

"The bill may be amended after witnesses are examined, where the substantial allegations are not changed." *Baggott v. Baggott*, Hoff. Ch. (N. Y.) 377.

"The power of the court to order an amendment, even on the final hearing, is unquestionable, but it is a power never exercised except where the ends of justice render it absolutely necessary, and its exercise will not substantially impair or prejudice the rights of the defendant." *Ogden v. Thornton*, 30 N. J. Eq. 569.

"A bill was directed to be amended after a final hearing so as to make the contract alleged agree with that proved in a bill for specific performance." *Davison v. Davison*, 13 N. J. Eq. 246. See, also, *Lanning v. Heath*, 25 N. J. Eq. 425.

"In the case of the Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97, the plaintiff filed a bill to restrain the infringement of a patent, and after final decree he was permitted to amend by setting up a reissue of the patent, which had not been set out in the original bill, contrary, however, to the supposition of both parties through the whole progress of the trial. The court conceded that the case was anomalous, but declared that the amendment might 'well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried.'" See *Claffin v. Bennett* (C. C.) 51 Fed. 693.

"A mere clerical error in a bill may be amended after final decree." *Dounelly v. Ewart*, 3 Rich. Eq. (S. C.) 18.

The author of the *Encyclopedia of Pleading and Practice*, vol. 1, par. "b," p. 474, states the rule in this way:

"The usual tests are whether the original and amended bills found the right of complainant to relief on different and inconsistent titles, or upon entirely inconsistent claims arising out of differing states of facts; or whether the same defenses are applicable; or whether the kind and character of relief, not the degree or extent, proper to one state of facts, is inappropriate to the other; in other words, whether the matters of the original and amended bills could have been properly stated in the alternative in the original bill."

If the bill in this case had originally been brought in the correct name of the plaintiff, the court is unable to see even any probability that it would have taken any other or different course, or required any other or different proof, or that it could have reached any other or different result than has already been reached. It seems to the court that the error is purely clerical, and that the substantial ends of justice require that the court should permit the amendment sought. Even in common-law cases the Supreme Court of the United States in *Baltimore & Potomac Railroad Company v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784, held that a mere misnomer of the corporation plaintiff is pleadable in abatement only, and is waived by pleading to the merits. There was no proper plea in abatement filed in this case, but the answer went to the merits, and therefore the matter of misnomer was waived. See also, *Michigan Insurance Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162. The motion of the plaintiff to amend will be allowed, and the motion of the defendant to set aside the submission of the case, and for leave to file a plea in abatement, will be denied. The defendants, if they so elect, may amend their answer by making it apply to the amendment made in the complainant's bill, and the amendments in each case may be made by a proper record entry. The costs incident to making these amendments will be taxed to the complainants.

It is so ordered, and, when the amendments are made, the case will be referred to the master, in conformity to the original opinion.

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In re SCHWARTZMAN.

Ex parte PRINGLE.

(District Court, D. South Carolina. February 12, 1909.)

**1. BANKRUPTCY (§ 301\*) — ADMINISTRATION OF ESTATE—POWERS OF COURT—INJUNCTION.**

A court of bankruptcy has power to restrain a landlord from interfering with the possession by a trustee of a store occupied by the bankrupt under an unexpired lease, and which contains a valuable stock of goods, until the trustee has had a reasonable time to dispose of the same, where they cannot be removed without serious loss to the estate, and on giving of a bond to protect the landlord from loss.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 464; Dec. Dig. § 301.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



2. BANKRUPTCY (§ 255\*) — ADMINISTRATION OF ESTATE — ACCEPTANCE OF LEASE BY TRUSTEE.

Under Civ. Code S. C. 1902, § 2416, which provides that "no parol lease shall give a tenant a right of possession for a longer term than 12 months from the time of entering on the premises and all such leases shall be understood to be for one year unless it is stipulated to be for a shorter term," a bankrupt who went into possession of a store under a verbal agreement that he should pay \$60 per month, without anything said as to length of term, was entitled to hold the premises for one year, and his trustee has the right to complete such year on payment of the monthly rent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 255.\*]

In Bankruptcy. On motion to vacate injunction.

Mordecai, Gadsden, Rutledge & Hagood, and Henry Buck, for trustee and creditors.

M. C. Woods, for landlord.

BRAWLEY, District Judge. The petitioner, Walter Pringle, filed his petition in this court December 30, 1908, setting forth, among other things, that he had been duly elected trustee of the above-named bankrupt December 28, 1908, and had duly qualified as such; that the principal asset of the said bankrupt estate consisted of a stock of goods, wares, and merchandise in the city of Marion, contained in a large, newly erected store or building in said city; that said stock of goods was entirely new, having been first opened about the 1st day of September, 1908; and the petition averred that said storehouse and building was built and fitted expressly for the use of the said business of the said Schwartzman, and was leased by the owner thereof, H. C. Graham, to said Schwartzman for the term of one year from the 1st day of September, 1908, to the 1st day of September, 1909, with the privilege of certain annual renewals.

The petitioner further stated that he was advised that the owner of said property, the said H. C. Graham, claimed the right to possession of the premises on the 1st day of January, 1909, and averred that irreparable loss and damage would follow if the stock of merchandise was removed from the premises before the sale could take place, and that the same could only be advantageously sold upon said premises, and that a sale could not take place at an earlier date than January 25, 1909.

Upon the hearing of said petition, which was duly verified, it was ordered that H. C. Graham should be restrained until the further order of the court from instituting any action or proceeding, or taking any steps to interfere with the possession of the said trustee, and the trustee was ordered to file with the clerk a bond in the sum of \$1,000, with surety, conditioned to save the said H. C. Graham harmless from all costs and damages which might accrue by reason of the issuance of said restraining order. It was further ordered that the said H. C. Graham have leave to apply for a revocation or modification of this order at any time upon giving one day's notice to the counsel for the petitioner.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It appears that the petitioner advertised a sale of the stock of merchandise for January 25, 1909, and that on that day a bid was made for the purchase of said stock of merchandise which was acceptable to the trustee and to the creditors, but the purchaser has failed to comply with his bid, and he is not within the jurisdiction of this court, and counsel for petitioner has stated to the court that they are uncertain whether the sale can be consummated, and that it may be necessary for the petitioner, in the execution of his trust, either to readvertise the same, or to proceed to sell the same at retail. Counsel for H. C. Graham, upon a notice served February 6, 1909, moved before me February 8, 1909, for an order dissolving the injunction, upon several grounds therein stated: (1) Because the injunction herein was improvidently granted, in that the facts averred in the fourth paragraph of the petition, upon the hearing of which his honor issued the order of injunction, are false and without foundation in fact. (2) Because the injunction herein was improvidently granted, in that there are no peculiar facts as stated in the petition warranting a court of equity in interfering by injunction, but, on the contrary, the stock of goods in question consists of clothing, dry goods, shoes, and men's and women's furnishing goods, in no sense liable to breakage or injury by removal. (3) Because the injunction herein was improvidently granted, in that, while respondent has bowed deferentially to the mandate of the court, he deferentially submits that the order of this honorable court herein deprives him of the possession and enjoyment of his property without due process of law, and further prohibits him from invoking the law of the land, whereby the possession and enjoyment of his property is secured to him. The fourth and fifth are amplifications of the above-stated grounds.

Upon the facts stated in the petition, which was duly verified by the person known to the court as a man of character and discretion, there can be no doubt that it was the right and duty of the court to grant the restraining order prayed for. The petitioner, but a few days before, had been selected by the creditors as trustee of an estate consisting of a stock of merchandise valued at \$25,000, stored in a building specially built for the bankrupt, with fittings especially adapted, at considerable expense, for their proper display, and he was notified that the owner of the building would require him to remove the same within two or three days. It was obvious that great loss and damage would follow a precipitate removal. In these circumstances it was the duty of this court as a court of equity, while giving full recognition to the legal right of the landlord, to so regulate the time and manner of its enforcement as not to cause unnecessary loss to others. Immediate ejection from the premises would have entailed great depreciation of the value of the bankrupt's estate, and, if the bankrupt had a lease of the premises for 12 months from September 1, 1908, as averred in the petition, it was the duty of the trustee to determine whether or not it was for the benefit of the creditors to assume said lease. If a sale upon the premises was necessary to avoid great loss, it was obviously the duty of the trustee to conduct the sale there, and it seems equally clear that it was the duty of the court to relieve him

from the coercion of a situation where precipitate action might have resulted in irreparable damage, and such delay as might be reasonably necessary seems clearly within the power of the court of equity to grant. The bond for \$1,000 conditioned for the payment of any costs or damages that might be sustained by the landlord by reason of the restraining order seemed adequate to provide for any pecuniary compensation that was necessary, there being nothing in the circumstances of the case which indicated that the sum of \$1,000 would not be ample to compensate the landlord for any loss or damage that might be sustained by him. If authority is needed to support what appears to accord with common sense and common justice, it may be found in *Re Chambers, Caldwell & Co.* (D. C.) 98 Fed. 865.

Upon the hearing of the motion to dissolve the injunction, affidavits were submitted which made it clear that the allegations in the fourth paragraph of the petition, that Graham had leased the premises to Schwartzman for the term of one year from the 1st day of September, 1908, to the 1st day of September, 1909, with privilege of certain annual renewals, were incorrect. There was no written lease for any period, and that brings up a very nice question, as to what Schwartzman's rights were in the premises, for the trustee is entitled to them and no more. It appears that Schwartzman had been for some years a merchant in Marion, and that he conceived the idea of establishing a department store in that city; that Graham agreed to erect, and did erect, a building especially for that purpose, which was ready for occupancy about September, 1908; that on or before that day Schwartzman bought a stock of merchandise of the value of nearly \$50,000; that he fitted up this building especially for that purpose, expending for fixtures alone what is now valued at \$1,000; and that he entered into possession about September 1, 1908, and brought there a very large and valuable stock of merchandise, and that the building was admirably adapted for the proper display of such goods, and that there is no building of like character in such city. Schwartzman became involved in financial difficulties in the autumn of the same year, and had been adjudicated a bankrupt. Upon his examination before the referee in bankruptcy, before this question arose, after testifying that this store had been built for him by Mr. Graham, he was asked:

"Q. How much rent do you pay? A. \$60 per month. Q. How long did you agree to take it from him? A. He did not give me any lease; he is a man who says, 'Here is the store; take it; stay as long as you want.' Q. He never told you to get out? A. No, sir; I could stay there as long as I wanted."

Affidavits have been submitted on this motion; from which it appears that Schwartzman desired a lease for five years, and that Graham refused to give him such lease, but let him into possession under an agreement that he was to pay \$60 per month, and there does not seem to be any room for doubt that Graham understood that he was renting this building by the month at the rate of \$60 per month, and Graham's contention now is that he had a right to eject his tenant at the end of any month, with or without reason. That parties may make their own terms as to the tenancy of real estate

cannot be disputed, and it is the duty of the courts to enforce such contracts, whether they seem reasonable or unreasonable; but when courts are called upon to decide upon contracts of this nature, they are bound to inquire as to what the real contract was, and whether, as to it, there was that agreement of minds that must lie at the base of every contract, and, where parties themselves have not reduced their agreement to writing, they inquire into the circumstances attending the alleged agreement. Schwartzman has testified that there was no agreement as to how long he was to keep the premises; that he was to stay as long as he wanted to, paying \$60 a month rent. The affidavit of Graham's attorney is that, in consequence of a conversation between himself and Graham, in August, 1908, he went to D. Schwartzman and told him that Mr. Graham would decline to lease his store to him for five years or any other period, but would lease the same to him by the month at \$60 per month—

"that then and there this deponent, acting as attorney or agent for H. C. Graham, entered into a contract or agreement, the same being parol, whereby D. Schwartzman rented the store in question at \$60 per month; that such was the whole contract or agreement, and nothing was said about renting for a year, 12 months, or until September 1, 1909."

These affidavits were prepared to meet the allegations of the petition, which set forth a specific agreement of a lease for one year, from September 1, 1908. It will be observed in the affidavit of Graham's attorney that, although he says that Graham would only lease by the month, in stating the contract he says that "Schwartzman rented the store in question at \$60 per month; that such was the whole contract or agreement," and nothing was said as to the duration of the lease. That Schwartzman understood that he was to stay as long as he wanted, paying \$60 per month rent, is clear from his testimony. This is in accordance with the probabilities. The store had been built for him especially by Graham. He was moving into it a large and valuable stock of goods; he had fitted it up at his own expense, at considerable cost, the fixtures alone being now valued at \$1,000. It is incredible that a man of any common sense would make this large expenditure for fixtures, and would put into the building a large and valuable stock of merchandise, if he understood that he could be turned out at the end of a month. Graham had already shown his friendliness by erecting the building for him, and evidently Schwartzman trusted to the continuance of such friendly relations, and believed that he could stay there as long as he wanted to by paying the monthly rental.

I must conclude, therefore, that there was no definite agreement between Graham and Schwartzman as to the duration of the lease; that the only definite stipulation between them was the payment of \$60 per month. That Graham believed that it was a rental from month to month, and that he had a right to eject his tenant at the end of any month, is not unlikely; but his understanding does not suffice to make a contract, unless the other party agreed to the same thing. That Schwartzman agreed that he could be turned out at the end of any month, that his business should be broken up, and that the fixtures upon which he had expended large sums should be

rendered valueless, is inherently improbable. Agreements of that nature must be supported by strong proofs. Schwartzman's testimony, given *ante litem motam*, is that he could stay in the store as long as he wanted to. That it was the understanding that the duration of the tenancy was indefinite agrees with all the probabilities of the case. It appears that he took possession in September; that he did not pay the monthly rental at the end of each month, but at the end of December, when bankruptcy supervened, all of the rent from the beginning of the tenancy was due, and the trustee has paid it. Schwartzman's testimony is that he received no notice from the landlord to move, notwithstanding the nonpayment of the rent. The statute of frauds provides that "all leases and terms for years by parol shall have the effect of leases at will only," and in South Carolina the law fixes the rights of parties in all cases of tenancies by parol, where there is no express stipulation as to the length of the term. Most of the cases have turned upon what was a necessary notice to quit. Such was the case of *Godard v. Railroad Company*, 2 Rich. Law (S. C.) 346, where the court says:

"Tenancies at will, from which tenancies from year to year are derived, are said to have been originally held by the will of the lessor; but from a very early period it has been the law that they were held at the concurrent will of both lessor and lessee—that they might be determined by the will of either party."

Reference is then made to the third section of the act of 1817 (6 St. at Large, p. 67), providing that:

"No parol lease shall give tenant a right of possession for a longer period than twelve months, and that all such leases shall be construed to be for one year unless it be stipulated for a shorter time."

The court then adverts to the mischief that would follow if tenancies should be unexpectedly determined, and says:

"Ignorance and remissness would frequently leave one of the parties in the power of the other. The law which implies a tenancy for a definite period when it has not been agreed on by the parties, and requires notice to dissolve the tenancy, is best suited to the habits of society, and is necessary to prevent surprise and oppression."

—and concludes:

"That in order to put an end to a tenancy from year to year there must be three months' notice to quit, ending at the expiration of the year."

In *Wilson v. Rodeman*, 30 S. C. 210, 8 S. E. 855, the lease was verbal for \$30 per month, but indefinite as to time, nothing being said as to how long it was to continue. The defendant entered into possession June 1, 1882, and paid his rent regularly every month. On October 1, 1884, the rent was raised to \$40 per month, and the plaintiff claimed that at that time the character of the tenancy was changed by agreement, that thereafter it was to be a yearly lease, but this the defendant denied. On September 30, 1887, the defendant gave written notice that he would vacate the premises by the 1st of January, 1888, and he did vacate them before the beginning of the year 1888, leaving his rent unpaid for the month of December, 1887, and February 10, 1888, the plaintiff brought suit before a trial justice

for \$80 rent, \$40 due for December, and including \$40 for the month of January, 1888, alleging that the tenancy was yearly. The defendant admitted owing \$40 for the month of December, and tendered the same. The trial justice gave judgment in favor of the plaintiff to the amount tendered, and the circuit court affirmed said judgment. The Supreme Court affirmed this judgment, and in its opinion says:

"As we understand it, there are only two questions in the case, one of fact as to the character of the tenancy, whether it was indefinite as to its termination, and therefore from year to year, and if so, whether, as matter of law, the end of the calendar year should be fixed for its termination. There seems to be no dispute that the first rental, in June, 1882, was indefinite as to time, except requiring the rent monthly; that under the statute was up to June, 1883, and, the defendant having held over, it became a tenancy from year to year."

In *Hillhouse v. Jennings*, 60 S. C. 399, 38 S. E. 599, the court considered the statute of frauds in its relation to tenancies under parol leases, and reviewed the decisions, announcing the following conclusions:

"From the statutes and the decisions interpreting them, the following principles may be deduced:

"(1) A parol lease gives a tenant a right of possession for a term of 12 months from the time of entering on the premises. If the lease is for a term less than 12 months, of course the tenant would only be entitled to hold possession for the time stipulated after entering into possession of the premises.

"(2) A parol lease undertaking to give a tenant a right of possession for a longer term than 12 months is within the statute of frauds; nevertheless, if the tenant is permitted to enter on the premises by virtue of such agreement, he should have the right of possession for 12 months from the time of such entry, but no longer.

"(3) A parol lease under which a tenant enters upon the premises shall, after the term of 12 months from the time of entering on the premises, have the effect of an estate at will.

"(4) If a landlord refuses to permit a tenant to enter on the premises under a parol lease no action shall be brought to charge him upon such contract, even if the lease is not for a term exceeding 12 months."

Section 2416 of the Civil Code of 1902 of South Carolina, relating to landlord and tenant, is as follows:

"No parol lease shall give a tenant a right of possession for a longer term than 12 months from the time of entering on the premises, and all such leases shall be understood to be for one year, unless it be stipulated to be for a shorter term."

My conclusion is that Schwartzman, having entered into possession of the premises September 1, 1908, under a parol lease, and there being no express stipulation as to the duration of the tenancy, was entitled under the law of South Carolina to a right of possession for 12 months from the time he entered on the premises, and that the petitioner, Pringle, as trustee in bankruptcy of his estate, is entitled to hold the premises until September 1, 1909, paying the monthly rental of \$60 per month, and motion to dissolve the injunction is denied.

## In re PRESNALL.

(District Court, W. D. Texas, San Antonio Division. February 16, 1909.)

No. 404.

## HOMESTEAD (§ 168\*)—EXEMPTION OF BANKRUPT—ABANDONMENT.

Under Const. Tex. art. 16, § 51, providing that a residence homestead in a city shall consist of lot or lots, not exceeding \$5,000 in value, when devoted to that purpose, "provided, that the same shall be used for the purposes of a home; \* \* \* provided, also, that any temporary renting of the homestead shall not change the character of the same when no other home has been acquired," as construed by the courts of the state, a bankrupt did not abandon a homestead right once acquired by verbally renting the property to his daughter from year to year for use as a boarding house, reserving a room in which he and his wife remained as boarders nor by a lease for similar purposes for a term of years, after making which he and his wife moved out, but without acquiring any other home, and with the expressed intention of retaining their homestead right, and of returning to the property as a home on the expiration of the lease.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 333, 334; Dec. Dig. § 168.\*]

## In Bankruptcy. On review of decision of referee.

Graham Dowdell, trustee of the bankrupt's estate, has filed a petition to review the order of the referee, requiring him to set apart to the bankrupt the following described property as his homestead: Lot No. 4, in city block No. 179, on the west side of Garden street, fronting 30 varas on said street, and running back between parallel lines to the San Antonio river for depth, known as "Presnall Place," No. 215 Garden street, situated in the city of San Antonio, Bexar county, Tex. The record contains the findings of fact and conclusions of law of the referee, as follows:

## "Findings of Fact.

"I find that in 1885 the bankrupt bought the lot in controversy, paying therefor less than \$5,000, and moved into the property with his family, consisting of himself, wife, daughter, and son, and continued to live upon the property, using same exclusively as a homestead, until the year 1895, when he leased the property to Mrs. Steffian for a year, and with his family moved to Dimmitt county, where they lived upon property which the bankrupt held under lease for 10 or 11 months, when the family returned to San Antonio and boarded in a different part of the city for 2 or 3 months, when they returned to resume their occupancy of this property, and that during the year 1896 the bankrupt and his wife rented this property to their daughter, Mrs. Gertrude Wooley, for the purpose of conducting a boarding house therein; the bankrupt, however, reserving the right to use a room, with the use of the parlor, dining room, stables, and other portions of the property in common with other boarders renting rooms from Mrs. Wooley.

"I find that Mrs. Wooley continued to rent said property from the bankrupt and his wife from the year 1896 to 1902 under a verbal lease, and that in 1902 a written lease was given by the bankrupt to Mrs. Wooley, in order that she might sublease the property to Messrs. Tenny & Lewis, who occupied the property under sublease for a year or more, using same for the purpose of conducting a boarding house, and at the expiration of their occupancy Tenny & Lewis surrendered possession of the property to Mrs. Gertrude Wooley, who then continued to occupy same and to conduct a boarding house therein up to September 30, 1907.

"I find that during the period of time from 1896 to September 30, 1907, the bankrupt and his wife continued to live in said house as boarders of the lessees, and with only the same privileges accorded them as were given to the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

boarders, with the exception that the bankrupt and his wife were allowed to bring their guests into the house and have them lodged and fed without cost to the bankrupt or his wife.

"I find that during said period of time the entire management and control of the property were vested in the lessees, and that neither the bankrupt nor his wife owned any of the furniture with which said house was furnished.

"I find that on September 30, 1907, the bankrupt and his wife executed a written lease to Mrs. Wooley, to run for a period of four years from that date, in order to enable her to sublease the property to Mr. M. B. Hutchins, and that on the same date the property was leased to said Hutchins for the purpose of conducting a boarding house or hotel for a period of four years, and that the bankrupt and his wife and his daughter, Mrs. Wooley, thereupon left said property and moved into the house owned by Mrs. Wooley, where they are now residing, and that during the period of said Hutchins' lease he has the exclusive management and control of said property, and neither the bankrupt nor any member of his family has any right to use the same for homestead purposes. I find that, when the bankrupt and his wife left the home, they did so with the expressed intention of returning thereto at the expiration of the Hutchins lease, and I find that they left the property because it had become unsuitable as a home, because of its use as a boarding house and the condition of Mrs. Presnall's health, but with the intention to return to same for the purpose of holding the property as a homestead against creditors.

"I find that a two-story addition of 7 rooms was made to said house in 1897 for the purpose of accommodating more boarders, that in 1898 a second addition of 4 rooms was made to said house for the same purpose, and that in 1899 a third addition of 5 rooms for the same purpose was made to the house, and that in 1904 a fourth addition, consisting of a one and two story frame addition, was added to said house, and that all of said additions were made for the purpose of accommodating more boarders, and that at the present time the size of said house has been increased from 8 rooms to something like 42 rooms, and that said property is better adapted for use as a hotel than as a homestead for a family of two or three; but I find that, owing to the fact that said additions have been made to the original structure and are not separate therefrom, the original property is incapable of segregation from the structures erected for the purpose of accommodating more boarders.

#### "Conclusions of Law.

"(1) By reason of the facts found, I am of the opinion that the property in controversy is, under the laws of this state, the homestead of Jesse Harrison Presnall and Ada H. Presnall, and that they have never abandoned same as such.

"(2) I find that they intend to return to said property and use it as a home at the expiration of the present lease to Hutchins.

"(3) I find that, inasmuch as the entire lot upon which this house is located constitutes the homestead of Presnall and wife, and the original building cannot be segregated from the additions thereto, the bankrupt is entitled to have set apart to him as exempt the whole of the property in controversy.

"Guy S. McFarland."

It is proper to add that the verbal lease, executed by the bankrupt and his wife to their daughter, Mrs. Wooley, extending from 1896 to 1902, mentioned in the findings of the referee, was from year to year. The record also discloses that, up to the time of the written lease executed to Hutchins, the bankrupt used the barn immediately in rear of the main building, and that Mrs. Presnall cultivated flowers in the yard. Further, it is shown that the property in controversy is the only home owned or claimed by the bankrupt since it was acquired in 1885. The order of the referee, setting apart the property to the bankrupt as his homestead, was made June 8, 1908, and about the 1st of November following the leases, executed between the Presnalls and Mrs. Wooley and between Mrs. Wooley and M. B. Hutchins, were canceled by mutual agreement of the parties, and the Presnalls resumed possession of the 215 Garden street property. They are now occupying and using the property as their home and are renting rooms to persons desiring board.



George R. Gillette, Wm. Aubrey, and Graham Dowdell, for trustee.  
Earl D. Scott and John Schorn, for bankrupt.

MAXEY, District Judge (after stating the facts as above). The question to be determined is whether the property in controversy should be set apart to the bankrupt as his homestead. By article 16, § 51, of the Constitution of this state, it is provided:

"The homestead in a city, town or village, shall consist of lot or lots, not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family; provided, also, that any temporary renting of the homestead shall not change the character of the same, when no other home has been acquired."

The jealousy with which homestead rights are protected by the laws of Texas is aptly illustrated by the following language of Mr. Chief Justice Hemphill in *Shepherd v. Cassiday*, 20 Tex. 30, 70 Am. Dec. 372:

"The homestead is not to be regarded as a species of prison bounds, which the owner cannot pass over without pains and penalties. His necessities and circumstances may frequently require him to leave his homestead for a greater or less period of time. He may leave on visits of business or pleasure, for the education of his children, or to acquire in some more favorable location means to improve his homestead, or for the subsistence of his family; or he may intend to abandon, provided he can sell. But let him leave for what purpose he may, or be his intentions what they may, provided they are not those of total relinquishment or abandonment, his right to the exemption cannot be regarded as forfeited."

In the present case it is insisted by the trustee, first, that the property in its entirety was abandoned by the bankrupt and his wife as a homestead; or, second, if the entire property was not abandoned, there was a partial abandonment of so much of the building as was leased or rented for boarding house purposes. Did the renting, by the bankrupt and his wife to their daughter, Mrs. Wooley, from year to year for the period from 1896 to 1907, operate, under the facts of this case, as an abandonment, for homestead purposes, of the property which had been used exclusively as a home since the erection of the building in the year 1889? The word "abandonment" implies desertion, relinquishment, and as applied to a homestead the abandonment, or desertion, must be coupled with the fixed intention not to return. The evidence here shows that the bankrupt and his wife, throughout the period of control of the property by the daughter, occupied a room in the house as boarders, and used the parlors and dining rooms, hallways, and barn as other boarders, and that they had no intention of abandoning the property as their homestead. In 1907 a written lease for four years was executed to the daughter, and she in turn leased the property for the same period to Hutchins. From the date of the execution of this lease the bankrupt and his wife resided with their daughter, in a house across the street from the property in controversy, until November, 1908, when the two leases were canceled and they returned to the property. The referee finds as a fact that, when the bankrupt and his wife left the home, "they

did so with the expressed intention of returning thereto at the expiration of the Hutchins lease," and that they left the property "because it had become unsuitable as a home on account of its use as a boarding house and the condition of Mrs. Presnall's health, but with the intention to return to the same for the purpose of holding the property as a homestead against creditors."

Does the evidence disclose an abandonment of the property for homestead purposes? The rule as to abandonment is clearly stated by Judge Hodges in *Sykes v. Speer* (Tex. Civ. App.) 112 S. W. 426, as follows:

"When a homestead character once attaches to property, it will continue to be the homestead till the owner voluntarily changes its character by disposing of the property, or by leaving with the intention of not returning and occupying it as a home. *Baum v. Williams*, 16 Tex. Civ. App. 407, 41 S. W. 840; *Gunn v. Wynne* (Tex. Civ. App.) 43 S. W. 292; *Fyffe v. Beers*, 18 Iowa, 11, 85 Am. Dec. 581. \* \* \* Abandonment is accomplished, not merely by going away without any intention of returning at a particular time in the future, but by going away with the definite intention never to return. *Foreman v. Meroney*, 62 Tex. 726; *Holland v. Zilliox*, 38 Tex. Civ. App. 416, 86 S. W. 37; *Thomas v. Williams*, 50 Tex. 271. In every case abandonment is to be regarded as a question of fact, to be ascertained from all the circumstances surrounding the particular transaction. The intent of the parties in leaving the homestead is the controlling fact. *Cline v. Upton*, 56 Tex. 319. When no other homestead has been acquired, 'it must be undeniably clear, and beyond almost the shadow at least of reasonable grounds of dispute, that there has been a total abandonment with an intention not to return and claim the exemption,' before an abandonment will be found. *Gouhenant v. Cockrell*, 20 Tex. 97; *Cantine v. Dennis* (Tex. Civ. App.) 37 S. W. 186. The first case cited, in which the language quoted was used, has been cited with approval in numerous cases since."

And it is said by Mr. Justice Field, in *Hurt v. Hollingsworth*, 100 U. S. 104, 25 L. Ed. 569:

"According to the decisions of the Supreme Court of Texas, it would appear that, in order to work a forfeiture of the right to the homestead, the owner's cessation of occupancy must be with an intention of total relinquishment, shown by clear and decisive circumstances."

That the renting of a part of a building for boarding house or mercantile purposes, while the owner occupies the remainder of the building as his home, does not operate as an abandonment of any part of the structure as a homestead, has been expressly decided by the courts of this state. Thus it is said in *King v. Hapgood*, 21 Tex. Civ. App. 217-220, 51 S. W. 532, using the words of the syllabus:

"A three-story building occupied by a debtor, who uses a portion of it for a boarding house and leases a part for mercantile purposes, together with so much of a one-story building adjoining as has not been devoted to other purposes, may be claimed exempt as the residence homestead of the occupant."

At page 220 of 21 Tex. Civ. App., page 534 of 51 S. W., language more emphatic was employed by Judge Pleasants, who delivered the opinion of the court. "That the three-story building," said the learned judge, "and so much of the one-story as had not been devoted to other purposes, constituted the residence homestead of the appellants King and wife, there can be no question." See *Forsgard v. Ford*, 87 Tex. 185, 27 S. W. 57, 25 L. R. A. 155; *Harle v. Richards*, 78 Tex.

80, 14 S. W. 257; *Pryor v. Stone*, 19 Tex. 371-374, 70 Am. Dec. 341; *Lang v. Fritz* (Tex. Civ. App.) 38 S. W. 233; *Farmer v. Hale*, 14 Tex. Civ. App. 73, 37 S. W. 164; *Newton v. Calhoun*, 68 Tex. 451, 4 S. W. 645. See, also, *Hinzie v. Moody*, 13 Tex. Civ. App. 193, 35 S. W. 832; *Brennan v. Fuller*, 14 Tex. Civ. App. 509, 37 S. W. 641; *Billings v. Matlage*, 36 Tex. Civ. App. 619, 82 S. W. 805; *Malone v. Kornrumpf*, 84 Tex. 454, 19 S. W. 607; *Duncan v. Ferguson-McKinney Co.*, 150 Fed. 269, 80 C. C. A. 157, 18 Am. Bankr. Rep. 155; *In re Harrington* (D. C.) 99 Fed. 390; *Rollins v. O'Farrel*, 77 Tex. 90, 13 S. W. 1021; *Foreman v. Meroney*, 62 Tex. 723.

Counsel for the trustee refer, among other authorities, to *Medlenka v. Downing*, 59 Tex. 32, *Wynne v. Hudson*, 66 Tex. 1, 17 S. W. 110, *Hargadene v. Whitfield*, 71 Tex. 482, 9 S. W. 475, and *Blum v. Rogers*, 78 Tex. 530, 15 S. W. 115, in support of their contention that the building occupied by the bankrupt and his wife, having been rented in part for a boarding house, was thereby abandoned and lost its character as a homestead. This class of cases is clearly distinguishable from the one before the court. In the present case is involved but a single house, used partly for the purposes of a home, while the cases cited involved not only the home place, but other buildings erected for the purpose of being rented for mercantile or other purposes. In those cases the owner had abandoned that part of the lot or lots which contained the rented buildings and devoted it to a purpose inconsistent with its use as a homestead. But the significant fact remains that, in all the cases, the head of the family was permitted to retain a home. *Wynne v. Hudson* and others of that type are explained in *Hinzie v. Moody*, *supra*, and in *Billings v. Matlage*, *supra*.

Upon a careful consideration of the authorities the court is of the opinion, in view of the facts of this case, that the bankrupt has not abandoned the property claimed by him as a homestead. Having reached that conclusion, it is scarcely necessary to refer to the contention of counsel that, if a part of the house has been abandoned, the part so abandoned should be subjected to the payment of the bankrupt's debts. It may be said, however, that the contention has been disposed of by the Supreme Court of this state in a case the facts of which have direct application to the one now before the court. In *Forsgard v. Ford*, *supra*, Mr. Justice Brown, as the organ of the court, propounded the question:

"Can a part of a house standing on a lot that is a homestead be subjected to forced sale under our Constitution and laws?"

The question thus stated was answered in the negative.

For the reasons stated, the order of the referee is affirmed, and the trustee is directed to set apart the property in controversy to the bankrupt as his homestead.

## In re LISK MFG. CO.

(District Court, W. D. New York. July 16, 1908.)

No. 2,840.

**BANKRUPTCY (§ 63\*)—CORPORATION—CONSENT TO ADJUDICATION—AUTHORITY OF DIRECTORS.**

A resolution adopted by the board of directors of a corporation called and held in the usual manner, and at which a quorum was present, admitting the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt on that ground, is sufficient, in the absence of fraud or collusion, to authorize creditors to institute bankruptcy proceedings, and to warrant an adjudication, although some of the directors in a distant state were not notified of the meeting, especially where neither the stockholders nor a new board of directors elected by them have taken any steps during several months to vacate a receivership obtained by the petitioning creditors with the consent of counsel for the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.\*]

In Bankruptcy. On petition in involuntary bankruptcy.

White & Stanley, for petitioning creditors.

John Dickey, Jr., W. K. & R. K. Prentice, Lewis & Lewis, and George P. Keating, for intervening creditors.

Kenefick, Cooke & Mitchell and Daniel J. Kenefick, for alleged bankrupt.

White & Case, Gardner, Pirce & Thornley, Satterlee, Bissell, Taylor & French, Walter S. Hubbell, O'Brien, Boardman, Platt & Littleton, and Alfred C. Coxe, Jr. (Alfred C. Coxe, Jr., Porter M. French, William W. Moss, and Joseph M. Hartfield, of counsel), for objecting creditors.

HAZEL, District Judge. This is an involuntary proceeding in bankruptcy, instituted by creditors to have the Lisk Manufacturing Company adjudged a bankrupt. The petition was filed on December 27, 1907, and on the same day receivers were appointed, who are in possession of the property and carrying on the business of the corporation. At the request of the Lisk Manufacturing Company the time to answer was extended by order of the court for a period of three months, and on April 13, 1908, the bankrupt filed an answer to the petition, alleging substantially that the corporation was not insolvent, that the board of directors were without power or authority to pass the resolution admitting the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt on that ground, and that such resolution was passed collusively. Trial by jury, which had been demanded under section 19a, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), was waived, and the trial proceeded before the court. Creditors having claims against the alleged bankrupt amounting to \$450,000 have intervened, but nevertheless object to the adjudication, while other creditors having claims amounting to upwards of \$750,000 have intervened and urge the adjudication. Although the directors adopt-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing the resolution were largely indebted to the corporation, no evidence was given to substantiate the allegation of the answer, and it is not now claimed that they acted collusively and fraudulently, and said defense was abandoned at the hearing. Following the decisions of *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, and *In re Moench & Sons*, 130 Fed. 685, 66 C. C. A. 37, evidence offered to show the solvency of the corporation was excluded. Accordingly the single question submitted relates to the power and authority of a quorum of the directors to make the admission under section 3 (a) 5, which is the act of bankruptcy alleged in the petition.

I am satisfied by the record that the meeting held in Buffalo, on December 26, 1907, by a majority of the directors of the Lisk Manufacturing Company, at which the resolution in evidence was adopted, admitting in writing the inability of the said corporation to pay its debts and its willingness to be adjudicated bankrupt, was assembled to adopt such resolution; moreover, that at such time the alleged bankrupt in fact was financially embarrassed and unable to pay its debts, and that the meeting was attended by a quorum of the directors and was called and held in the usual manner in which said corporation transacted its business affairs. It appears that the officers of the corporation, before adopting the resolution, had conferred with counsel regarding the financial condition of the alleged bankrupt, and acting under his advice the meeting was held and the resolution adopted. In this situation the creditors were authorized to institute bankruptcy proceedings under section 3 (a) 5. Officers who have power to make a general assignment under the laws of the state have power to make the specified admission. Neither the state statute nor the by-laws of the corporation prohibited the directors from making a general assignment for the benefit of creditors; and hence the written admission, signed by the secretary of the corporation by order of the majority of the board of directors, was sufficient to authorize the creditors to institute the bankruptcy proceeding in question. *In re Moench & Sons*, supra; *In re Mutual Mercantile Agency Co.* (D. C.) 111 Fed. 152.

It is claimed in behalf of the bankrupt that the statute of the state (section 29 of the general corporation law [Laws N. Y. 1901, p. 507, c. 214]) substantially provides that the business of the corporation shall be conducted by a majority of the directors at a meeting duly assembled, etc., and it is pointed out that the requirement of the by-laws of the Lisk Manufacturing Company indicates that such meeting of the board of directors was not regularly assembled or convened. Under section 5 of the by-laws of such corporation, special meetings of the directors were held at any time by oral notice or by notice in writing duly signed by each director. The by-laws do not provide that such meetings of the directors shall be held in Canandaigua, the place of business of the bankrupt. In view of the manner in which previous business meetings were held by the directors, it was not absolutely necessary that oral notice should have been given, in the absence of bad faith, to directors living or sojourning in a distant state. For this reason, in my opinion, it was not necessary that C. D. McLaughlin, the director residing in Omaha, should have notice of the meeting. The situation was thought by a majority of the direc-

tors, after consultation with their counsel and thorough examination of the financial affairs of the corporation, to require immediate action by the board of directors, and under all the circumstances to secure the consent of the absent director was obviously unnecessary. *Porter v. Robinson*, 30 Hun (N. Y.) 209; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64; *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 139; *American Exchange National Bank v. First National Bank*, 82 Fed. 961, 27 C. C. A. 274. J. L. McLaughlin, another director, knew of the proposed meeting and its object. He must be deemed to have acquiesced in the action of the other directors or waived notice of the meeting. 21 Amer. & Eng. Ency. of Law (2d Ed.) 869.

Moreover, the Lisk Manufacturing Company, in view of the facts, must be held to have acquiesced in or ratified the action of its secretary in signing the resolution setting forth an admission of inability to pay its debts and its willingness to be adjudicated a bankrupt. *Leavitt v. Yates*, *supra*; *Sheldon, etc., Co. v. Eichmeyer, etc., Co.*, 90 N. Y. 607. Although other directors were elected by the corporation on April 4, 1908, more than three months after the filing of the petition in bankruptcy, successors to the directors who adopted the resolution in question, who have disaffirmed the act of bankruptcy, yet nothing has been done by them or the stockholders to vacate the receivership appointed on the application of the petitioning creditors and counsel for the alleged bankrupt. That the financial condition of the company was in fact different from that represented at the meeting is not contended, and that at such time the corporation was unable to pay its debts is undeniable. The business of the bankrupt has been conducted by the receivers for more than six months with the evident assent of the new directors, the stockholders, and parties in interest; and under the circumstances the latter are equitably estopped to claim at this time that the resolution which is the foundation of this proceeding was unauthorized or was improvidently passed at a meeting of which all the directors were not notified and did not attend. If new directors had promptly repudiated the action of their predecessors by moving to vacate the receivership, or had challenged their good faith, a different question would be presented.

In view, however, of the evidential facts, I am of the opinion that the answer of the bankrupt was interposed to postpone the adjudication, though undoubtedly in the honest belief that the corporation in the near future, by negotiations with creditors conducted by the receivers, would be enabled to pay its debts in full or effect a satisfactory settlement with its creditors. However commendable the efforts of the corporation or stockholders may be in that respect, it is to be remembered that the general creditors are entitled to primary consideration, and, moreover, that terms of composition may be offered under section 12 of the bankruptcy act. To allow the receivers to conduct the business of the bankrupt for a prolonged period, to the exclusion of rights of creditors demanding the right given them by the bankruptcy act to elect a trustee and administer the estate, is unwarranted. The bankrupt act was passed for the benefit of cred-

itors on the principle that, when a bankrupt's property is insufficient to pay its debts in full, there shall be an equitable division thereof pro rata among them, and this fundamental rule requires the court, not only to preserve the estate and prevent its dissipation, but that the property and assets of the bankrupt should be collected or marshaled and the amount realized distributed without unnecessary delay.

An order adjudicating the Lisk Manufacturing Company a bankrupt may be entered.

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UNITED STATES v. HAVILAND & CO.

(Circuit Court, S. D. New York. January 19, 1909.)

No. 5,034.

1. CUSTOMS DUTIES (§ 75\*)—APPRAISAL—"PRINCIPAL MARKET"—LIMITED SALES.

In Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924), the provision that dutiable value shall be the market value "in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported," refers to the "principal market" where imported merchandise is bought and imported to the United States in wholesale quantities, rather than to markets where there may have been limited purchases.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 183-185; Dec. Dig. § 75.\*]

2. CUSTOMS DUTIES (§ 75\*)—APPRAISAL—EXPORT PRICE—"PRINCIPAL MARKET."

The entire output of a china manufacturer in Limoges was exported to the United States directly from Limoges, except a small amount of special classes, which was disposed of in Paris to European trade; the wholesale business in Paris being less than 4 per cent. of said exportations to the United States. *Held*, that for the goods shipped to America Limoges, and not Paris, was the "principal market," within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 183; Dec. Dig. § 75.\*]

3. CUSTOMS DUTIES (§ 75\*)—APPRAISAL—"CONDITION."

Where practically all the output of a china manufacturer was sold to the United States, special classes manufactured for European trade cannot be said to be in "condition" to supply the American trade, within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924), providing that dutiable value shall be determined according to the "condition in which \* \* \* merchandise is there bought and sold for exportation to the United States."

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 75.\*]

4. CUSTOMS DUTIES (§ 85\*)—REAPPRAISEMENT—REVIEW ON PROTEST.

Though, under Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 (U. S. Comp. St. 1901, p. 1932), a reappraisement by a Board of General Appraisers is "final and conclusive," it may be impeached, if based upon a wrong principle or contrary to law, or the power conferred by statute has been transcended; and where such board misinterprets a portion of the evidence, a legal error has been committed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

making it necessary to see if the error works injustice, and proceedings for review may be initiated by protest under section 14 of said act.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 201; Dec. Dig. § 85.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below is reported as G. A. 6,655 (T. D. 28,382).

D. Frank Lloyd, Asst. U. S. Atty.

B. A. Levett (Henry A. Wolff, on the brief), for importers.

MARTIN, District Judge. The merchandise in question is Haviland china. The local appraiser advanced the importers' invoice prices for duty. The importers appealed, under Act June 10, 1890, c. 407, § 13, 26 Stat. 136 (U. S. Comp. St. 1901, p. 1932), and the case went before a single General Appraiser (Judge Waite), who found its entered value correct. The government then appealed to a board of three General Appraisers, called in the record "Board No. 2." This board advanced the goods 16.5 per cent. above the entered value, and liquidation was made on that basis. Thereupon the importer appealed to a board of three General Appraisers by protest, under section 14 of said act. Board No. 3 sustained the protest, and held that the decision of Board No. 2 was illegal. From this decision the government appeals to this court, under section 15 of said act.

At the time of the importations in question there were three houses known as Haviland & Co.—one house at Limoges, France, which manufactured china; another at New York, a wholesale house, which supplies the trade in the United States and Canada; and a third in Paris, France, a selling house for European trade. Each house is a partnership, and the head of each firm is Mr. Charles Edward Haviland. The remaining partners are not all the same. The main business of the Limoges house is the supplying of china to the New York house. Its sales are exclusively to New York and Paris. All the sales of the New York house are wholesale, while the Paris house is partly retail, dealing in other goods as well as those of Haviland & Co., and selling a small quantity at wholesale. There are a number of other manufacturers of china at Limoges, whose goods are similar in character to those of Haviland & Co., there being altogether 36 manufacturers, 25 decorators, and 21 commissionaires, all engaged in the manufacture or sale of china similar to Haviland's, and they sell in the open markets to buyers, many of whom ship to the United States. Prior to 1905 controversies between importers and the government had arisen with reference to the market value. Attempts had been made to come to an agreement as to the invoice value of importations of china. Various investigations had been made by the government at different periods. In 1905 there was an especial effort made to establish the foreign market value of these goods. There was then a reappraisal, known as "No. 3,843," that was confirmed by the Board of General Appraisers. It was then understood that those prices were the fair foreign market value; but there was a discrimina-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



tion of 5 per cent. against the Haviland goods, or, in other words, their value was increased 5 per cent. because of their reputation in the trade.

There was no evidence of any material change in the general market price of these goods since that time. The prices then fixed, with the exception just stated, applied to all china coming from Limoges, by whomsoever manufactured. An effort was made in 1906 on the part of Haviland & Co., of New York, to be relieved of this 5 per cent. discrimination, but they did not succeed. There was then no attempt, however, on the part of the government, to advance the price. Yet in the latter part of that year the importations by Haviland & Co., of New York, invoiced at the same prices as theretofore, were advanced, and every cask containing their imported china was seized for alleged fraudulent undervaluation, and for several months none was allowed to pass through the customhouse of New York.

The record of the hearings in this cause shows that the only persons examined as witnesses who had actually bought for the genuine purpose of importing china from France to the United States were as follows: Adolph Barroutaud, of the firm of Barroutaud & Watson, importers of French china for 14 years; Henry Creange, an importer of china for 16 years; Herman Siegel, a member of the firm of L. Straus & Co., connected with this business 25 years, in charge of the import department, including French china, frequently called by the Board of General Appraisers to give values of china; Max O. Doerring, a member of the firm of Charles Ahrenfeldt & Sons, importers of French china since 1891; Ernest Waeldin, of the firm of George Bassett & Co., importers of china and glassware, and the European buyer since 1890; B. Rosenfeldt, importer of china for 15 years; and Lucien D. Bloch, of the firm of Lucien D. Bloch & Co., importers of French china for 5 years. These witnesses testified that Limoges is the only market where they buy, and is the market for the buying of china for importation to the United States; that the china that they buy is of an average quality with that of Haviland & Co.; and they gave a list of prices which they have paid and are paying, which on an average is below the prices given by Haviland & Co. in their invoices for tariff duty.

It is contended by the government, however, that the Havilands of New York are substantially the same firm as Haviland & Co. who manufacture the china at Limoges and the Haviland & Co. who sell at wholesale and retail in Paris, and that, as they sell to no one else in Limoges and do sell in Paris, the prices in Paris must control. The evidence shows that the manufacture of china by Haviland & Co. in Limoges was developed for the sole purpose of supplying the American market, and that Haviland & Co., of New York, furnish the wholesale market of the Haviland china for this country. Special classes of goods for the foreign trade are also manufactured at the Limoges factory, when the trade in this country is not in a condition to take the full output of the factory. The Paris house takes that excess, which is but a small proportion of the output of the plant. The Paris house also buys from other manufacturers as their European

trade demands. It appears that the total wholesale business of the Paris house is less than 4 per cent. of the total importations to the United States from the Limoges house. Some of the other manufacturers in Limoges maintain agencies in Paris; but it does not appear that they have any other duty than to transmit orders to Limoges. The price charged to the Paris trade by the manufacturers at Limoges includes a profit, and the sales at Paris must cover that profit, also the expense of shipment, breakage, rent, and the like. It is not disputed that prices in Paris are considerably higher than in Limoges. It is self-evident, therefore, that any intelligent importer would buy at Limoges.

The evidence fairly shows that the principal wholesale market of china in France is Limoges. It is evident that the reason that Haviland & Co., of Limoges, sell to no other importer than Haviland & Co., of New York, is that Haviland & Co., of New York, desire to control the American trade in their goods, which is legitimate. The fact that the Limoges house sells to the Paris house a limited quantity for retail and wholesale in Europe of a class of goods made for the European trade, under the circumstances developed by the evidence, is not sufficient upon which to find that the Paris market should be established as the basis of ad valorem tariff duty. There is no substantial evidence that the importers in the case at bar, in their relations with the manufacturing house at Limoges, have adopted prices of invoice on the basis of a purchase price that is fraudulent, dishonest, or even unfair. The history of previous transactions by these importers, their negotiations with the government heretofore, and the prices paid by other importers to other manufacturers of china at Limoges negative such an inference.

I concur with Board No. 3 in their view of the Haviland letter. The opinion of the board is so carefully and ably written that I need not add anything in the discussion of that question. I do not concur in the decision of Board No. 3 in affirming Board No. 2 as to the adoption of the Paris wholesale prices for the duty to be imposed upon the merchandise in question. Board No. 2 based its decision upon the Haviland letter, misinterpreted its contents, and thereby committed a legal error. Therefore it becomes necessary to look into all the evidence before them to see if that error works injustice. I have read the evidence with great care, including nearly 200 pages of briefs of counsel, and I concur with Judge Waite in finding Limoges to be the principal wholesale market of china from which importations are made to the United States. As bearing upon this question, the position taken by the government in its recent German agreement (T. D. 28,215, 28,216) is pertinent. It reads as follows:

"Market values as defined by section 19 of the customs administrative act (26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]), shall be construed to mean the export price whenever goods, wares, and merchandise are sold wholly for export, or sold in the home markets only in limited quantities, by reason of which facts there cannot be established a market value based upon the sale of such goods, wares, and merchandise in usual wholesale quantities, packed ready for shipment to the United States."

That stipulation fits the case at bar. There is no reason why the principle adopted as to importations from Germany should not be adopted as to importations from France.

It is contended by counsel for the government that the importations in question antedated the German agreement. I understand that to be so, but that does not affect the principle at all. If the claimed error of Board No. 2 was that said board had not given the same construction to section 19 of the customs administrative act of 1890 that the Treasury Department gave in this German agreement, and therefore erred in applying the facts found to said section 19, then the date of said agreement, being subsequent to the importations in question, might be material. Section 19, as it affects these questions, reads as follows:

"That whenever imported merchandise is subject to an ad valorem rate of duty \* \* \* the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale. \* \* \* That the words 'value' or 'actual market value,' whenever used in this act or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value or wholesale price as defined in this section."

The above provision as to market value where the merchandise is bought "in usual wholesale quantities" at the time of the exportation has a meaning. The words "in the principal markets of the country from whence imported" have a meaning. These words mean the principal market where the imported merchandise is bought and imported to the United States in wholesale quantities. They cannot fairly be construed to mean that special agents of the Treasury Department may, by searching France, find some place where there have been some purchases at wholesale at a higher price than in the principal market, and a Board of Appraisers adopt that as a basis of valuation. In the language of Judge Lacombe, in *United States v. Godillot & Co.*, 139 Fed. 1, 71 C. C. A. 505, T. D. 26,272, "not some varying local value prevailing in some of its individual cities." Board No. 2 seems to have given no effect to the words "and in the condition in which such merchandise is there bought and sold for exportation to the United States." The "condition" is as pertinent, under this act, as are sales in the markets. The word "condition" has a meaning—"state of being; quality; situation in relation to environment; attribute or characteristic." The evidence fairly shows that practically all the goods manufactured by Haviland & Co. at Limoges that were in a "condition" to supply the American trade were bought by the New York house at Limoges, and from Limoges exported to the United States.

It is claimed by the government that the decision of Board No. 2 is final. The language of section 13 of said act, which has reference to said Board No. 2, is as follows:

"Which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein."

If the record showed that Board No. 2 considered all the evidence before them, and from it found certain facts, and there was some evidence to sustain those facts, the court would not review it, nor sustain Board No. 3 in reviewing it. That is not the question here presented. Board No. 2 erred upon a question of law by adopting a wrong principle in the interpretation of a written document, the result of which would work injustice to these importers. It, therefore, was the plain duty of Board No. 3 to correct it, and it is the duty of this court to sustain that board in so doing. Notwithstanding the language of said section 13, the courts have repeatedly held that where the appraisement was based upon a wrong principle, contrary to law, or has transcended the power conferred by statute, such action is subject to review and may be impeached. *United States v. Passavant*, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. Ed. 644; *Erlanger v. United States (C. C.)* 152 Fed. 576; *Hermann v. United States (C. C.)* 84 Fed. 151; *United States v. Muller (C. C.)* 152 Fed. 575; *United States v. Godillot & Co.*, 139 Fed. 1, 71 C. C. A. 505; *Lace House v. United States*, 141 Fed. 869, 73 C. C. A. 103.

The Circuit Court of Appeals for this circuit, in *Gulbenkian & Co. v. United States*, 153 Fed. 858, 83 C. C. A. 40, upon examination of the record found that the appraised value of imported wool was based upon the actual value of white overcolored wool, and thus the invoiced valuation was increased for tariff duty, when the market value of each kind of wool, colored and white, was the same when it was bought in the principal markets of Bagdad, Turkey, and imported here. The Court of Appeals there held that the appraisement for duty, having been based upon the value of the wool in question in other markets than the market from which it was imported, was an error; and, notwithstanding the provision of section 13 that the appraisement shall be final, it was reviewed by the court, and impeached, because the action of the appraisers was not within the letter of the law. The same principle is applicable to the case at bar.

The decision of Board No. 3 is affirmed.

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In re SASSMAN.

(District Court, E. D. Pennsylvania. February 8, 1900.)

No. 2,880.

**BANKRUPTCY (§ 140\*)—PROPERTY VESTING IN TRUSTEE—PROPERTY PAID FOR BY ANOTHER—CONSTRUCTION OF CONTRACT.**

Bankrupt was a manufacturer of carpets, largely on orders obtained by claimants from dealers. When such orders were filled, they were charged to claimants, who made an advance thereon and guaranteed collection, charging a commission and interest on the advances. Claimants also made an agreement with the bankrupt under which he bought yarn and had it charged to them. He agreed to use it only on their orders, and they paid the bills therefor, charged the amount to his account, and deducted the same, with interest and their usual commission, from the proceeds of the carpet when sold. Certain of such yarn, bought

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the bankrupt, but paid for by claimants, was in his possession at the time of bankruptcy, and was afterwards made up and the carpet shipped on claimants' orders and collected for by them. *Held*, that the yarn was the property of the bankrupt, and not of claimants, the transaction being merely a loan of money by them, and that they were not entitled to withhold the amount paid for the yarn by them from the proceeds of the carpet.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

In Bankruptcy. On certificate of referee concerning claim of T. J. Keveney & Co.

Julius C. Levi, for claimant.  
Alfred Aarons, for trustee.

J. B. McPHERSON, District Judge. The present dispute arises upon the following facts, which are admitted by the parties to be true:

For some time before May 31, 1907, the bankrupt had been manufacturing carpets, buying the materials in his own name. His principal business came through T. J. Keveney & Co., a commission house in New York City, by whom orders for carpets were obtained from dealers and turned over to him. When an order was filled, the bankrupt shipped the carpets directly to the dealer, but charged them to Keveney & Co., and sent the invoices to that firm. Keveney & Co. guaranteed the account, and immediately advanced 80 per cent. thereof, charging a commission of 5 per cent. for selling and guaranteeing, and also charging interest on the advance of 80 per cent. On the discount due date, this date being specified on the order sent by Keveney & Co. to the bankrupt, Keveney & Co. made good the balance of 20 per cent. to the bankrupt, whether or not the dealer had paid the account. The dealer remitted directly to Keveney & Co. On or about May 31, 1907, the bankrupt's credit was so impaired that he could not obtain the necessary worsted yarns. Thereupon he agreed with Keveney & Co., whose credit was good, that yarns should be bought and delivered to the bankrupt, but that the goods should be charged to Keveney & Co. and paid for by them. The agreement appears in the following memorandum:

"May 31, 1907.

"To Whom It may Concern:

"I hereby agree to make and ship all orders I receive from T. J. Keveney & Co. without delay. With regard to worsted yarns, I agree to purchase these at once and have the bills for same forwarded to T. J. Keveney & Co., so that they may pay them for my account, and I agree to use all such yarns on the T. J. Keveney & Co. orders. All yarn bills which T. J. Keveney & Co. paid for my account they are to deduct from my account with them. My purchase will not exceed \$500 on worsted yarns. Henry Sassman & Co."

Under this agreement the bankrupt bought yarns, among them the consignment from Kenworthy & Bro. that is now in dispute. The purchase was made by the bankrupt, and the goods were delivered to him; but the account was charged to Keveney & Co., by whom it was paid. When the carpets were manufactured under the orders transmitted by Keveney & Co., they were billed to that firm at so much a yard. The charge made by the bankrupt was not merely for

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the labor of manufacture and for the cost of other materials than the yarns. After the agreement of May 31st, in addition to Keveney & Co.'s commission and the interest on their advances of 80 per cent. they also deducted such sums as they paid on account of yarns that were charged to them under the agreement, together with interest on these sums. At the time of the failure there was no balance due the bankrupt in the hands of Keveney & Co., and therefore they could not deduct the amount of the Kenworthy bill; but, as these yarns were in the bankrupt's possession when the creditors' petition in bankruptcy was filed on August 16, 1907, it was agreed that they should be made up into carpets. Afterwards the carpets were sold by Keveney & Co., who were allowed to retain \$552.90 out of the proceeds to await the determination of the present controversy. The referee was asked to award this sum to the claimant firm, but he declined to make the order and dismissed the petition.

Obviously, Keveney & Co. can only succeed in their effort to retain the money if they had the title to the yarns when the proceedings in bankruptcy were begun; and it is this position that is earnestly maintained by their counsel. In my opinion, however, the facts show clearly that the title to the goods was never in Keveney & Co., but was always in the bankrupt. Under the agreement of May 31st, the bankrupt was to buy the yarns, and I see nothing to support the inference that in so doing he was merely acting as Keveney & Co.'s agent. On the contrary, while Keveney & Co. were liable for the yarns, such money as they might pay therefor was to be charged to the bankrupt's account and was to bear interest, thus showing clearly that Keveney & Co. were in reality lending the money and were not buying the goods on their own behalf. They were *del credere* agents (Clark & Skyles, Agency, p. 968, § 434), guaranteeing payment for the goods that they sold, and also lending their credit to enable the bankrupt to continue the business of manufacturing. But, so far as the evidence shows, the goods in question were the bankrupt's property. He made the contract with Kenworthy & Bro., the yarns were delivered to him, and, so far as appears, he was himself liable for the purchase price, although Keveney & Co. were also liable and were looked to in the first instance. The bill was naturally sent first to them, since it was their credit that induced the sale; but the bankrupt was also liable, and could have been compelled to pay if Keveney & Co. had made default. The argument that the claimants were bailors of the goods necessarily implies that they had title to the property originally, and delivered it, or ordered it to be delivered, to the bankrupt for the purpose of having it manufactured; and the argument must fall if the title passed, not to them, but to the bankrupt himself by his contract of purchase from Kenworthy & Bro. No doubt the bankrupt agreed to use the yarns on Keveney & Co.'s orders, but the very fact that he so agreed shows that such an agreement was considered necessary. It would not have been necessary if the yarns had been bailed to him by the owner for the specific purpose of being worked up; for, in that event, he would have been bound to carry out the bailor's orders without specifically agreeing

so to do. Moreover, Keveney & Co. charged a commission of 5 per cent. for selling and guaranteeing the sales of the carpets, and this certainly implies that they were selling, not their own property, but the property of the bankrupt. If they had bailed the yarns to be made up into carpets, the carpets would have been theirs, and they would hardly have charged a commission for selling their own property.

The decision of the referee (Edward F. Hoffman, Esq.) is affirmed; and it is further ordered that Keveney & Co. pay over to the bankrupt's trustee the sum of \$552.90 now in their hands.

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Ex parte HUFFMAN.

(Circuit Court, W. D. Texas, El Paso Division. February 10, 1909.)

No. 476.

GUARDIAN AND WARD (§ 167\*)—FOREIGN GUARDIAN—RIGHT TO FUND IN COURT—ANCILLARY APPOINTMENT.

Where the judgment of a federal court in Texas in favor of a minor directed the money to be paid out by the clerk to her legal and qualified guardian, and application is made for the same by a guardian appointed in another state where the minor resides, such guardian should obtain ancillary letters of guardianship from the court in the county where the property is located, as provided for by Rev. St. Tex. 1895, art. 2753.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 557; Dec. Dig. § 167.\*]

Application by Mrs. Patsy Huffman, of the state of West Virginia, praying for an order authorizing the clerk of this court to pay over to her the sum of \$500, now on deposit in the registry of the court, for the use and benefit of Ethel Copley, a minor child 10 years of age.

At the October session of the court at El Paso judgment was rendered in favor of the minor for the amount named in a suit instituted by Mrs. Huffman, as next friend, against the Texas & Pacific Railway Company. The judgment in terms required the money to be paid into the registry of the court for the use and benefit of the minor, and to be paid out by the clerk to her legal and duly qualified guardian. The money was seasonably deposited by the railway company, and the applicant bases her right to receive it upon letters of guardianship issued to her by the county court of Wayne county, W. Va. The order of her appointment is as follows: "On motion, Patsy Huffman is hereby appointed as guardian of and for Ethel Copley, age 10 years, heir at law of M. F. Copley, deceased; and the said Patsy Huffman, being present in open court, accepted said trust, and entered into and acknowledged a bond in the penalty of \$1,200, conditioned as the law directs, together with Henry Copley and Milton Perry, her sureties therein. Thereupon the said Patsy Huffman took the several oaths as required by law as such guardian." It does not appear from the order whether Mrs. Huffman was appointed guardian of the estate, or of the person, or both of the estate and person, of the minor, nor is the condition of the bond set out. The transcript of the proceedings of the West Virginia court seems to be regular, and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it is authenticated conformably to the requirements of section 905 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 677).

Brown & Terry, for applicant.

MAXEY, District Judge (after stating the facts as above). The judgment rendered in the court at El Paso in favor of the minor, Ethel Copley, directed the money to be paid out by the clerk to her legal and qualified guardian. The amount of the judgment not being in excess of \$500, the court might have directed an order to be entered, pursuant to the provisions of Rev. St. Tex. 1895, art. 3498w, authorizing the next friend of the minor or other person to take charge of the money, upon giving bond in any sum not less than double the value of the property; but the judgment as actually entered directed its payment to the legal and qualified guardian of the minor. In some jurisdictions it has been held that, without express statutory authority, a court of chancery has power to order the payment of the ward's assets to a foreign guardian, when in its judgment such action is deemed best for the interest of the ward. *Earl v. Dresser*, 30 Ind. 11, 95 Am. Dec. 660, and note at page 666; *Woerner*, Am. Law Guardianship, 87; 13 Am. & Eng. Enc. Law (2d Ed.) 968, 969. But it is said to be generally requisite that, where an infant domiciled in one state has property in another, a guardian be appointed for such property in the state where it is situated. In the exercise of comity, however, preference will ordinarily be given to the person already clothed with the authority of guardian in the state of the infant's domicile. 13 Am. & Eng. Enc. Law (2d Ed.) 968, cl. 3.

Since courts should act with extreme circumspection in dealing with the estates of infants and others under guardianship, it is thought to be the better and safer practice, where nonresident guardians seek to obtain possession of moneys in the registry of the court, to require as a prerequisite to the payment of such moneys the production of ancillary letters, issued by a local court where the property is situated. In Texas such letters may be obtained expeditiously and with little expense. The statute upon the subject provides as follows:

"Where a guardian and his ward are nonresidents, such guardian may file in the county court of any county a full and complete transcript from the records of a court of competent jurisdiction where he and his ward reside, showing that he has been appointed and has qualified as guardian of the estate of such ward, which said transcript shall be certified by the clerk of the court in which the proceedings were had, under the seal of such court, if there be one, together with a certificate from the judge, chief justice or presiding magistrate of such court, as the case may be, that the attestation to such transcript is in due form; and upon the filing of such transcript the same may be recorded, and the guardian shall be entitled to receive letters of guardianship of the estate of such minor situated in this state, upon filing a bond with sureties, as in other cases, in double the amount of the estimated value of such estate." Rev. St. 1895, art. 2753.

See, also, *Simkins*, Administration of Estates, pp. 484, 611.

Article 2754 provides for the recovery of the property of the non-resident ward and for its removal out of the state; and by article 2755 it is provided that:



"Any resident executor, administrator or guardian having any of the estate of such ward, may be ordered by the court to deliver the same to such non-resident guardian."

It is thus seen that the laws of this state provide an easy, expeditious, and inexpensive method whereby a nonresident guardian may obtain possession of the ward's estate situated in Texas. In addition, the interest of the ward is thoroughly protected by requiring a bond to be given in double the amount of the value of the assets sought to be recovered. As before stated, the judgment rendered in favor of the minor, Ethel Copley, authorized the clerk to pay over the money to her legal and duly authorized guardian. Such a guardian, as applied to the facts of this particular case, is one appointed, or to be appointed, by the county court of El Paso county; and when a guardian so appointed applies for the \$500 in the registry of the court, the clerk will then be clothed with authority to pay it over.

The application in its present form will be denied, with liberty to Mrs. Huffman to present an application at some future time in conformity with the views above expressed.

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In re GREEK MFG. & ENTERPRISING CO.

(District Court E. D. Pennsylvania. February 10, 1909.)

No. 2,971.

**BANKRUPTCY (§ 188\*)—RIGHTS VESTING IN TRUSTEE—PROPERTY LEVIED ON BY BANKRUPT.**

A corporation, a few months prior to its bankruptcy, sold and transferred certain property to another, taking a judgment note therefor. Included in the property so transferred was a cash register, which it held under a contract of rental or conditional sale from the manufacturer, and a similar contract was made with the transferee with the bankrupt's knowledge and consent. Not receiving payment, it issued execution on the note and levied on property, including the cash register, which levy was pending at the time of the bankruptcy. *Held* that, whether the contract was one of rental or conditional sale, the reservation of title in the manufacturer was valid between the parties and as against the bankrupt and its trustee.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 188.\*]

In Bankruptcy. On certificate of referee.

See, also, 164 Fed. 211.

George Wentworth Carr, for National Cash Register Co.

Albert L. Möise, for trustee.

T. Henry Walnut and William R. Murphey, for creditors.

J. B. McPHERSON, District Judge. This is a controversy over a fund produced by the sale of a cash register. The machine was sold by the receiver (afterwards the trustee) of the bankrupt company, and the money thus produced is in his hands awaiting the decision of the present dispute. There are two claimants to the fund, namely, the trustee of the bankrupt and the National Cash Register Company;

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the latter having been originally the owner of the machine, and asserting that its ownership continued, and could lawfully be asserted, at the time of the sale. The facts are as follows:

In July, 1907, the bankrupt acquired a machine from the National Cash Register Company under a form of agreement whose terms will be set out more fully in another connection. It provided, inter alia, for the payment of certain installments, and after several of these had been paid the bankrupt sold its entire interest in the machine (whatever that interest may have been), together with other property, to Alexander Alexakis, and took from him a judgment note in payment of the purchase price. Alexakis took possession of the machine, both the bankrupt and the register company agreeing thereto, and on November 21st recognized the ownership of the register company by entering into an agreement that was identical in all essential particulars with the instrument to which the bankrupt had been a party. The principal provisions are as follows:

"The National Cash Register Co., Dayton, Ohio:

"Please ship to the undersigned, at \* \* \* Philadelphia, \* \* \* one of your registers, \* \* \* and we agree to lease it from you for the term of six months for the rental of \$225. We agree to give you our promissory note for \$125, payable in six monthly installments, five of \$20 each and one of \$25, as collateral security for the payment of said rental. We further agree to pay you \$—— forthwith, and \$—— upon arrival of the register, as partial security for the fulfillment of this agreement. At the expiration of this lease we agree to surrender to you the said cash register in good condition; you to return to us the amount deposited with you as security as hereinbefore mentioned, provided the terms of this lease have been complied with. The \$100 paid by the Greek Manufacturing & Enterprising Company to apply as part rental. We are to have the option, after the expiration of this lease and after surrender of said register, to purchase the same upon the payment to you of the amount deposited as partial security."

The remaining provisions of the agreement need not be quoted. The promissory note referred to was duly executed, dated December 2d, and reads as follows:

"For value received, —— promise to pay to the order of the National Cash Register Co. (Dayton, Ohio, U. S. A.) one hundred and twenty-five dollars, at Philadelphia office, in six installments, payable as below:

One	month	after	date.....	\$20
Two	months	"	" .....	20
Three	"	"	" .....	20
Four	"	"	" .....	20
Five	"	"	" .....	20
Six	"	"	" .....	25

"It is agreed that default in the payment of any of the above installments shall, at the option of the holder hereof, render the unpaid balance of this note due and payable."

In December, 1907, the bankrupt issued execution upon the judgment note given by Alexakis, and levied, inter alia, upon the machine. While the levy was pending, the petition in bankruptcy was filed, and a receiver was appointed. He mistakenly supposed that the machine was the property of the bankrupt, and in that belief offered it for sale. By agreement between the register company and himself, he was allowed to sell it and to retain the proceeds until it should be determined

who was entitled thereto. This question is now presented, and ordinarily it would be fully answered by construing the agreement between Alexakis and the register company. If the court should determine this to be a bailment, the register company would continue to be the owner, and would be entitled to the fund; if the court should find it to be a conditional sale, the machine would be subject to levy as the property of Alexakis under the judgment note given by him to the bankrupt, and the trustee would succeed to the interest that was acquired by the levy. The situation would be precisely the same as if the Greek Company had not been adjudged a bankrupt, but was claiming the fund as a solvent individual by virtue of its execution lien. Alexakis is not a bankrupt, and the lien obtained by the Greek Company's execution was therefore not affected by section 67, or by any other provision of the statute. The case would present the familiar aspect of a dispute over a piece of property that has been levied on in the possession of a debtor, and therefore belongs *prima facie* to him, but is claimed by a third person as being in reality his property although he has temporarily allowed it to pass into the debtor's possession.

But it will be observed that a peculiar situation exists in the present case, and owing to this situation it is not necessary to construe the agreement of November 21st, and to decide whether it evidences a bailment or a conditional sale. And the reason is this: Upon the undisputed facts it is not open to the bankrupt, or to its trustee, who has succeeded to no more than the bankrupt's rights, to insist that the agreement should be construed. Whether it evidences a bailment or a conditional sale, the transaction was unquestionably good between the register company and Alexakis, and, while it might, no doubt, be questioned by some of the latter's creditors, the legal rule which permits it to be attacked is only at the service of a class of creditors to which the bankrupt does not belong. The rule is founded upon the assumption, which in most cases is justified by the fact, that creditors have been deceived by the debtor's possession of the property in question and have given him credit in the belief that the real ownership corresponds with the apparent ownership. When, therefore, the possession and the apparent ownership are both in the debtor as the result of a contract of conditional sale, the conditional vendor is not permitted in the state of Pennsylvania to set up his real ownership, although it may be protected by his agreement with the debtor, so as to defeat the claims of creditors who have levied upon the property in the debtor's possession. The reason of the rule ceases, and therefore the rule itself is no longer applicable, when it appears that the creditor has not been deceived at all, but has been in full possession of the facts concerning the debtor's apparent title. If he knows that the debtor has come into possession of the property by virtue of a contract which preserves the title and the real ownership of another person, he evidently does not credit the debtor on the faith of the latter's apparent ownership, and there is no longer any ground for disabling the real owner from insisting upon his title in spite of the fact that the debtor (and conditional vendee) has been allowed to have

the possession. In the present case the agreement of November 21st between the register company and Alexakis was made with the knowledge and consent of the bankrupt, by whom the nature of the agreement was well understood. The bankrupt knew that the possession of Alexakis was taken under a contract that was either a bailment or a conditional sale, and in either event that the real title and ownership had not passed to him. With such knowledge the bankrupt's judgment note against Alexakis was given and accepted, and I am unable, therefore, to see how it is possible to disregard this undoubted fact, and to permit the bankrupt to enjoy the rights that belong only to a creditor who was ignorant of the full scope of the transaction by which Alexakis acquired possession of the property in dispute. The bankrupt's knowledge concerning the title of Alexakis to the register is the knowledge of the trustee, and both, I think, are as much bound to respect the agreement of November 21st as was Alexakis himself.

The order of the referee is reversed, and the trustee is now directed to pay over to the National Cash Register Company the sum of \$100, the proceeds of the machine in question.

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NASH v. BOHLEN.

(District Court, E. D. New York. February 13, 1909.)

ADMIRALTY (§ 30\*)—JURISDICTION—CONTRACTS IN PART MARITIME.

An agreement by a carrier to insure cargo, where it is one of the elements of a properly maritime contract of affreightment, may be proved in admiralty and damages recovered for its breach in a suit for other breaches of the contract.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 298-300; Dec. Dig. § 30.\*]

In Admiralty.

Alexander & Ash, for libellant.

Peter S. Carter, for respondent.

CHATFIELD, District Judge. The court has already found a contract, and that the contract was broken, in that unseaworthy vessels were furnished, and that the respondent was responsible for this unseaworthy condition of his boats and the accidents resulting therefrom, even though he had attempted to take advantage of a proceeding to limit his liability with respect to anything not occurring through his own fault.

The libel in this case seems to have been prepared upon the theory that, if a maritime contract be broken, all elements of damage can be proven upon the one breach. No fault can be found with that theory; but upon the trial it developed that the libellant had set forth a single contract, and had stated as component parts of one cause of action a number of breaches, or of acts which were alleged to be each a breach of this maritime contract, and that from each breach the same damage, namely, the loss of the two cargoes of cement, had resulted.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For a time on the trial it appeared as if no relief could be granted, inasmuch as the evidence tended to show merely the making of a contract, and that damage had occurred, but that no evidence had been offered from which any particular breach of the contract could be ascertained, except that a contract to insure had not been carried out. This contract to insure, if standing entirely by itself, would be a civil and not a maritime contract, and could not be the sole basis of a cause of action in admiralty.

Considerable discussion was had as to the form of the pleadings and the various acts which were claimed to be breaches of the contract. It ultimately was established by the libelant that he was entitled to claim damages upon more than one cause of action growing out of the one maritime contract. Upon the proof the issues became clearly enough defined, so that the fault in the pleadings was removed, especially as no exceptions to those pleadings had ever been taken until the court began its analysis of the testimony up to the time when the question appeared. The court found upon the alleged breach of warranty of seaworthiness (the respondent not being a common carrier, but a carrier for hire upon private contract) for the libelant; and also found upon the facts that a contract for insurance existed, which could be satisfactorily complied with either by a policy upon each individual cargo, or a blanket policy to the full value of the carrying capacity of the vessel, with a certificate for each cargo. The question as to whether such an insurance contract could be proven in admiralty, where it was one of the elements of a properly maritime contract, was reserved, and must be now determined in favor of the libelant. The cases of *Rosenthal et al. v. The Louisiana* (C. C.) 37 Fed. 264, *The City of Clarksville* (D. C.) 94 Fed. 201, and *Keyser v. Blue Star S. S. Co.*, 91 Fed. 267, 33 C. C. A. 496, satisfactorily substantiate the proposition that such a contract may be introduced as an incident, and damages for the breach of such a contract awarded upon the trial of the action in admiralty. See, also, *Marquardt et al. v. French* (D. C.) 53 Fed. 603.

It may be said that the award upon the breach of the contract for seaworthiness alone would be sufficient to dispose of this case. But inasmuch as the contract for insurance would seem to be properly established, and inasmuch as the court has found that the contract was broken, the libelant may have a decree upon both grounds.

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In re HUDDLESTON.

(District Court, S. D. Georgia, W. D. May 26, 1908.)

1. BANKRUPTCY (§ 114\*)—RECEIVERS—APPOINTMENT.

After adjudication of voluntary bankruptcy, an application by creditors, in which the bankrupt unites, to appoint a receiver or custodian to preserve the assets of the estate, otherwise wholly unprotected, will usually be granted, especially in the absence of any charge of fraud or collusion,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and where the creditors and other persons interested make no objection whatever.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.\*]

2. BANKRUPTCY (§ 114\*)—RECEIVERS—SERVICES.

When a receiver is designated by the court, the subsequent election by the creditors of the same person as trustee is evidence of the fitness and competency of such person.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.\*]

3. BANKRUPTCY (§ 482\*)—ATTORNEYS—COMPENSATION.

Where an application for fees for a receiver and for attorneys has been referred to a competent special master, where there are two hearings, and where the evidence discloses that the attorneys have rendered meritorious services, nearly trebling the value of the estate, such attorneys are entitled to a fee, justly compensatory for such services. *Smith v. Cooper* (5th C. C. A.; opinion by Circuit Judge Pardee) 120 Fed. 230, 56 C. C. A. 578.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.\*]

4. BANKRUPTCY (§ 484\*)—RECEIVERS—COMPENSATION—EXCEPTIONS TO REPORTS OF SPECIAL MASTERS—WHERE NO EXCEPTIONS.

Without objection to the special master's report on this subject, the compensation allowed such receiver, if not exorbitant, should be approved. *Smith v. Cooper*, *supra*.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 484.\*]

(Syllabus by the Court.)

In Bankruptcy. Petition of attorneys for bankrupt and of receiver for compensation. Petition to review referee's findings.

Hardeman, Jones & Johnston, for creditor.  
Persons & Persons, for bankrupt.

SPEER, District Judge. This case is one which in some respects has been irregularly conducted. The suit was originally brought upon petition in equity, in order to conserve the assets of the bankrupt, and Mrs. Amos was appointed by the court as receiver to take charge of the assets of the bankrupt's estate. The bankrupt himself joined in the request for the appointment of a receiver. It is unusual to appoint a woman, but it has sometimes been done with the best results in the economy, dispatch, and accuracy of management. The excellent and amiable woman here appointed had shortly before the appointment lost her husband, after long and lingering illness of consumption. She had several little children dependent on her for support. She was besides a woman of practical business training, and for a number of years had conducted the business of the successful Southern Mutual Insurance Company, at Forsyth, Ga., in the county in which the bankrupt lived. I therefore regarded her as qualified to perform her duties as receiver, and I accordingly appointed her. This action of the court was ratified by the action of creditors, who elected her as trustee. There is nothing in this case which involves the propriety of the appointment of a receiver, and no objection to such an appointment on the part of any creditor or party. Nor is there anything in the record which questions her management of the estate, except, perhaps, that she may have estimated certain property

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

some hundreds of dollars lower than it brought at the sale. In this, however, she was justified, for the bankrupt had claimed an equity of redemption in the property. It was set apart by her as an exemption to the bankrupt, and, when exposed for sale, the fee was sold. This, of course, brought more than the value as it appeared to the trustee when the equity of redemption was claimed.

The attorneys for the bankrupt, Messrs. Persons & Persons, were neighbors and friends of Mrs. Amos. These gentlemen assisted her in the preparation of the schedules, etc., and advised her in the performance of her other duties. It is highly creditable to them that they did this, and they did it, so far as I discover from the record, without any charge. Finally the referee ordered the property to be sold. The elder member of the firm, Mr. Robert Persons, recognizing the fact that the trustee herself could not well conduct the sale in person, undertook to act as auctioneer for her. An agent for creditors appeared at the sale and studiously sought to chill the bidding. His purpose was to buy the property in for his clients. He stated in the hearing of the assembled crowd at the sale that the property offered was not worth more than \$900, and yet, through the judicious conduct of Mr. Persons, it was made to bring more than \$2,500. This agent himself, notwithstanding his open efforts at depreciation, finally offered about that amount. The price which Mr. Persons obtained made the property bring something within \$15 or \$20 of its appraised value. Now, the court regarded the appraisal as a fair one. It was made by three of the most competent and disinterested merchants, among the best in Forsyth.

The question of the propriety of the fee for Persons & Persons was referred to the referee in bankruptcy as special master. After two hearings of the sworn testimony and the arguments of counsel relating to this matter, the sum of \$300 was allowed to Persons & Persons for their services as the attorneys for the bankrupt. This, it is claimed, was exorbitant; but in view of the fact that they not only acted as attorneys for the bankrupt and for the trustee, but that they acted as auctioneer, thus avoiding the costs of an auctioneer whom the trustee had the right to employ, and rendered other valuable services to the trustee, while the fee is liberal, I do not regard it as at all exorbitant.

The views of this court upon this subject were expressed, in the Matter of Macon Sash, Door & Lumber Company, Bankrupt, as follows:

"The court is always very glad, indeed, to allow counsel in all proper cases fees which adequately compensate them for the skill and ability with which their professional services are rendered. Estimated upon this basis, the compensation of Mr. Smith in this case would be very large. There are, however, a good many considerations which must influence the court in fixing the fees of the attorneys.

"Since the enactment of the bankruptcy law we have habitually fixed the fees, not only of counsel, but of receivers, referees, and others, upon an economical scale. In fact, from the beginning the court has been pretty regularly assailed with complaints that such allowances for compensation have not been sufficiently large. Perhaps these complaints were at times justifiable. We have, however, felt that it was due the parties and due the law that there should be an economical administration of bankrupts' estates.

Now, in this case application is for a fee of over 50 per cent. of the amount in the hands of the trustee. This is only about \$2,000, and yet two attorneys have testified that it should be subjected to a charge of \$1,500 counsel fees. The master allows over 50 per cent. of the actual amount of the recovery. I do not think it is proper for the court to make any such allowance. While doubtless, the services of counsel were worth the amount allowed, if considered with sole regard to the skill and learning displayed, yet the court must have in consideration the amount which was secured by those services for the general creditors. It is one of those cases in which counsel take a certain degree of chance. Had they been successful, they would, without doubt, have received a considerable enlargement of the compensation which the court will allow; but they were unsuccessful. The effort to defeat the bankruptcy law was successful. I cannot, therefore, regard myself as at liberty to consider solely the services of counsel for petitioning creditors.

"All I can allow is 10 per cent. upon the amount in the hands of the trustee; that is, about \$200. It will be so ordered." Reported 120 Fed. 231, 56 C. C. A. 578.

These views of the court were reversed by the Circuit Court of Appeals of the Fifth Circuit, in the case of *Smith v. Cooper*, 120 Fed. 230, 56 C. C. A. 578, Judge Pardee rendering the opinion, in the following language:

"In considering the master's report, the learned judge seems to concede that, for the services actually rendered, the amount allowed by the master was not in excess of a reasonable fee; but, for considerations of economy and the necessity of preserving a good portion of the fund recovered for the benefit of creditors, he considered it proper to reduce the amount recommended by the master, and allow only a small percentage, not of the amount actually recovered, but upon the amount left in the hands of the trustee after paying certain of the costs. While we agree with the learned judge of the bankruptcy court that to aid the parties and under the law there should be an economical administration of the bankrupt's estate, we are unable to concur with him in his reasons for reducing the fee to be allowed appellants in this case."

The allowance made by this court was thus increased on appeal by 500 per cent., without any regard to the balance in the hands of the trustee for general creditors, and the fee allowed was that reported by the master, and amounted to \$1,000 on a \$2,500 recovery.

It may be justifiable to state that the District Court of the Southern District of Georgia, immediately after the enactment of the bankruptcy law, determined that it was proper to judicially investigate every application for compensation. This has been done by rule. It is required that a formal petition for compensation be filed, that it be served on the trustee or his attorneys, that notice of the hearing be given, that the master shall make and file with his report a stenographic report of the evidence, that the report itself shall show the value of the property, the extent of the services of counsel, and recommend the proper approximate fee to be allowed. Formal notices of the filing of this report are issued by the clerk to the trustee and to the attorneys of each party at interest, and the rule provides that the report shall remain on file for five days so that exceptions may be filed. If such exceptions are filed, they are considered, and argument heard by the District Judge. The fee is often reduced, and very infrequently enlarged, as it may appear to be justified by the record. It is believed that this procedure has



resulted in saving many thousands of dollars to the estates of bankrupts, and the trivial cost of the inquiry has proved no sort of a counterbalance to the large sums thus saved. In no case have the parties or attorneys been permitted to adjust fees by agreement among themselves. These separate records of the proceedings to fix compensation have been carefully filed, and may be found in the clerk's office in the record in each case. And in no case since *Smith v. Cooper*, supra, to the date on which the oral opinion in this case was filed, has complaint been made to the Circuit Court of Appeals, because of a judicial finding on any such application.

As to the compensation allowed the receiver herself, there was no complaint whatever before this court, and no exception is made thereto. Sixteen hundred dollars, the statutory amount fixed by the law of Georgia, was set apart as the bankrupt's exemption. The referee, however, without warrant of law so far as I understand, assessed this exemption with all the costs of the litigation. The referee will be directed to so modify his order as to assess the costs of the litigation, not against the bankrupt's exemption, but against the general fund in the hands of the trustee, held for the benefit of unsecured creditors. This is small, but the bankruptcy court can be scarcely held responsible for the fact that a person who becomes bankrupt has not anterior to the bankruptcy accumulated a larger estate.

It follows that the fee which has been allowed the attorneys by the referee is deemed not unreasonable, and is approved by the court.<sup>1</sup> The homestead, which is set apart in cash, will be turned over to the bankrupt. In this way the erroneous record will be corrected, and the estate administered in accordance with my conception of the bankruptcy law. While the result may not be very satisfactory to unsecured creditors, they would have obtained nothing whatever if the agent of some, who appeared at the sale and sought to buy in the property at a figure not more than one-half of the sum of the exemption allowed by law, had succeeded in his unlawful and unwarrantable interference at that sale. A repetition of such conduct will be visited by a rule for contempt, not only against the agent of the creditor who so acted, but against the creditors whom he represented.

<sup>1</sup> NOTE. It is learned that since the oral opinion in this case was rendered, on petition for review the Circuit Court of Appeals has affirmed the allowance of the attorneys' fee in this case, and has stated that there were no specifications of error as to the fee allowed to the receiver.

DUNLAP HARDWARE CO. et al. v. HUDDLESTON et al.  
 (Circuit Court of Appeals, Fifth Circuit. February 2, 1909.)

No. 1,829.

**1. BANKRUPTCY (§ 400\*)—BANKRUPT'S HOMESTEAD EXEMPTION—SALE OF PROPERTY AND ALLOWANCE OF EXEMPTION FROM PROCEEDS.**

Where a bankrupt under the laws of the state is entitled to a homestead exemption of property to a certain value, creditors, who, with notice, make no objection to a sale of all of the property for the purpose of permitting the bankrupt to take his exemption from the proceeds, cannot afterward object to its allowance, nor can they require the costs of administration in such case to be deducted from the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 675; Dec. Dig. § 400.\*]

**2. BANKRUPTCY (§§ 482, 484\*)—RECEIVERS—APPOINTMENT AND COMPENSATION.**

The allowance of compensation to receivers and attorneys from bankrupt estates is largely committed to the sound discretion of the court under whose direction the services were performed, but it should always be borne in mind that it is the intention of the present law that estates should be so administered as to preserve the assets for the benefit of creditors, and that under Bankr. Act July 1, 1898, c. 541, § 2 (3) (5), 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3421), as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1024]), the appointment of receivers is authorized only when absolutely necessary for the preservation of estates, and their compensation should be measured by that provided for trustees for similar services.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 482, 484.\*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Georgia, in Bankruptcy.

Geo. S. Jones, for petitioners.

G. Ogden Persons and Robt. T. Persons, for respondents.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

BURNS, District Judge. On December 30, 1907, J. A. Huddleston filed a voluntary petition in bankruptcy, and an order was passed duly adjudging him a bankrupt, and thereupon a receiver was appointed to take charge of the assets of the estate consisting of a small stock of merchandise, notes, and accounts and two small parcels of land, not exceeding in the aggregate 1½ acres. The receiver was thereafter elected by the creditors as trustee and under the orders of the referee administered the estate of the bankrupt. Under the Constitution and laws of the state of Georgia, the bankrupt is entitled to property of the value of \$1,600 as a homestead exemption. With the consent of the bankrupt the entire estate was converted into cash after notice to the creditors and without objection upon their part. Said sale realized the sum of \$2,513, from which was deducted the item of \$1,600 to cover the homestead exemption of the bankrupt. The petition for revision complains of this action, and seeks to have the same vacated.

The proceeding below does not appear to be objectionable, and the petitioners seeking to have the same revised cannot justly complain

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
 167 F.—28

for the reason that no objection was offered to the sale, which was made for the purpose of converting the estate into money and deducting the homestead valuation of \$1,600 therefrom. Equity and good conscience will not permit a creditor to acquiesce in the sale of a bankrupt estate, and then deny to the bankrupt the exempt property, in this case, the proceeds thereof, which the Constitution of the state of Georgia undertakes to protect. If there is an irregularity in the proceedings, incident to the sale and the application of the money value of the homestead exemption, which we do not concede, the creditors should have offered timely objection. Failing to do so, they cannot now be heard to complain.

It is contended in the petition for revision that the costs of the administration should be deducted from the allowance to the bankrupt. This contention cannot be sustained, for the reason that the homestead exemption is not subject to tax or charge of any character and to the extent of the burden which may be imposed in the way of costs in bankruptcy proceedings would be a diminution of the constitutional provision relating to homestead exemptions.

The petitioning creditor complains of the allowance of an attorney's fee amounting to \$300, and invites the attention of this court to the additional allowance of \$250, to the receiver, though the latter item is not assigned in the specifications of error. It is to be observed in this case that after setting aside \$1,600 to the bankrupt, there remained in the hands of the trustee the sum of \$913. The costs of administration aggregate the sum of \$817.02, leaving a balance of \$95.98 for distribution among the general creditors. The transcript in this case does not disclose the ground or necessity for the appointment of a receiver, and ordinarily we would be justified in concluding that there were urgent and sufficient grounds upon which the order of appointment followed. The question of allowance of compensation to receivers and attorneys is largely committed to the sound discretion of the court under whose direction the services are performed. The fees allowed in this case, together with the commissions and court costs, practically consume the residue of the estate after deducting the homestead allowance in lieu of exempt property.

The proceedings of courts of bankruptcy should be so administered as to preserve the assets of the bankrupt estates for the benefit of the creditors. As said in *Re Curtis*, 100 Fed. 792, 41 C. C. A. 68:

"The present bankrupt law was evidently intended to reduce to the lowest minimum the cost of administration, as regards fees of officers created by the act, as well as those of attorneys who may be called to assist the court in the preservation and distribution of the bankrupt's estate."

This statement has our approbation and a strict compliance therewith is recommended in this circuit.

We also deem it well to refer to *T. S. Faulk & Co., Petitioners, v. Steiner, Lobman & Co. et al.* (recently decided by this court) 165 Fed 861, in which the improvident appointment of receivers is dealt with, and also to quote the following from section 2 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 545, 546 [U. S. Comp. St. 1901, p. 3421]):

"(3) Appoint receivers or marshals upon applications of parties in interest in case the court shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (5) authorize the business of bankrupts to be conducted for limited periods by the receivers, marshals or trustees, if necessary, in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services." As amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1024).

The petition to superintend and revise is denied.

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McCUE et al. v. NORTHWESTERN MUT. LIFE INS. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1908.)

No. 739.

1. INSURANCE (§ 438\*)—LIFE INSURANCE—RISKS INSURED AGAINST—EXECUTION OF INSURED FOR CRIME.

The fact that an insured was legally executed for crime will not defeat recovery on a life policy on the ground that death by such means was not one of the risks insured against, where the policy was in a mutual company of which all policy holders became members and which was authorized by its charter "to make all and every insurance appertaining to or connected with life risks," the policy contained no exception of such risk, and the general state agent of the company accepted payment of a premium from the insured after he had committed the crime for which he was afterward executed and while he was in prison awaiting trial.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 438\*.]

2. COURTS (§ 359\*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—PUBLIC POLICY OF STATE.

Where the public policy of a state has been declared either by statute or by uniform decision, it will be recognized and followed by the federal courts as to contracts or other matters governed by the laws of such state, although it is contrary to what has been independently determined and announced by such courts as the true public policy.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 359\*.]

State laws as rules of decisions in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

3. INSURANCE (§ 147\*)—LIFE INSURANCE—CONSTRUCTION OF CONTRACT—LAW GOVERNING.

A policy of life insurance issued by a mutual company incorporated by a special act of the Legislature of Wisconsin which defines its powers and obligations and makes all policy holders, their heirs and assigns, members so long as they remain insured, with the right to vote and share in dividends earned, which policy shows on its face that it was issued at the office of the company in Wisconsin and is payable there, is a Wisconsin contract, and the rights of the parties are governed by its laws.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 293; Dec. Dig. § 147\*.]

4. INSURANCE (§ 438\*)—LIFE INSURANCE—RISKS INSURED AGAINST—EXECUTION OF INSURED FOR CRIME.

A policy of life insurance was issued by a Wisconsin corporation authorized by its special charter to "make all and every insurance appertaining to or connected with life risks" without limitation. The policy

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was a Wisconsin contract, construable and enforceable under its laws. By the rule of public policy established by the decisions of the state Supreme Court the manner of death of an insured does not avoid the policy where third persons are beneficiaries, in the absence of any provision in the policy to that effect. *Held*, that the fact that the insured was executed for a crime did not bar a recovery on the policy by his heirs, where it contained no provision excluding such risk.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 438.\*]

Waddill, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg.

On March 15, 1904, the Northwestern Mutual Life Insurance Company issued to James McCue, of Charlottesville, a 10-year renewal life policy for \$15,000, based upon an application made by him therefor on February 25th preceding. The policy provided that in event of death payment would be made to such beneficiary or beneficiaries as might thereafter be nominated, provided that, if no beneficiary survived the insured, then the payment should be made to his executors, administrators, or assigns. The application designated "my estate" as the person for whose benefit the insurance was desired. The policy provided that no liability should arise on the part of the company until the first premium should be actually paid. By arrangement made by McCue with Carroll and Fitzgerald, local agents soliciting the insurance, instead of actually paying the first premium he executed to them his note for \$427.50, payable in 6 months, which sum was to cover premiums for 18 months from the date of the policy, or until September 15, 1905. Carroll and Fitzgerald sent this note with one of their own as collateral to Cary, the company's state agent, who remitted the \$427.50 in cash to the company in due course of business. On September 7th following, eight days before this note of his became due, McCue was arrested and lodged in jail charged with the murder of his wife. While so in jail under such charge, on September 15th, when said note became due, he paid it to Cary, the company's state agent. He was subsequently tried and convicted upon the murder charge, and on February 10, 1905, was executed.

This suit was brought by foreign attachment in equity by the infant heirs at law against the company, the People's National Bank of Charlottesville, as garnishee, and the executors of said decedent. Subsequently, by stipulation of counsel, the facts were agreed, all questions as to whether the cause should be considered a law or equitable one, as to the right to trial by jury, or as to whether parties were misjoined, were waived, and the whole matter was submitted to the court, who found for the defendant, and thereupon both writ of error and appeal was taken to this court. Here the sole assignment of error relied on is that "the court erred in its verdict and judgment under the law and the facts in the case." It is admitted that the defendant insurance company is a strictly mutual one, incorporated by special act of the Legislature of Wisconsin; that its charter gave it "the power to insure the lives of its respective members, and to make all and every insurance appertaining to or connected with life risks, and to grant and purchase annuities." Membership in the company was to be effected by taking out insurance, and "persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporation and no longer." Trustees and officers of the company are required to be selected from such membership. Dividends are required to be distributed to such membership from the profits secured by the company.

Daniel Harmon and G. B. Sinclair (Harmon & Walsh and Walker & Sinclair, on the brief), for plaintiffs in error.

Wm. H. White and Wm. H. White, Jr., for defendants in error.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PRITCHARD, Circuit Judge, and WADDILL and DAYTON, District Judges.

DAYTON, District Judge (after stating the facts as above). We cannot refrain from expressing our admiration for the learning, research, and ability displayed by counsel on both sides, in both oral arguments and in the briefs filed by them. It is not our purpose to discuss in detail all the points raised. To do so would consume too much time and space. On behalf of the defendant company it is insisted that "there can be no recovery on a life insurance policy where the insured is legally executed, the policy being silent on the subject." First. Because death on the gallows was not one of the risks against which decedent was insured. Second. Even if it had been a risk specially contracted for, a recovery under such circumstances would be contrary to public policy. On the other hand, it is contended: First. That this company, incorporated by special statute of Wisconsin, was expressly given the right "to insure the lives of its respective members and to make all and every insurance appertaining to or connected with life risks," and, having this power, admitted McCue into membership, thereby giving him a vested interest in the corporation, and bound itself to pay the policy "upon receipt and approval of proofs of the fact and cause of his death," without any condition against such death occurring by the mandate of the law. Second. That the obligation of this contract is controlled by the law of Wisconsin, that public policy affecting ordinary business transactions between citizens is determined by state laws, and the special statute of that state has settled the question of public policy adverse to the general rule relied on by the company. Third. That, if this were not so, the peculiar facts and conditions arising in this case take it outside of the application of this rule of public policy. In reply, it is insisted that this insurance policy in this court must be construed under the rules of general commercial law, and not under local state statutes.

We need have little trouble in disposing of the first ground of defense, to the effect that death by the mandate of the law was not one of the risks insured against by decedent's policy. It is well understood that the insurance companies generally have adopted a policy of incorporating into their policies exceptions to risks not desired to be undertaken by them. For instance, in this policy in controversy the company required McCue to agree that if he should "pass south of the Tropic of Cancer, or be previously engaged in blasting, mining, or submarine operations, or in the production of highly inflammable or explosive substances, or in electrical employment where the voltage is over six hundred, or in switching or coupling or uncoupling cars, or be employed in any capacity on the trains of a railroad, except as passenger or sleeping car conductor, mail agent, express messenger or baggage-master, or in ocean navigation, or shall enter or be engaged in any military or naval service (except in time of peace) without the written consent of said company, or shall within one year from the date of said policy, whether sane or insane, die by my (his) own hand," then the policy should be null and void. When it is remembered that this company was expressly authorized by its charter to "insure the

lives of its respective members and to make all and every insurance appertaining to or connected with life risks"; that no exception for death by mandate of the law was incorporated among these many other exceptions; that the company's general state agent allowed the decedent, after commission of the crime and when in custody to answer therefor, to pay the note executed by him for the 18 months' premium due—we are not prepared to hold that this risk was not one contemplated by the company when it executed this contract.

The case therefore resolves itself, in practical effect, to a solution of the question whether the contract, by reason of the manner of the death, was made absolutely void through considerations of public policy. And here we are involved in very great doubt and perplexity by reason of the conflict that exists in the decisions of many of the state courts themselves, and between those of many of these state courts and of the federal courts as to what constitutes the public policy touching cases of this kind and others involving similar principles.

Counsel for the company in support of their position confidently rely upon these four cases: *Amicable Society v. Boland*, 4 Bligh (N. S.) 194; *Burt v. Union Central Ins. Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216; *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; *Collins v. Met. Life Ins. Co.*, 27 Pa. Super. Ct. 353.

The *Boland Case* was decided by the House of Lords in England in 1830. There, Fauntleroy, insured, was guilty of forgery, then a capital offense, declared bankrupt, and his insurance policy with other effects was assigned to Boland and others as trustees. He was tried upon the forgery charge, convicted, and hung. His assignees sought to recover upon his insurance policy. The lower court gave judgment, but the House of Lords reversed it, and held that to allow recovery would be against public policy. It is insisted by counsel for appellants that this decision was determined largely by reason of the law of attainder then in force in England, but that since the abolition of this law with its attendant forfeiture of goods and corruption of blood, by 33 Victoria, in 1870, the principle of public policy set forth in this *Boland Case* has been greatly modified, if not reversed, by the *Maybrick Case* (*Cleaver v. Mutual, etc., Life Association*, 1 Q. B. D. 147), where it was held that although Mrs. Maybrick, who had poisoned her husband and been convicted, could not directly take the proceeds of her wrong, yet if, by a reasonable construction of the contract resulting in the avoidance of forfeiture, even if such construction resulted in establishing a trust fund for the benefit, in part, of Mrs. Maybrick, yet this could furnish no defense to the insurance company. In this case the Master of Rolls, all the other judges concurring, says:

"When people vouched that rule (of public policy) to excuse themselves from the performance of a contract in respect to which they had received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires."

Again, in *Moore v. Woolsey*, 4 E. & B. Q. B. 243 (82 E. C. L.), where the policy itself stipulated death by dueling, by suicide, or by

the hands of justice should be void as to the executors or administrators of the decedent, and remain in force only to the extent of any previous interest which may have been acquired by any other person under an actual assignment by deed, for a valuable consideration, etc., and when decedent was a suicide, Lord Campbell, C. J., says:

"Where a man insures his own life, we can discover no illegality in a stipulation that if the policy should afterwards be assigned bona fide for a valuable consideration, or a lien upon it should afterwards be acquired bona fide for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned. No authority has been cited in support of the position that such a condition is illegal; and the frequent introduction of it into life policies indicates the general opinion that it is unobjectionable. The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide is a very remote and improbable contingency; and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee."

Whether or not the law of attainder had a controlling influence in the determination of the Boland Case is immaterial, for certain it is it should have no influence here, as we in this country have never recognized this law, and its operation has been expressly prohibited by our national Constitution and by those of most of the states, and by an act (Act April 10, 1790, c. 9, § 24, 1 Stat. 117) of Congress.

Turning now to the decisions of our state courts, we find:

(a) By the great majority of the state decisions it has been held that suicide is not excepted from the risks assumed by the insurer, unless the policy was taken out with intention to commit suicide and defraud the insurer. *Patterson v. Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; *Supreme Conclave, etc., v. Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528; *Eastabrook v. Ins. Co.*, 54 Me. 224, 89 Am. Dec. 743; *Grand Lodge, etc., v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; *Kerr v. Association*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; *Schultz v. Ins. Co.*, 40 Ohio St. 217, 48 Am. Rep. 676; *John Hancock Co. v. Moore*, 34 Mich. 46; *Conn. Mut. Life Ins. Co. v. Groom*, 86 Pa. 92, 27 Am. Rep. 689; *Darrow v. Society*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430. If this be true, then it necessarily follows that, if McCue in this case, after killing his wife, actuated by the remorse and terror that follows such a deed, had taken his own life, then there could be no question but what, under these decisions, his infant children could derive the benefit of this insurance; and the application of the doctrine of public policy in this case must be enforceable only because he did not go a step farther and commit the two crimes of murder, and self-destruction instead of the one alone.

(b) It has been held that for the beneficiary in an insurance policy to feloniously kill the insured in order to reap the benefit of such insurance will clearly defeat the contract so far as he or any one holding through him is concerned, upon the clearest principle of public policy.



But on the other hand, it has been held in the Maybrick Case, as we have shown, that if the proceeds of the policy go not direct to the guilty beneficiary, but to a trust fund constituted, in part, for his benefit, then public policy will not intervene and defend the insurer from the enforcement of his contract.

(c) "Statutes of descent have generally been held not to exclude an heir or devisee from the benefits of these statutes on the ground that the heir or devisee had feloniously and intentionally destroyed the life of the person from whom the legacy or inheritance was expected." *Collins v. Life Ins. Co.*, 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, 122 Am. St. Rep. 54; *Shellenberger v. Ransom*, 41 Neb. 641, 59 N. W. 935, 25 L. R. A. 564; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Carpenter's Estate*, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765. From this principle it is clear that, if these infant children of McCue had killed their father instead of his killing their mother and getting hanged for it, thereby leaving them innocently without the support of either, then this policy made payable to his personal representatives could have been collected and made to inure to their benefit.

(d) It goes without saying that under constitutional and statutory prohibition no vested property rights of one dying at the hands of justice can be forfeited, no matter how heinous his crime, nor, for that reason, can the obligations of those who by ordinary contracts have dealt with him be avoided.

Therefore, if this insurance company had been a joint-stock company instead of a mutual one, and had contracted with McCue, for a valuable consideration, to deliver over to his personal representatives, say, \$5,000 of its capital stock, the day after his death, no one would deny that it would have to comply with its contract.

But with great force it is argued that the question is no longer an open one in the federal courts, and that, notwithstanding the decisions of courts of last resort in the states to the contrary, the Supreme Court of the United States in *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, has held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when he, in sound mind, intentionally took his own life, and this irrespective of the question whether there was a stipulation in the policy to that effect or not, and that the same court in *Burt v. Union Central Ins. Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216, has decided the exact question in controversy here to the effect that a policy of life insurance does not insure against the legal execution of the insured for crime. Touching the first case little need be said, and it is cited only as illustrating how jealously this great court has adhered to and applied this doctrine of public policy to these insurance contracts. That its ruling is not in accord with those of the courts of last resort in many of the states we have already pointed out, and in some of these states the contrary view has so impressed the legislative mind that special statutes, expressly nullifying the principle of this decision, have been enacted. In passing upon such a statute the Supreme Court, speaking through the same learned justice who rendered the opinion in the *Ritter Case*, says:

"That the statute is a legitimate exertion of power by the state cannot be successfully disputed. Indeed, the contrary is not asserted in this case, although it is suggested that the statute 'seemingly encourages suicide, and offers a bounty therefor, payable, not out of the public funds of the state, but out of the funds of insurance companies.' There is some foundation for this suggestion in a former decision of this court, in which it was held that public policy, even in the absence of prohibitory statute, forbade a recovery upon a life policy, silent as to suicide, where the insured, when in sound mind, willfully and deliberately took his own life. *Ritter v. Mutual L. Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

"But the determination of the present case depends upon other considerations than those involved in the *Ritter* Case. An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot, for that reason alone, be disregarded; for it is the province of the state, by its Legislature, to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the Constitution of the state or the Constitution of the United States." *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895.

By this decision it seems to us we reach bed rock in this matter. It would seem very clear that touching general contracts of insurance, governed by the rules of commercial law, the federal courts in obedience to the ruling in the *Ritter* Case must hold, regardless of state decisions, that no recovery can be had on a policy of insurance on the life of one who willfully and deliberately, while in sound mind, took his own life. And we must go a step further and say that, in the case of such contracts general in character and governed by the rules of commercial law, we must, regardless of state decisions, in view of the decision of the Supreme Court in the *Burt* Case, hold that a policy of life insurance "does not insure against the legal execution of the insured for crime." But in special contracts not governed by the rules of commercial law, but provided for by special legislation of a state, conferring special rights and vested interests enforceable alone under such state legislation, we must, under the ruling in the *Whitfield* Case, be governed by the law of that state touching the application of this doctrine of public policy, for, under such circumstances, the state has a right to adopt the view entertained by the Supreme Court or to reject it. In other words, the state by its own legislation and the decisions of its own courts can establish its own public policy, "provided it does not, in doing so, come into conflict with the Constitution of the state or the Constitution of the United States," although such policy, so established, may be, in the opinion of the federal courts, "inconsistent with public policy or sound morality."

"The courts of the United States adopt and follow the decisions of the highest court of a state in questions which concern merely the Constitution or laws of that state; also where a course of those decisions, whether founded on statutes or not, have become rules of property within the state; also in regard to rules of evidence in actions at law; and also in reference to the common law of the state, and its laws and customs of a local character, when established by repeated decisions." *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

That this position has from the beginning, and uniformly since, been held by the Supreme Court, cannot be more strikingly illustrated than by its decisions touching indefinite charitable bequests and devises. In 1819, Chief Justice Marshall rendered his opinion in *Baptist Association v. Hart*, 4 Wheat. 1, 4 L. Ed. 499, in which he held such could not be established by a court of equity, independent of the statute, 43 Eliz. The case came from Virginia, where the public sentiment was distinct and very bitter against these indefinite charities, especially to church organizations. Judge Story subsequently published a concurring opinion in this case. 3 Pet. 481, 497, 7 L. Ed. 749. Subsequently he changed his mind and wrote the opinion in *Vidal v. Girard's Ex'r*, 2 How. 127, 11 L. Ed. 205, upholding such a bequest. See, also, *Fontain v. Ravenel*, 17 How. 369, 15 L. Ed. 80. The Virginia public policy, however, became firmly established in accord with the ruling in *Association v. Hart* against the validity of such indefinite charities. See *Gallego's Ex'rs v. Attorney General*, 3 Leigh (Va.) 450. In consequence, in *Wheeler v. Smith*, 9 How. 55, 13 L. Ed. 44, 24 Am. Dec. 650, and again in *Kain v. Gibboney*, 101 U. S. 362, 25 L. Ed. 813, both Virginia cases, the case of *Association v. Hart* was followed, and such indefinite charitable bequests were held void, solely because the rule of public policy in Virginia, as determined by the decisions of its courts, demanded it, and this, too, notwithstanding the fact that it was clear that Chief Justice Marshall had been mistaken in saying that such charities in England could not be established by a court of equity independent of the statute of 43 Eliz., and the further fact that the Supreme Court in the *Girard Case*, and in other cases arising from other states where no such rule of public policy prevailed, had upheld such charities. In fact, in *Russell v. Allen*, 107 U. S. 167, 2 Sup. Ct. 331, 27 L. Ed. 397, Mr. Justice Gray says:

"And the only cases in which this court has followed the decision in *Baptist Association v. Hart* have, like it, arisen in the state of Virginia, by the decisions of whose higher court charities, except in certain cases specified by statute, are not upheld to any greater extent than other trusts."

It would seem clear, therefore, that the Supreme Court by this line of decisions, so uniformly upheld for so many years, notwithstanding we be in entire accord with it as to what constitutes the true principle of public policy based upon sound morals in the premises, has directed us if the state has, by its statutes or the decisions of its highest court, established a contrary rule not contrary to constitutional inhibition, to follow such rule in the enforcement of contracts arising under the laws of that state and not otherwise.

It therefore becomes important for us to determine, first, whether this insurance policy was a Wisconsin contract or simply a commercial one, and, second, whether the rule of public policy in Wisconsin, if there be any, is contrary to that enunciated by the Supreme Court.

As to the first: The defendant company is a Wisconsin corporation. It owes its life to a special act of the Legislature of that state (*Priv. Laws Wis. 1857*, p. 195, c. 129), which distinctly defines its power and obligations. This act, amended by some nine other legislative acts, enacted from time to time since 1857, expressly provides

that those "who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns \* \* \* shall thereby become members thereof during the period they shall remain insured." It gives to them, under conditions expressly set forth, the right to vote for and elect its trustees and officers; to become such trustees and officers; to sue said corporation and to be sued by it touching their rights and obligations as such members; and it goes to the extent of expressly defining the rule of evidence as to disqualification of witnesses in any such suits; it provides for stated dividends to be ascertained and paid to them from the profits of the company, and other provisions are made, all of which clearly disclose that persons holding these policies become members of the corporation and acquire rights under and by virtue of these laws not set forth in the policy and not attaching to the ordinary policies issued by stock companies. In addition to this, the policy on its face shows it was executed at the office of the company in Wisconsin, and by its express terms was made payable there. This being true, the conclusion is inevitable: This contract must be held to be a Wisconsin one, to be construed according to its laws.

As to the second question: The legislative act of Wisconsin gave to this company the unlimited power to "insure the lives of its respective members and to make all and every insurance appertaining to or connected with life risks."

"This court can know nothing of public policy except from the Constitution and the laws and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the Legislature. Questions of policy determined there are concluded here." License Tax Cases, 5 Wall. 462, 469, 18 L. Ed. 675.

This legislative act did not limit the power to assume life risks, but expressly gave power to assume all and every such. We would simply be indulging in judicial legislation for the state of Wisconsin if we should add to this act "except those arising from suicide or hanging." To have clothed this company with this power may have been inexpedient and unwise, but with that we can have no concern. Having been thus empowered to assume all and every risk, the company was not thereby deprived of the power to limit its assumption by express stipulations in the contract to those it was willing and desirous to assume. If it does not, however, so limit its liability under such circumstances, it must be held to have assumed the risks, under ruling of the Supreme Court of Wisconsin in *McCoy v. Northwestern Mutual Relief Association*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681. In this case the policy provided that death by suicide was not one of the risks assumed, and would render the policy void. The charter and by-laws of the company did not exclude suicide as a risk, however. The lower court held that, by reason of the charter not so excluding death by suicide as a risk to be assumed, the suicide clause in the policy was void, and the company responsible notwithstanding. The Supreme Court reversed this ruling, and held that the policy contract could

provide such exception, although the charter and by-laws of the company did not. Marshall, J., in this case, says:

"It is well settled that, if a contract for life insurance does not provide against liability in case of death by suicide or self-destruction, then such cause of death does not constitute a defense."

Again in *Patterson v. National, etc., Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899, the Supreme Court of Wisconsin, after direct consideration of the Boland Case (upon which the ruling in the Burt Case is based) and the Ritter Case, says:

"Conceding the strength of the arguments upon public policy on which the Ritter Case is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence in these decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect."

We are driven to the conclusion that the rule of public policy in Wisconsin as established by the legislative act creating the defendant company and defining its rights and powers and by the decisions of its highest court is directly opposite to that established by the Supreme Court in the Ritter and Burt Cases, and that, in compliance with the direction of the Supreme Court as herein set forth in such case involving public policy, we must construe this Wisconsin contract in accord with its law and its Supreme Court's ruling.

It may be added incidentally that the case of *Collins v. Met. Life Ins. Co.*, relied on by defendant's counsel, as a case directly in point, decided by intermediate courts adverse to recovery in Pennsylvania (where the action was allowed to be dismissed without prejudice before final judgment, however), and in Illinois, has by the Supreme Court of the latter state, all the judges concurring, been reversed and the company held liable. 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, 122 Am. St. Rep. 54.

With this view that, touching questions of public policy, the state laws and decisions must control, we find no conflict apparent with the decision in the Burt Case. The question did not arise there. It seems in effect to have been conceded that the insurance contract was a commercial one, to be construed by the rules of commercial law independent of state decision. This is shown by the contract itself, a copy of which is appended to the brief of the appellants. It was the ordinary nonparticipating one for \$5,000 in case of death, and contracting to pay a fixed surrender value of \$2,194 upon maturity at the end of 20 years. The greater stress in the case was made upon the alleged right to show, notwithstanding the judicial conviction, that the insured was unjustly convicted and executed; that he did not in fact commit the crime of murder or participate therein, or, if he did, he was at the time insane and irresponsible.

We do not discuss or determine whether under the circumstances the children and heirs at law or the executors are entitled to recover, the determination of this question having been expressly waived by counsel.

The judgment, or more properly decree, of the court below, must be reversed, the cause remanded, and the defendant company held liable. Reversed.

WADDILL, District Judge (dissenting). I am unable to concur with the majority of the court in the view above expressed, believing as I do, that the case is controlled by the decision of the Supreme Court of the United States in *Burt v. Union Central Insurance Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216, and hence that the judgment of the lower court should be affirmed.

NOTE.—The following is the opinion of McDowell, District Judge, in the court below:

McDOWELL, District Judge. The first question is whether this court must, in deciding the question of liability of the insurance company, be guided by the principles of "general commercial law" (*Carpenter v. Insurance Co.*, 16 Pet. 495, 511, 10 L. Ed. 1044; *Washburn Co. v. Insurance Co.*, 179 U. S. 1, 16, 21 Sup. Ct. 1, 45 L. Ed. 49; see, also, *Sias v. Insurance Co.* [C. C.] 8 Fed. 187, 188), or by some other rule. In the charter of the insurance company here, which is embodied in an act of the Legislature of Wisconsin, is the following clause: "Sec. 4. Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in said corporation, shall thereby become members thereof during the period they shall remain insured by such corporation, and no longer." It is argued that, in cases where the policy is payable on the death of the insured, this clause makes the heirs, executors, administrators, or assigns of one who had insured his own life for the benefit of his estate and assigns members of this (mutual) insurance company. On this construction of this section counsel for the claimants found a contention, rather difficult to express briefly, that the rights of the parties here are to be ascertained as they would be by a Wisconsin court.

The best conclusion I have been able to reach is that, even if this construction of the above-quoted charter provision be sound, this court must here be guided by the principles of the general commercial law. But, partly because of this contention, and partly because of other deductions made by counsel for claimants founded on their construction of this section of the charter, it seems advisable to here discuss somewhat fully the meaning of this section. In this discussion I shall consider only the (possible) application of this section to cases where the policy is made payable on the death of the person whose life is insured. It is possible that this section was intended to apply only to cases where the policy is payable at a fixed future date, which may not arrive for a considerable time after the death of the person whose life is insured. But it seems unnecessary to consider the meaning of the section as applied to such cases; for in the case at bar the policy is payable on the death of the person whose life was insured, and if this section applies to both classes we are here only concerned as to its application in cases such as we have here.

(1) Where A. insures his own life for the benefit of his "heirs," executors, administrators, or assigns, and then assigns the policy to Z. (assuming the circumstances to be such as to make this permissible), it may be (A. still living) that Z. becomes a member of the society; but, if so, I incline to the opinion that Z., upon the assignment being made, becomes a member, not as the "assign" of one "who has insured with the corporation," but because he has become the assured—because he has become, within the meaning of the charter, the person who has "insured with the corporation."

(2) Where A. insures his own life for the benefit of his executors, administrators, or assigns, and dies, having made no assignment of the policy to any stranger, the construction put on section 4 by counsel for claimants is that on A.'s death his personal representatives and heirs become members of the society. Parenthetically, it should here be said that, if this be the true construction, it seems to me that it is, in the case at bar, the executors, and not the children, who would become members. But I find myself unable to agree that

this is the proper construction. The theory of life insurance, in case the policy is payable as it is here, is that the sum promised to be paid by the insurer will be paid as soon as reasonably may be after the death of the person whose life is insured. Hence I can see no reason why the personal representatives or devisees or distributees of the decedent should become members of the society. Their only interest is to forthwith collect the insurance money. Again, they do not continue to be insured. And under this section it is only the personal representatives or heirs, continuing to be insured, who become members.

(3) The case where this section seems to subserve a useful purpose, if it applies at all, is where A. (having an insurable interest) insures the life of B. for the benefit of A.'s successors in interest or assigns, and then, having made no assignment, dies, leaving B. living. I find nothing in the charter which forbids one to insure the life of another, where, impliedly, such insurance is not forbidden by statute or the policy of the law; and section 20 of the amendment of March 15, 1870, clearly contemplates such insurance. In such case, A. dying (B. living), the successors in interest of A. can "continue to be insured," and there is good reason why the charter of this mutual insurance company should provide that A.'s successors in interest shall become members, with a consequent voice in the management of the company.

(4) It is unnecessary to consider the case (assuming it to be a permissible hypothesis) where A. insures the life of B. for the benefit in the first instance of Z. Here in effect it is Z. (A. paying the premiums for Z.) who insures the life of B., and we have in principle the case last above considered.

In the case at bar McCue insured his own life for the benefit of his executors, administrators, or assigns. By will he left the benefit of the policy to his children and appointed executors. Under this state of fact I am led to the conclusion that neither the executors nor the children have become members of the insurance company. If the construction that I put on section 4 be correct, it seems to me that there can be no shadow of foundation for the contention that this court must construe the contract here according to some supposed doctrine of the Wisconsin courts, rather than according to the doctrine of the general commercial law.

It follows that, if there be a decision, not a mere dictum, of the Supreme Court of the United States, fairly covering the exact question here presented, such decision is in this court absolutely binding. *Burt v. Insurance Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216, seems to me to be incontestably such a case. In that case Wm. E. Burt insured his own life under a policy the stipulations of which were in all material respects like those of the one at bar. The policy in case of death was payable to Anna M. Burt, his wife, if living; otherwise to his executors, administrators, or assigns. Shortly thereafter the insured and his wife assigned a half interest in the policy to S. M. Burt and H. R. Burt, who were creditors of the assignors. Thereafter Wm. E. Burt killed his wife. He thereafter, while under indictment, assigned the remaining half interest in the policy to said S. M. Burt and H. R. Burt. Wm. E. Burt was subsequently convicted of the murder of his wife, and was executed therefor. S. M. Burt and H. R. Burt, who were not only the assignees of the policy of insurance as above stated, but were also the sole heirs of Wm. E. Burt, sued at law on the policy. The petition, which set out the above facts, as well as some others to be mentioned, was demurred to. The trial court sustained the demurrer, and this judgment was affirmed by the Circuit Court of Appeals (105 Fed. 419, 44 C. C. A. 548), and again by the Supreme Court (181 U. S. 617, 22 Sup. Ct. 945, 45 L. Ed. 1030). There was in the petition an allegation that, notwithstanding the indictment and conviction, Wm. E. Burt did not commit or participate in the murder, but that, if he did, he was at the time insane.

As to this allegation, wherein the Burt Case is unlike the case at bar, it is sufficient to say that it was held that the judgment of the court which convicted Wm. E. Burt was based on a legal ascertainment that he was sane and that he was guilty of murder, which precluded further inquiry. It follows, therefore, that it was necessary in that case to decide identically the same question in principle which is presented in the case at bar. In neither the Burt Case nor here was there an express stipulation forbidding the company to contest its liability. It is true that in the opinion in the Burt Case it is said that "public policy forbids the insertion of a condition [the so-called "incontestable

clause"] which would tend to induce crime, and, as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for." It may be, as is insisted by counsel, that this language can be properly regarded as a dictum, as there was in the Burt policy no clause of the character thus declared to contravene public policy. But this leaves the facts in the Burt Case in principle the same as in the case at bar, and the question necessarily decided there was the one presented here. On the express ground that "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured," and that "there is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy," it was there decided that the plaintiffs could not recover.

There is a doctrine, supported by some more or less persuasive authority, to the effect that, where public policy forbids the enforcement of a life insurance policy in behalf of those who claim under a felon and would otherwise be the beneficiaries, the court will seek a hand capable of taking and will enforce the policy for the benefit of such person. It seems to me that there are two reasons why this doctrine, if sound, cannot apply here:

(1) As I construe section 4 of the charter, there is no force in the contention that either the executors or the children of the insured have become members of the company and have acquired a right otherwise than through and under the insured.

(2) As I read the opinion in the Burt Case, it requires this court to hold that the parties to the contract of insurance here did not contemplate the possibility that the insured might commit a capital felony, and thereby bring about his own death, and that therefore the contract does not embrace the contingency of the death of the insured thus brought about. "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured." Again, in making the contract of insurance, the insured impliedly obligated himself "to do nothing to wrongfully accelerate the maturity of the policy."

It follows that the insurance company is under no obligation to pay the sum demanded to any one. Hence there can be no power in this court to apply the doctrine contended for. It also follows that we are not concerned to ascertain the public policy of the state of Wisconsin, and that much the greater part of the exhaustive and admirable brief of the learned counsel for the claimants cannot be considered by this court. It can, as I think, only be considered by the Supreme Court when asked to overrule the Burt Case.

The question of estoppel can be very briefly disposed of. The insured, at the time the policy was issued, gave his note, payable in 6 months, for \$427.50; the amount of the premium for 18 months. This note was payable, not to the company, but to the local solicitors personally. They in turn executed their note for the same amount, due at the same time, to the personal order of T. A. Cary, the state agent of the company, to which the note of the insured was attached as collateral, and both notes were sent to Mr. Cary. He thereupon sent the amount of the premium in cash to the company. The company had no knowledge concerning the making of the notes. After the charge of murder had been made against the insured, and while he was in jail on the charge, but while still protesting his innocence, he paid the note by checks drawn to the order of "T. A. Cary, Gen'l Agt." It seems to me that the payment by Mr. Cary to the company, long before the murder, completed the contract, absolved the insured of any liability to the company for this premium, and left Cary personally the creditor of the insured. In other words, even if there were otherwise room for a possible application of the doctrine of estoppel, there is here no foundation for such claim. The company in no sense received any premium payment after the charge of murder had been made against the insured.

From the foregoing the necessary conclusion is that neither the executors nor the children have a right to recover.

As to the premium money, I am of opinion that it should in part be ordered paid to the executors. The death of the insured came about under circumstances not contemplated by the parties to the contract, and hence is a contingency not covered by the contract. Quoad such a death there is no contract, and the consideration, except for the insurance from March 15, 1904, until



February 10, 1905, should be returned. Between the dates mentioned there was a contract and a risk by the company. In the judgment to be entered I shall apportion the fund in the registry as thus indicated.

We are now brought to the consideration of some questions rather technical in character. This proceeding was instituted in the state court, from which it was removed to this court, by a bill in equity and attachment served on a garnishee. The legatees, children of the insured, are the complainants, and the executors, alleged in the bill to be claiming as against the children the right to enforce the policy, are made defendants. Counsel have agreed, as they are interested only in securing a speedy determination on the merits, that no objection will be founded on the mere misarrangement or misjoinder of parties, and that either or both the executors and the children may be considered as parties plaintiff. However, I call attention to these facts because of their bearing on the question as to whether it is the law side or the equity side of this court on which this controversy should be determined.

From what has already been said it seems clear that we cannot hold this a case in which the executors, having the (apparent) legal right to recover, are forbidden by public policy to take, and that the children have a beneficial, as distinguished from a legal, interest entitling them to sue. As a matter of law, I think that the (apparent) right to sue is vested in the executors, and in them only. *Schouler, Ex'rs and Adm'rs* (2d Ed.) pp. 318-321, 326; Code 1904, §§ 2706, 2708. It follows that this is in its essential nature an assertion of a cause of action which is purely legal, and not equitable in character.

It is believed that the state statute (section 2964, Code 1904), which authorizes the prosecution of a purely legal cause of action by bill in equity and attachment, does not, on removal, give the federal court on its equity side jurisdiction of such an action as is the one at bar. That the existence of the lien of an attachment (acquired only at or after the institution of the suit) does not change this result seems to be established by the following authorities: *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; *Hollins v. Brierfield*, 150 U. S. 371, 378, 14 Sup. Ct. 127, 37 L. Ed. 1113; *Putney v. Whitmire* (C. C.) 66 Fed. 388; *Tompkins v. Catawba Mills* (C. C.) 82 Fed. 782; *Bank v. Prager*, 91 Fed. 692, 34 C. C. A. 51; *Viquesney v. Allen*, 131 Fed. 21, 65 C. C. A. 259. Under these cases, if I read them correctly, the lien which can give a federal equity court jurisdiction must have been in existence prior to the institution of the suit.

It follows that this cause would regularly be ordered docketed on the law side of this court and the (proper) plaintiffs required to file a declaration. Under the agreement of counsel this course is not necessary. The jury has been waived by proper stipulation. As the court is to decide the case, the bill can, under the agreement, be treated as a declaration filed by the proper parties, and the judgment of the court entered in the common-law order book.

The answer of the defendant company contains what is in effect a plea of payment into court under sections 3296, 3297, Code 1904. Under the facts here, this defendant should be adjudged its costs.

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### STURTEVANT v. VOGEL et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,576.

#### 1. MINES AND MINERALS (§ 22\*) — REQUISITES OF VALID LOCATION OF CLAIM — RECORDING LOCATION NOTICE.

Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), specifying the requirements of records of mining claims, does not require the recording of loca-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion notices, but leaves that subject open to legislation by the states or to regulation by the miners.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 45; Dec. Dig. § 22.\*]

**2. MINES AND MINERALS (§ 22\*)—REQUISITES OF VALID LOCATION OF CLAIM IN ALASKA—RECORDING LOCATION NOTICE.**

Act Alaska, June 6, 1900, c. 786, § 15, 31 Stat. 327, while providing for the recording of instruments, including notices of mining locations, "Provided, notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice," does not require, but merely permits, the recording of such notices, nor does it provide that the failure to record shall work a forfeiture of rights, and such forfeiture does not follow in the absence of a well-established rule or custom of the miners of the district to that effect.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 22.\*]

**3. MINES AND MINERALS (§ 19\*) — VALIDITY OF LOCATION OF CLAIM—ERROR IN NOTICE.**

An error in the location notice of a mining claim in its reference to the location of a permanent monument is not material in an action between the locators and a subsequent locator, where the claim was properly marked by stakes, and especially where the subsequent locator never saw the notice and could not have been misled thereby.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37-39; Dec. Dig. § 19.\*]

Ross, Circuit Judge, dissenting.

**In Error to the District Court of the United States for the Second Division of the District of Alaska.**

The plaintiff in error brought ejectment against the defendants in error to recover the possession of a placer mining claim. On July 23, 1903, the defendants in error joined in the location of the Lillian Association claim, containing about 152 acres, and made discovery of gold thereon. There was evidence that they properly marked the boundaries of the claim, and that they placed on the initial stake their location notice, describing the claim by reference to the boundaries, and that this location notice remained there until January, 1905. On July 24, 1903, they duly recorded their location notice, but the notice was insufficient, in that it contained no description of the claim with reference to natural objects or permanent monuments so as to identify it. On November 5, 1904, the plaintiff in error located a claim, consisting of 20 acres within the boundaries of the Lillian Association claim. At that time there was no one visibly in possession of the Lillian, and the evidence is undisputed that the plaintiff in error at the time of making his location had no knowledge of the prior location, and was not notified thereof until about November 20, 1904. In his reply to the answer of the defendants in error, the plaintiff in error alleged that in the year 1903, and since, there was and has been a uniform, well-known custom among the miners and prospectors in the Cape Nome mining recording district, in which the premises in controversy are situated, requiring that the notice of location of any mining claim be filed for record and recorded within 90 days after the location, and that a failure to record within that time leaves the premises free, vacant, and open for location as if the ground had never been formerly located. The notice posted on the Lillian was as follows: "Notice is hereby given that the undersigned citizens of the United States have this day located and claim the following described placer mining ground, together with all the water and timber rights thereon, to wit: Commencing at the initial stake marked No. 1, of Lillian group, upon which a copy of this notice is posted, thence running 2,640 feet in an easterly direction to stake No. 2 of Lillian group, thence 2,640 feet in a westerly direction to stake No. 10 of Lillian group, thence 2,640 feet in a southerly direction to initial stake. Stake No. 1 adjoins S. E. corner stake of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Dead Eye placer claim 180 feet east from line of Wild Goose Telephone opp. ninth pole south from intersection of said telephone line, with Pioneer Mining Co. telephone line. Stake No. 10 lies 60 ft. S. E. from 5th pole on Wild Goose line north of said intersection, 150 acres, and situated on Wonder creek or river, which is a tributary of Center; thence Snake River, in the Cape Nome Mining District, District of Alaska. This claim shall be known as Lillian Association placer mining claim. Located this 23 day of July, A. D. 1903." Upon the evidence and the instructions of the court, the jury returned a verdict for the defendants in error.

John Rustgard, W. H. Metson, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for plaintiff in error.

Albert H. Elliott and William H. Packwood, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff in error contends that, both by the laws of Alaska and the custom of the miners, the recording of the location notice within 90 days after location is essential to the life of the location, and that a failure to so record the same results in the forfeiture thereof. But one witness was called to prove the alleged custom of the miners, and his testimony falls short of showing the existence of any custom or regulation adopted by the miners, in the district where the claim is located, making the recording of the notice of location essential to the right to hold the same. The court in charging the jury said that such a custom can only be binding when established by clear and satisfactory evidence, and that no custom which may require the recording of a location certificate is good and valid in law unless it carries with it a provision that for noncompliance therewith the location shall be forfeited and void. The court further instructed the jury that the mining laws of the United States in force in Alaska, while they allow a location notice to be recorded, do not require such record as an essential to a valid location.

Section 2324, Rev. St. (U. S. Comp. St. 1901, p. 1426), provides that all records of mining claims shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. This provision does not require that the location be recorded. It leaves the subject open to legislation by the states or to regulation by the miners. *Haws v. Victoria Copper Mining Co.*, 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436; 1 *Lindley on Mines* (2d Ed.) 373, and cases there cited. It is contended that section 15, c. 786, Act June 6, 1900, 31 Stat. 327, requires that notice of the location of a mining claim shall be filed for record within 90 days of the discovery of the claim. The section requires recorders, upon the payment of fees, to record separately certain classes of instruments, such as deeds, mortgages, certificates of marriage, wills, official bonds, etc., including affidavits of annual work done on mining claims, notice of mining locations and declaratory statements; and in subdivision 11 it adds to the list such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others:

"Provided, notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice."

This statute permits the recording of instruments. It contains no positive enactment that any of the enumerated instruments shall be recorded, nor does it provide that the failure to record any instrument shall work a forfeiture of rights thereunder. Obviously by the terms of this statute an unrecorded deed is not rendered invalid as between the parties, nor does the mere failure to record a mining location work a forfeiture thereof. We are therefore not called upon to decide the question, discussed by counsel, whether a statutory requirement that the location notice be recorded is mandatory or merely directory.

In the decisions of Montana relied upon by the plaintiff in error, we do not find support for his contention that, under the law of Alaska, failure to record location notice should be held to work a forfeiture of a mining claim. In *King v. Edwards*, 1 Mont. 235, the question for decision was whether the failure to perform the prescribed amount of work upon a claim resulted in forfeiture. The court found that it was generally considered, among the miners of the district in which the claim was situated, that such a failure would have that effect, and said that:

"Where a custom is plain, there is no room for construction, and the court must take it as it reads and give it its legal effect."

In *Baker v. Butte City Water Co.*, 28 Mont. 222, 72 Pac. 617, 104 Am. St. Rep. 683, the question was whether the trial court had erred in excluding from the evidence the location notice of the defendant's claim. The Supreme Court affirmed the right of the Legislature to provide rules for the marking of the boundaries of mining claims, and for the record thereof, and to specify what the recorded paper must contain, and held that, since the notice failed to comply with the statute, it was not admissible in evidence. The decision in that case was affirmed in *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409, in which the court answered the contention of the plaintiff in error, that the provisions of the Montana statute were too stringent and conflicted with the liberal purpose manifested by Congress in its legislation respecting mining claims, by saying:

"We do not think that they are open to this objection. They certainly do not conflict with the letter of any congressional statute; on the contrary, are rather suggested by section 2324. It may well be that the state Legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full particulars in respect to the discovery shaft and the corner posts should be at the very beginning placed of record."

The trial court, in instructing the jury, relied upon a line of decisions of the Supreme Court of California and of the federal courts in this circuit. In *McGarrity v. Byington*, 12 Cal. 426, the court said:

"The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the for-

feiture as the result of noncompliance with such of them as make noncompliance a cause of forfeiture."

That decision was cited and followed by Judge Sawyer in *Jupiter Min. Co. v. Bodie Con. Min. Co.* (C. C.) 11 Fed. 666. In *English v. Johnson*, 17 Cal. 108, 76 Am. Dec. 574, the court said:

"But in the absence of any rule declaring that a failure to record avoided the entry or claim, we cannot see that this failure, when actual possession was taken by the claimant and kept—no forfeiture or abandonment shown—would avoid the claim as against a subsequent entry and location in due form."

In *Bell v. Bed Rock Co.*, 36 Cal. 219, the court said:

"The failure of a party to comply with a mining rule or regulation cannot work a forfeiture unless the rule itself so provides."

In *County of Kern v. Lee*, 129 Cal. 369, 61 Pac. 1124, the court adhered to the doctrine of the prior decisions that, in the absence of a state or district requirement, the failure to record notice of location does not affect the validity of the location; and in the case of *Daggett v. Yreka Min. Co.*, 149 Cal. 360, 86 Pac. 968, it was again held that, in the absence of a statute or local miners' law requiring the recording of a notice, the recording does not constitute in itself a location of any part of a legal location of the claim. In *Last Chance Min. Co. v. Bunker Hill & S. Min. Co.*, 131 Fed. 579, 66 C. C. A. 299, this court held that the failure of the locator of the Bunker Hill claim to record his notice of location within the time prescribed by the Idaho statute did not work a forfeiture of the claim, there being no such penalty affixed by the statute; citing *Jupiter Min. Co. v. Bodie Con. Min. Co.* (C. C.) 11 Fed. 666, *Bell v. Bed Rock T. & M. Co.*, 36 Cal. 214, and other cases from California and Arizona. In *Zerres v. Vanina* (C. C.) 134 Fed. 610, Judge Hawley construed Comp. Laws Nev. § 210, providing for the location of a lode mining claim, and declaring that within 90 days of the date of posting the location notices on the claim the locator shall record his claim within the mining district, etc., and held that, since the statute did not provide for a forfeiture for a failure to record within the time specified, the failure was insufficient to work a forfeiture of the locator's right. And in *Ford v. Campbell*, 92 Pac. 206, the Supreme Court of Nevada said that the intention that failure to comply with the statute should work a forfeiture of mining rights "ought not to be imputed to the Legislature except upon the very clearest language, not susceptible to any other reasonable construction," and quoted with approval the language of Judge Hawley in *Zerres v. Vanina*. Of similar import are *Johnson et al. v. McLaughlin*, 1 Ariz. 493, 4 Pac. 130, and *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

Error is assigned to the instruction given to the jury that, if there is a variance or discrepancy between the stakes and monuments on the ground and the recorded location certificate, the former will prevail over the latter, as superior evidence of the particular ground located and its boundaries. It is contended that this instruction was erroneous, not because the proposition of law therein expressed is in itself unsound, but because the evidence in the case indicated that, at the time when the location of the plaintiff in error was made, the

stakes marking the boundaries of the Lillian location had disappeared. But the record shows that the evidence on this feature of the case was conflicting. The defendant in error Vogel testified that on November 20, 1904, he found the stakes all in place. The court had instructed the jury that, when a valid location is once made, it vests in the locator the right of possession thereto, which cannot be divested by the obliteration or removal, without his fault, of the stakes and monuments marking its boundaries, or the obliteration or removal from the claim of the location notice posted thereon, and that marking the claim on the ground by stakes and monuments, with or without written notice, whereby the boundaries of the claim can be readily traced, is sufficient, and submitted to the jury the question whether the location had been so staked and marked. No exception was taken to those instructions. There is no evidence in the case to indicate, and it is not claimed by the plaintiff in error, that he was misled by the defect in the recorded notice of location, or that he ever saw or heard of the location notice. Indeed, he testified that he never saw it. In view of that fact, the case as it went to the jury stood precisely as it would have stood if no notice whatever of the location had been recorded. The plaintiff in error is therefore in no position to object to the instruction, the giving of which he now assigns as error.

Error is assigned to the refusal of the court to instruct in substance that, if the calls and distances given in the location notice posted on the ground do not correspond with those actually marked on the ground, the notice is misleading, and that fact must be taken into consideration in determining the markings as a whole, and that a person examining the ground and finding a posted location notice has the right to rely on the description of the ground so claimed by the locator or owner. The defect in the location notice was that the permanent monument to which it tied the claim was erroneously located. Any one finding the location notice posted on one of the stakes which marked the boundaries of the claim could observe that error at a glance. It would then devolve upon him to trace out the claim by reference to the calls and distances set forth in the notice, and to discover where it lay, and to disregard the obvious error in the reference to a permanent monument. The location notice was not by law or custom required to be posted on the claim or recorded. Stakes driven in the ground are the most certain means of identification. The location notice which, it was testified, was posted on the Lillian, described the claim by calls and distances to stakes, running from the stake on which it was posted. No one could have been misled by the erroneous call to the telephone pole.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

ROSS, Circuit Judge (dissenting). By section 2324 of the Revised Statutes it is declared that in making a location of a mining claim "the location must be distinctly marked on the ground so that its boundaries can be readily traced." The same section of the statute expressly confers upon the miners of each mining district the

power to make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, covering the location, manner of recording, and amount of work necessary to hold possession of a mining claim, subject to the requirement in respect to so marking the location as that its boundaries may be readily traced. And it has been uniformly held by the courts that the respective states and territories may make like rules and regulations not in conflict with any law of the United States upon the subject. Neither the act of Congress of 1866 nor of 1872 required such notices to be recorded. As a result, in some states and territories and in some mining districts the notice of location is required to be recorded, and in some it is not. But, whenever required, the express declaration of section 2324 of the Revised Statutes is that such record "shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." In respect to the mining ground of the territory of Alaska, however, Congress, in section 15 of the act of June 6, 1900, "making further provisions for a civil government for Alaska and for other purposes" (chapter 786, 31 Stat. 327), provided that "notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice." *Smith v. Cascaden*, 148 Fed. 793, 78 C. C. A. 459. The recording of the notice of location is therefore, by a statute of the United States, made one of the essential steps to a valid location of a mining claim in the territory of Alaska.

As shown in the prevailing opinion, the notice filed for record by the defendants in error was insufficient to meet the requirements of section 2324 of the Revised Statutes. It was therefore as if no notice at all was recorded. It therefore seems to me that the location under which the defendants in error claim was never perfected, because they did not take one of the essential steps required by the statutes of the United States; that is to say, they did not file for record within 90 days from the date of the discovery of the claim, nor at any time, a notice containing the name or names of the locators, the date of the location, and such a description of the claim located by reference to some natural object or permanent monument as would identify it. The case here presented, therefore, is not, in my opinion, one of forfeiture, for the defendants in error never took one of the essential steps required in making their location.

In the case of *Last Chance Mining Company v. Bunker Hill & S. Mining & C. Co.*, 131 Fed. 579, 66 C. C. A. 299, referred to in the opinion of the court, there was a question of priority between the Last Chance mining claim and the Bunker Hill mining claim. Priority was asserted for the Last Chance only upon the fact that it was located, marked, and the notice of its location recorded before the location notice of the Bunker Hill was recorded. A statute of the state in which the claims were situate required such notice to be recorded within 15 days after the making of the location in the office of the recorder of the county, or with the recorder of the district

designated by the resident miners, as provided by section 3103 of the Revised Statutes of Idaho of 1887. That statute, however, prescribed no penalty for a failure to record such notice. The facts as found by the master, and which were accepted by the court, were that the Bunker Hill claim was located September 10, 1885, by one O'Rourke, who possessed the necessary qualifications, and who had theretofore discovered within its limits a vein of rock in place carrying silver and lead; that on the day named O'Rourke posted "a discovery notice of location," containing the name of the location and claim, the date of its location, a description of the claim by reference to such natural objects and permanent monuments as identified it, and reciting such other matters as were then required by the laws of the United States and the territory of Idaho; that at the same time O'Rourke marked the boundaries of the claim on the ground so that they could be readily traced, and then entered into the actual possession of the claim and commenced working it, which possession was maintained by him and his successors in interest; that on September 29, 1885, O'Rourke caused a notice of location of the claim, duly verified, to be recorded in the office of the recorder of the county in which it was situate; that prior to March 21, 1902, the complainant in that suit duly acquired, through mesne conveyances from O'Rourke, the title to the claim, and on the day last mentioned made application to the United States for a patent therefor, which application recited the facts just stated, and upon which application a patent was issued by the government to the complainant on the 17th day of November, 1903; that the Last Chance claim was duly located September 17, 1885, and the location notice thereof recorded on the 22d day of the same month; that prior to the discovery and location of the Last Chance its discoverers and locators "had actual knowledge of the discovery and location of the Bunker Hill claim; they had visited the discovery, read the notice posted thereon, saw the discovery stake, the east end stakes, and knew that the locator was in the actual possession of the claim, and was then engaged in development work thereon." Other facts appear in the stipulation of counsel in the case, as shown in 131 Fed. 584, 585, 66 C. C. A. 304, 305, in the opinion of the court. And upon the point in question we said:

"We do not think it necessary to decide whether a stipulation to the effect that a certain witness would, if present, testify in contradiction of one or more of the facts already agreed to by counsel, could be properly held to modify such prior stipulation, for the reason that upon the facts expressly conceded, found, and in no wise contested the Last Chance was located after the Bunker Hill, and while the latter was a valid, subsisting claim. At the time of the location of the Last Chance claim the time prescribed by the Idaho statute within which the Bunker Hill location should be recorded had not expired. The Last Chance locators had actual notice of the Bunker Hill location, had read the description of it, and the locator of the Bunker Hill was in actual possession of that claim and actually engaged in working it. No part of the claim, therefore, whether above or underground, was then open to location by any other person."

We further said:

"That the failure of the locator of the Bunker Hill claim to record his notice of location within the time prescribed by the Idaho statute did not work a for-



feiture of the claim, there being no such penalty affixed by the statute, is well settled [citing *Jupiter Min. Co. v. Bodie Con. Min. Co.* (C. C.) 11 Fed. 666; *Bell v. Bedrock T. & M. Co.*, 36 Cal. 214; *McGarrity v. Byington*, 12 Cal. 426; *Johnson v. McLaughlin*, 1 Ariz. 493, 4 Pac. 130; *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036; *Rush v. French*, 1 Ariz. 99, 25 Pac. 816]. Besides, the issuance by the government of its patent for the claim is conclusive evidence of the sufficiency of the steps taken by the complainant [citing *Davis v. Weibhold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *U. S. v. Iron & S. M. Co.*, 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; *Montana Cent. Ry. Co. v. Migeon* (C. C.) 68 Fed. 811]."

In the case of *Last Chance Mining Company v. Bunker Hill & S. Mining & C. Co.*, therefore, it appeared that the claimants of the Last Chance claim entered upon the actual possession of the locator of the Bunker Hill claim while the latter was a valid, subsisting claim, and while its locator was actually engaged in working it. That ground was, therefore, not open to location by the Last Chance claimants, for which reason they acquired no right. And since the statute of the United States applicable to that case did not require the recording of such notices of location, and the statute of Idaho did not fix any penalty for the failure to record such notice within the time it prescribed, the government of the United States issued its patent in perfection of the Bunker Hill location, and this court very properly sustained that title, and held that the recording by the Bunker Hill claimant of his notice of location three days later than the time prescribed by the Idaho statute did not work a forfeiture of his rights. In the case now before us, however, there was no actual possession of the ground by the defendants in error, and they never at any time filed the notice of location required by the Alaska statute. The location under which they claim, therefore, lacked one of the essential elements of a valid location in Alaska. No question of forfeiture, in my opinion, arises in the case. The ground was confessedly vacant, and was therefore open to exploration and location, unless covered by a location which met the requirements prescribed by Congress.

For the reasons stated, I dissent from the judgment here given.

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#### EBNER v. ALASKA MILDRED GOLD MINING CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,516.

##### 1. CORPORATIONS (§ 309\*)—OFFICERS—EXPENSES INCURRED BY PRESIDENT.

In the absence of any contract therefor, the president and superintendent of a corporation cannot charge it with sums expended by him for dinners and entertainments to prospective purchasers of stock.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1367; Dec. Dig. § 309.\*]

##### 2. CORPORATIONS (§ 308\*)—OFFICERS—PRESIDENT—RIGHT TO SALARY.

The president of a corporation, who performs only the services required from him as such officer under the by-laws, is not entitled to

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pay himself a salary from money of the company in his possession, where there has never been any agreement for a salary nor claim therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1334; Dec. Dig. § 308.\*]

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

The plaintiff in error was the president of the defendant in error, a corporation, from January, 1898, until July 7, 1904. After his term of office expired the corporation brought an action against him to recover the sum of \$12,343.60, which it was alleged were funds of the corporation which the plaintiff in error refused and neglected to turn over to its officers and directors. The plaintiff in error answered, accounting for the said sum as follows: That he had paid himself, for salary as president and general manager during the period of his office, \$100 per month, amounting to \$7,300; that in January, February, and March, 1900, in placing upon the market and selling the capital stock of the corporation in Boston and other Eastern cities, he had incurred traveling, hotel, and other incidental expenses, in the sum of \$1,800; that in January, February, and March, 1901, he had expended \$1,200 in like manner and for like services; that he had paid out for the annual assessment work upon the corporation's mining claims for the year 1903 \$820, for assessment work for the year 1904 \$300, and for assessment work for the year 1905 \$600; that for office rent for 1903 he had paid \$50, for office rent in 1904 \$25; that he had paid Thomas R. Lyons, attorney at law, for legal service performed for the corporation in 1903 and 1904, \$250, and to A. S. Lovett, for services performed for the corporation as bookkeeper and clerk in 1898 and 1899, \$200; that he had deposited in bank to the account of the corporation in July, 1904, \$53.13; that he had paid out for surveys, merchandise, drawing up of papers, stenographer's fees, etc., \$196.24, leaving a balance due him from the defendant in error of the sum of \$450.70. Upon the trial of the cause before a jury, a verdict was returned for the defendant in error for the sum of \$10,299.30 and interest from January 15, 1905. The defendant in error subsequently remitted from the verdict \$886.50, being all of the items mentioned in an itemized account of the plaintiff in error of amounts claimed to have been paid for the use of the corporation during the months of January, February, and March, 1901, except the sum of \$313.50 thereof, which was for dinners, entertainments, and incidentals. Judgment was thereupon rendered in favor of the defendant in error for the sum of \$9,412.80, with interest at 8 per cent. per annum from January 15, 1905, and costs and disbursements.

Winn & Burton, for plaintiff in error.

L. P. Shackleford and R. W. Jennings, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the trial court erred in denying the application of the plaintiff in error for leave to amend his answer so as to allege that the claim for \$1,800 for traveling, hotel, and other incidental expenses incurred on his trip to Boston was for expenses incurred in the year 1899, instead of in the year 1901, as originally alleged in the answer. We need not pause to discuss the question whether the trial court abused discretion in denying this application; for the record shows that, when the defendant in error took judgment, it remitted \$886.50 of the items involved in the proposed amendment, and took judgment only for \$313.50, which was for dinners, entertain-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ments, and incidentals to stockholders and prospective buyers of stock. As to those items the trial court very properly held that the plaintiff in error was not entitled to credit, since there was no contract to pay and no liability on the part of the corporation to pay them. The court said:

"It was not any part of his duty as superintendent or president to go to Boston and entertain those people, and there was no agreement that he should do it; no agreement to pay for it."

The justice of these remarks of the court is well sustained by the record. It was not alleged in the answer or shown by the proof that the sum so expended for dinners and entertainments was authorized or agreed to be paid for, or that the expenditure inured to the benefit of the corporation.

It is contended that the court erred in striking out, on the motion of counsel for the corporation, evidence of the amount paid by the plaintiff in error to A. S. Lovett for services as bookkeeper and clerk. Lovett had sued the plaintiff in error personally on two causes of action—one for salary, and the other for moneys alleged to have been converted by the plaintiff in error to his own use. He recovered judgment against the plaintiff in error for \$900.39. The amount sued for for salary, and the amount sued for for moneys converted each exceeded the amount of the judgment recovered, and it does not appear for which of these demands, or for how much of either, the judgment was rendered. The court below held that there was no evidence connecting the corporation with the Lovett account, and that there was no evidence before the jury from which it could be ascertained how much the corporation ought to pay, if anything, on that account. Aside from the record of Lovett's judgment, there was no evidence before the court as to what services Lovett performed for the corporation or as to the value thereof. There was no error, therefore, in striking out the record of the judgment.

Error is assigned to the ruling of the court in withdrawing from the consideration of the jury items amounting to \$1,800, claimed to have been paid by the plaintiff in error in traveling, hotel, and other incidental expenses, and in striking out his testimony as to his claim for salary as president of the corporation. The plaintiff in error and A. S. Lovett were the owners of certain mining claims at Mildred Bay, Alaska. On January 15, 1898, they, with B. M. Behrends, organized the Alaska Mildred Mining Company, the defendant in error herein, with a capital stock of \$1,000,000, divided into 200,000 shares, of the par value of \$5 each. One share was issued to Behrends, and the remainder was issued to Lovett and the plaintiff in error in exchange for their mining claims. By the by-laws the president was given the powers usually conferred upon that officer. Juneau was made the principal place of business of the corporation. The first Tuesday in July of each year was fixed as the time for the annual meeting of stockholders. Provision was made for special meetings of the stockholders at Juneau upon 60 days' personal notice in writing to each stockholder; but it was provided that notice might be dispensed with if all of the stockholders were present either in person

or by proxy and consented to the meeting on the records of the corporation. Lovett donated 12,500 shares, and the plaintiff in error 27,500 shares, of stock in the company, to be used by the company, by sale or otherwise, to develop and equip the mining property. In February, 1898, the plaintiff in error sold in the East 2,450 shares at 50 cents a share. He testified that with the money thus obtained he drove a tunnel 68 feet and did some prospecting. In February, 1899, he again went East and sold 10,000 shares at 75 cents per share.

There was no resolution of the board of directors, and no understanding or agreement between the other directors and the plaintiff in error, providing for payment to him of a salary or the expenses incurred upon these trips. There was such a conversation between the plaintiff in error and some of the stockholders in Boston, to whom he sold stock. They suggested that he ought to have a salary, and ought to be reimbursed for the money he had spent in entertaining them on the occasion of these visits to the East. In February, 1901, at a meeting of certain of the stockholders in Boston, a resolution was adopted to the effect that the president and manager should receive a reasonable salary for past and future services as such manager, and should be reimbursed for any expenditures on behalf of the company, "the amount of such salary and expenses to be determined and fixed at any regular stockholders' or directors' meeting to be held at some future time"; but nothing was done in pursuance of that resolution, and the question of payment of salary and other expenses was never brought before the corporation. The plaintiff in error presented no account to the directors, and made no effort to obtain a settlement. All that he did was to retain the money for his own use, instead of applying it to the work for which the stock was authorized to be sold. The power to make contracts for a corporation is vested in its board of directors, and they must act, collectively or as a board, in making all contracts, unless they have by their by-laws, or by previous resolution duly made, authorized some officer to contract on their behalf.

The evidence fails to show, moreover, that these trips to the East were made solely on account of the business of the corporation. The plaintiff in error had other business there. He was engaged in selling on his own behalf stock in the Windham Bay Company, and was attending to business for the Ebner Gold Mining Company and the Boston group of mines, of which he was president. When, upon the expiration of his office as president of the defendant in error, he turned over to the corporation the books, he kept his vouchers and memoranda of money now claimed to have been expended, and up to the time of the commencement of the present action he had presented no claim for salary or reimbursement of expenses. On December 15, 1902, he rendered a statement accounting for \$28,474.50, the amount of the development fund realized on the sales of stock, and showing a balance on hand of \$12,343.67, and appended to it the statement that there were no liabilities, except about \$200, which was due the present contractors. This statement was made in a report to the stockholders concerning the work done on the mine and the condition of the mining properties. The trial court said:

"It is evident that the services required of the president in this case included that of general superintendent under the by-laws of the company. He accepted the office of president under those by-laws, and they required the general supervision of all the affairs of the company."

The evidence does not show that at any time he performed any services outside of his duties as president so prescribed by the by-laws, or that the company ever understood or agreed that he should be paid a salary; nor does his answer allege that the services performed by him were outside his duties as president. 10 Cyc. 921, and cases there cited.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

### McMULLEN et al. v. UNITED STATES.†

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,642.

#### 1. PRINCIPAL AND SURETY (§ 99\*)—SCOPE AND EXTENT OF SURETY'S LIABILITY—CONSTRUCTION OF CONTRACT.

The contract of a surety, like any other contract, is to be construed according to the intent of the parties; but, it being determined what is the meaning of the contract, the sureties are entitled to stand on its very terms, and if they have not consented to any variation of it, and variation is made, it is fatal.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158-161; Dec. Dig. § 99.\*]

#### 2. PRINCIPAL AND SURETY (§ 128\*)—DISCHARGE OF SURETY—ALTERATIONS IN CONTRACT.

If, in a contract for the performance of work on the construction of a building or other improvement, it is provided that in the course of the work one of the parties shall have the right to make certain specified changes therein, the sureties for the contractor are deemed to assent in advance to the making of such alterations, and if they are made, although they may materially vary the contract, the sureties are not thereby released.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 356-360; Dec. Dig. § 128.\*]

Discharge of surety by alteration of instrument, see note to Zeigler v. Hallahan, 66 C. C. A. 6.]

#### 3. PRINCIPAL AND SURETY (§ 104\*)—DISCHARGE OF SURETY—EXTENSION OF TIME TO PRINCIPAL.

A contract for government work which in terms gave the contractor the right under certain circumstances to apply for an extension of time for completion of the work, but left it optional with the government to grant or refuse it, by such provision added nothing to the rights of the parties, and cannot be said to have provided for an extension, and the contractors' sureties were discharged by an extension made without their consent.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 104.\*]

In Error to the Circuit Court of the United States for the Northern District of California.

On or about September 14, 1897, the Navy Department of the United States advertised for proposals for dredging at the United States naval station at Port Royal, S. C. The New York Dredging Company sent a bid which was

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 23, 1909.

accepted, and on October 25, 1897, a contract in writing was executed by that company as principal and John McMullen and R. Percy Wright as sureties, parties of the first part, and the United States of America, party of the second part. To the contract was annexed a bond in the sum of \$30,000, with the New York Dredging Company as principal and John McMullen and R. Percy Wright as sureties, conditioned for the faithful performance of the contract. The plans and specifications on which the bids had been made were attached to the contract and made a part of it. The portions of the plans and specifications and bonds necessary to be considered on the writ of error are as follows:

"16. Time of commencement of work.—The contractor shall commence work within thirty days from the date of signing the contract and continue without interruption; the entire work to be completed in sixteen calendar months from date of contract.

"17. Progress of work.—If at the close of any working month the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the government may refer the matter to a board of three officers, and if recommended by them, and the interests of the government so require, annul the contract and complete the work in such manner as it deems best, at the expense of the contractor and his sureties.

"18. Unavoidable delays.—When an unavoidable accident, storm, or other act of Providence occurs, through which the progress of the work is or seems likely to be delayed, the contractor shall immediately notify, in writing, the officer in charge of the occurrence in detail, and state in what way and to what extent it will delay the fulfillment of his contract, in order that the necessary investigation may be made, and the matter put on record. And it is clearly to be understood that unless it be done whenever such thing occurs, no subsequent application for an extension of time for the completion of the contract on account of such occurrence will be recommended.

"19. Avoidable delays.—Should the progress of the work be delayed by anything but unforeseen and unavoidable accidents, storms, or other acts of Providence, or by the action of the government, no application by the contractor for an extension of time for the completion of his contract will be recommended by the officer in charge for favorable consideration, except on condition that the contractor make good any deterioration caused by such delay and bear the additional cost of supervision and inspection by the government, and other expenses caused by the failure of the contractor to fulfill his contract with the United States according to its terms; and by granting the extension of time asked for there shall be reimbursed to the United States by the contractor the amount of such additional charges, to be deducted from any money that may be or may become due him from the United States under this contract, the difference only to be paid him upon his receipt.

"20. Authority for extension of time.—No extension of time for the completion of the work will be made except upon the authority of the Secretary of the Navy."

The condition of the bond was as follows:

"The condition of the above bond is such, that if the said above-bounden New York Dredging Company, their heirs, executors, or assigns, shall well and truly, and in a satisfactory manner, fulfill and perform the stipulations of the contract hereto annexed, entered into with the Chief of the Bureau of Yards and Docks, acting under the directions of the Secretary of the Navy, for and in behalf of the United States, and shall conform in all respects to said contract, and to the plans and specifications attached thereto and forming a part thereof, and to the satisfaction of the said Chief of the Bureau of Yards and Docks, and shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the aforesaid contract, then this obligation to be void and of no effect; otherwise to remain in full force and virtue."

The New York Dredging Company began work under its contract, and encountered difficulty through striking rock. The work was also delayed by storms and accidents to machinery. Early in 1899, and before February 15th, it was ascertained by the government that only about one-third of the

dredging contracted for had been done. Two weeks then remained of the sixteen months in which the contract was to be completed. In response to a request from the dredging company, the time for the completion of the contract was extended to December 30, 1899. The dredging company failed to complete the contract within the time so extended. On March 25, 1901, the Chief of the Bureau of the Department of the Navy addressed a letter to the dredging company as principal, and to McMullen and Wright as sureties, stating that because of their failure to perform the contract of October 25, 1897, "the party of the second part, exercising the option reserved to them, declare said contract null and void, without prejudice to their right to recover for defaults therein or violation thereof," and notified them that an advertisement had been prepared and issued inviting proposals for the completion of the work under said contract, and that the same would be completed at the expense of the dredging company and the sureties. On December 5, 1903, the United States brought this action against the dredging company and the sureties to recover the sum of \$25,588.02, alleged to be the difference between "what the defendant New York Dredging Company agreed to perform the work of dredging for, and what it actually cost these plaintiffs to complete the work," and for the further sum of \$31,750 as liquidated damages. The answer of the sureties set up the defense, among others, that the contract entered into on October 25, 1897, was, by the terms thereof, to have been fulfilled by the dredging company and the work mentioned therein was to have been completed between February 23, 1897, and December 30, 1899; that the time was extended, and the condition of the contract was in that regard changed by the plaintiffs without the consent of said sureties. Upon the pleadings and an agreed statement of the facts, judgment was rendered for the defendant in error.

Burke Corbet, J. R. Selby, and Edward J. Lynch, for plaintiffs in error.

Robert T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty.  
Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The time for the completion of the contract, which was originally 16 months from the date of the contract, was, without the consent of the sureties, extended for a further period of 1 year. We may premise the discussion of the question whether the sureties were thereby released from their obligation by adverting to some of the well-settled principles applicable to the obligation of a surety for the performance of his principal's contract: (1) The contract of a surety is to be construed as any other contract—that is to say, according to the intent of the parties—and the rules for its construction are not to be confused with the rule that sureties are favorites of the law and have the right to stand upon the strict terms of their obligation. Brandt on Suretyship and Guaranty (2d Ed.) §§ 92 and 94; Lee v. Dick, 10 Pet. 480, 493, 9 L. Ed. 503. (2) It being determined what is the meaning of the contract, the sureties are entitled to stand upon the very terms of their undertaking. Said Justice Story:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and variation is made, it is fatal."

Miller v. Stewart, 9 Wheat. 680, 701, 6 L. Ed. 189. Of similar import are Smith et al. v. United States, 2 Wall. 219, 17 L. Ed. 788; Reese v. United States, 9 Wall. 13, 19 L. Ed. 541; United States v. Frell, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177; and Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242. (3) If, in a contract for the performance of work or the construction of a building or other improvement, it is provided that in the course of the work one of the parties shall have the right to make certain specified changes therein, the sureties for the contractor are deemed to assent in advance to the making of such alterations; and if they are made, although they may materially vary the contract, the sureties are not released thereby. Wehr et al. v. Germ. Evan. St. Matthew's Con., Balto., 47 Md. 177; Hayden v. Cook, 34 Neb. 670, 52 N. W. 165; Village of Chester v. Leonard et al., 68 Conn. 495, 37 Atl. 397; People's Lumber Co. v. Gillard, 136 Cal. 55, 68 Pac. 576; United States v. Frell (C. C.) 92 Fed. 299; De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 402; Northern Light Lodge v. Kennedy, 7 N. D. 146, 73 N. W. 524; American Surety Co. v. San Antonio Loan & Trust Co. (Tex. Civ. App.) 98 S. W. 387, 403.

It is not disputed that the extension of time given the contractor in the present case was a variation of the contract sufficient in itself to discharge sureties; but the defendant in error contends that the contract provides for extensions of time, and that therefore the sureties must be deemed to have assented thereto, and that the case comes within the doctrine of the decisions last above cited. It is true that the contract refers in terms to the subject of extension of time. It provides, first, that, in case of unavoidable accident or storm which is likely to delay the progress of the work, the contractor shall forthwith notify in writing the officer in charge, stating in what way and to what extent the fulfillment of the contract may be delayed, so that timely investigation may be made, and that, unless that be done, no subsequent application for extension of time on account of such occurrence will be recommended. It provides, further, that, if the progress of the work should be delayed by anything but unforeseen and unavoidable accidents or storms, or by the action of the government, no application by the contractor for an extension of time will be recommended for favorable consideration, except on condition that the contractor make good any deterioration caused by such delay, etc., and that no extension of time for the completion of the work can be made except upon the authority of the Secretary of the Navy. In none of these provisions is there a promise on the part of the United States that there shall be an extension of time. In none of them, under any exigency that may arise, is the contractor given any right to extension of time. The whole purport of these provisions is to let the contractor know what, if any, excuses for delay will be considered by the officers of the government in case of an application for extension of time, and to specify the officer of the government in whom alone is vested the power to grant it. Such a contract does not provide for an extension of time. It gives no right of any kind to either of the contracting parties. To say that the



contractor may apply for an extension of time is to confer no right. That right, it is needless to say, always exists in the absence of such a provision. The mere suggestion in the contract that one of the parties thereto may, if it sees fit, ask for an extension of time, and that the other party may, if it sees fit, grant it, interjects nothing of a contractual nature. By virtue thereof, the sureties who undertake to become responsible for the performance of the contract cannot be said to assent to extension of time. Sureties to all contracts must be presumed to know that the contracting parties have, as between themselves, the power to make such alterations therein as they may subsequently agree upon. Unless the right to alter the same is expressly reserved in the contract itself, the obligation of the sureties is to answer for the default of their principal upon the precise contract made, and not upon one which may thereafter be made without their assent. Even an express provision in such a contract that, in the event of the occurrence of certain causes of delay, "additional time may in writing be allowed" the contractor, does not mean that it shall be allowed. *United States v. Gleason*, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284.

The decisions cited and relied upon by the defendant in error are all cases in which the power to make the alterations was expressly reserved, and in which it was stipulated that the contract should not thereby be invalidated. Thus in *Wehr et al. v. Germ. Evan. St. Matthews Con.*, Balto., the court said:

"But if, by the terms of the original contract, additions to or alterations in the work are provided for, or left to the judgment and discretion of the other contracting party, either without limit or within certain limits, then the variation, if within the limits prescribed, is allowed by the contract itself, and the surety cannot complain of the variation which he has agreed to by the original contract."

In *Hayden v. Cook*, in a building contract, it was provided that the owner at any time during the progress of the work should have the right to make any alterations, changes, or additions to the building, and that the same should not invalidate the contract. It was held that the changes and additions disclosed by the evidence were provided for in the contract, and that the making of the same did not discharge or release the surety. In *Village of Chester v. Leonard et al.* the original contract provided that the engineer of the village could make such changes in the forms, dimensions, and alignment of the work as might, in his opinion, and that of the board of water commissioners, be necessary for its proper fulfillment. The court said:

"Sureties for the performance of a contract so framed must be presumed to contemplate the making of such changes, and, as the defendants did not stipulate for any right to participate in determining whether they should be made, there was no occasion to notify any one but the principal contractor of the fact that they had been ordered."

In *People's Lumber Company v. Gillard*, it was held that, where the contract to which the bond was appended provided for certain changes by the board of trustees, the sureties on the bond must be presumed to have known of such provision, and to have agreed that

they would be bound in case changes were made in the contract. The other cases cited are of like effect.

The judgment is reversed, and the cause is remanded to the Circuit Court, with instructions to enter judgment for the defendants in the action upon the pleadings and the agreed statement of facts.

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WELSH v. BARBER ASPHALT PAVING CO.†

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,629.

1. MASTER AND SERVANT (§ 204\*)—ACTION FOR INJURY TO SERVANT—ASSUMPTION OF RISK—VIOLATION OF STATUTE BY EMPLOYER.

Under Act Or. Feb. 25, 1907 (Laws 1907, p. 302), which requires every owner of a factory, mill, or workshop to provide reasonable safeguards for all machinery which it is practicable to guard under penalty for failure to comply with such requirement, and also gives a right of action to recover damages for any injury to an employé of which such failure is the proximate cause, an employer in such an action cannot invoke the defense of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544, 545; Dec. Dig. § 204.\*]

2. STATUTES (§ 226\*)—CONSTRUCTION—STATUTE ADOPTED FROM OTHER STATE.

Act Or. Feb. 25, 1907 (Laws 1907, p. 302), requiring owners of mills and factories to safeguard their machinery, having been adopted from a statute of Washington, the construction previously placed upon such statute by the Supreme Court of Washington was also adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.\*]

Construction of statutes, state laws as rules of decision in federal courts, see note to *Wilson v. Perrin*, 11 C. C. A. 72.]

3. COURTS (§ 372\*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The construction and effect of a state statute requiring owners of mills and factories to safeguard their machinery is not a matter of general, but of local, law, and the decisions of the highest court of the state thereon are binding on the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 977; Dec. Dig. § 372.\*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

4. MASTER AND SERVANT (§ 252\*)—ACTION FOR INJURY TO SERVANT—NOTICE AS CONDITION PRECEDENT.

Under Act Or. Feb. 25, 1907 (Laws 1907, p. 302), which gives a right of action for injury to an employé resulting from a failure of the employer to safeguard machinery as therein required, but provides that no such action shall be maintained unless notice of the time, place, and cause of injury is given to the employer within six months and the action is commenced within one year, the commencement of the action within six months and the filing of a complaint setting out the facts dispenses with the necessity of any other notice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
167 F.—30

† Rehearing denied February 23, 1909.

## 5. ACTION (§ 11\*)—CONDITIONS PRECEDENT—WAIVER.

The giving of a notice required by statute as a condition precedent to the maintaining of an action is waived by the failure of the defendant to object to the want of notice by demurrer, answer, or otherwise.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 11.\*]

In Error to the Circuit Court of the United States for the District of Oregon.

Upon the trial in the court below, upon a complaint alleging that the plaintiff's intestate was killed by an accident while employed in operating the hoisting works of the defendant in error, and alleging that the accident resulted from the negligence of the defendant in error, first, in allowing a friction clutch to be and remain defective, and, second, in allowing a set screw to extend beyond the surface of a set collar, without being guarded as required by law, the jury returned a verdict for the defendant in error. The law so referred to was adopted by the Legislature of Oregon on February 25, 1907 (Laws 1907, p. 302). It requires every person, firm, corporation, or association operating a factory, mill, or workshop where machinery is used to provide reasonable safeguards, among other things, for set screws and all machinery "which it is practicable to guard," and prohibits the use of any machine not safeguarded. It imposes a penalty for failure to comply with said provisions, and provides that any person, firm, or corporation who violates the same shall, if such failure or omission be the proximate cause of any injury to an employé, be liable in damages to any employé who sustains injuries by reason thereof, but limits the amount to be recovered to \$7,500. While attempting to operate the friction clutch, the plaintiff's intestate became entangled in the set screw which extended beyond the surface of the collar, and, by the rapid rotation of the shaft, he received mortal injuries. It was proven that the set screw was not guarded or boxed as required by the statute. The court instructed the jury that the ordinary doctrine of assumption of risk applied to the case, notwithstanding the statute, and that the statute required no different consideration of the issues than would be required had it not been adopted. To these instructions the plaintiff in error excepted.

Henry E. McGinn, for plaintiff in error.

Blattner & Chester, Wm. D. Fenton, F. S. Senn, and L. B. Da Ponte, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). A statute of Oregon required that reasonable safeguards be provided for set screws in all factories, mills, and shops where machinery is used. There was evidence in the case that the proximate cause of the death of the plaintiff in error's intestate was an unguarded set screw on a revolving shaft in a factory. Upon the question whether the defense of assumption of risk may be invoked against an employé who has notice of his master's failure to perform a statutory duty for his protection, the decisions of the state courts are contradictory, and are nearly evenly divided. In Massachusetts, New York, Minnesota, Maine, Iowa, Alabama, Wisconsin, and Rhode Island, it is held that the defense is available. *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; *Camp v. Chicago Great Western R. Co.*, 124 Iowa, 238, 99 N. W. 735; *Swenson v. Chicago & B. Mfg. Co.*, 91 Minn. 509, 98 N. W. 645; *Powell v. Ashland*

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Iron & Steel Co., 98 Wis. 35, 73 N. W. 573; *Langlois v. Dunne Worsted Mills*, 25 R. I. 645, 57 Atl. 910; *Birmingham R. & Elec. Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457; *Gillin, etc., v. R. Co.*, 93 Me. 80, 44 Atl. 361. The reverse has been held in Indiana, Illinois, Missouri, Vermont, Michigan, North Carolina, Washington, Louisiana, and Texas. *Spring Valley Coal Co. v. Patting* 210 Ill. 342, 71 N. E. 371; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; *Green v. American Car & Foundry Co.*, 163 Ind. 135, 71 N. E. 268; *Murphy v. Grand Rapids Veneer Works*, 142 Mich. 677, 106 N. W. 211; *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62, 10 S. W. 484; *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Hall v. West & S. Mill. Co.*, 39 Wash. 447, 81 Pac. 915; *Hailey v. Texas R. Co.*, 113 La. 533, 37 South. 131; *Elmore v. Seaboard Air Line R. Co.*, 132 N. C. 865, 44 S. E. 620; *Missouri, etc., R. Co. v. Goss*, 31 Tex. Civ. App. 300, 72 S. W. 94.

There is a similar division of opinion in the federal courts. In the Sixth Circuit, in the leading case of *Narramore v. Cleveland, C. & St. L. R. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, it was held that the doctrine of the assumption of risk by a servant rests, either expressly or by implication, in the contract of employment, and that no right of action accrues to the servant for an injury due to such risk, for the reason that under the contract, the master has violated no legal duty in failing to protect the servant from dangers, the risk of which he agreed to assume; but that where a statute intervenes to protect the servant by requiring the master to perform certain designated acts, if the servant impliedly waives a compliance with the statute and agrees to assume the risk by continuing in the service without complaint, a court will not recognize or enforce such an agreement, and that to permit the master to avail himself of such assumption of risk by his employé is in effect to nullify the statute and is against public policy. In the Eighth Circuit, on the other hand, the reverse was held in *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551 (from which Judge Thayer dissented); *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 61 C. C. A. 506; *Federal Lead Co. v. Swyers* (C. C. A.) 161 Fed. 687; *Denver & Rio Grande Ry. Co. v. Norgate*, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981. In the Seventh Circuit, in *Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co.* (C. C.) 130 Fed. 957, Phillips, District Judge, in a case arising in Illinois, held that the defense of assumption of risk was taken away by the Illinois statutes as construed by the decisions of that state, and, while not expressly declaring that the federal court was bound by such construction of the state statutes, the court said that its conclusion was in accordance with the established construction of the statute by the Supreme Court of Illinois, which, it was said, "had been enacted in compliance with the declared public policy of the state as defined in its fundamental law." In *Inland Steel Co. v. Kachwinski*, 151 Fed. 219, 80 C. C. A. 571, the Circuit Court of Appeals for the Seventh Circuit said that the construction of the statute adopted by the Supreme Court of

Indiana was of binding force upon a federal court in a case arising thereunder, and, without further discussion of the question than to ascertain what that construction was, held that the employer could not set up the defense of assumption of risk to an action for personal injury resulting from his failure to obey the law. In *E. S. Higgins Carpet Co. v. O'Keefe*, 79 Fed. 900, 25 C. C. A. 220, the Circuit Court of Appeals for the Second Circuit followed the decisions of the Supreme Court of New York, and said:

"As construed by the highest courts of the state, the statute does not impose any liability upon an employer for injuries received by a minor in his service in consequence of the fault of the employé, or arising from the obvious risks of the service he has undertaken to perform."

We find in the discussion of this question in the American decisions some diversity of opinion as to the purport and meaning of some of the English cases construing and applying the Employers' Liability Act of 1880. The value of those cases as precedents on the question here before us is complicated by some obscurity in the reasoning of certain of the opinions, and by the fact that the English statute differs in important features from those of most of the American states, and particularly from that of Oregon. One of the differences is that the English statute deprives the servant of the right to maintain an action where he has discovered a defect and failed to notify the master. The opinions of the English judges, as we understand them, while they are not harmonious as to some of the questions arising under the act, uniformly sustain the proposition that assumption of risk is taken away in every case where the injury results from the master's failure to do a specific act required by law for the workman's protection. In *Weblin v. Ballard*, 17 Q. B. Div. 122, it was held that an employer, when sued by a workman for personal injury caused by failure to comply with the act, cannot avail himself of the defense that the workman had contracted to take upon himself the risks incident to the employment. *Thomas v. Quartermaine*, 18 Q. B. Div. 685, decided by the Court of Appeal a year later than *Weblin v. Ballard*, was a case in which the alleged negligence which caused the injury was the failure of the employer to properly fence a vat. The particular statutory provision under consideration, was section 2, subsec. 1, providing that the workman cannot maintain his action when arising from a defect in the ways or plant, unless the defect arose from, or had not been discovered or remedied owing to, the negligence of the employer or of some person in his service as therein mentioned. It was this section which the court construed, and not a provision expressly requiring that a vat, such as that which was maintained by the defendant in that case, should be fenced or guarded. Another of the provisions of the act was that, in an action to recover for personal injury to a workman, he should have the same rights of compensation and remedies against the employer as if he had not been a workman in the service of the employer nor engaged in his work. In view of that provision, Lord Esher, Master of the Rolls, was of the opinion that the act took away from the master the defense of the assumption of risk by the work-

man in all cases where the injury resulted from the negligence of the master, whether there was or was not a violation by the master of a specific precautionary provision enacted for the protection of the workman. This view was not taken by the two Lords Justices Bowen and Fry, who were of the opinion that, in the class of cases such as that under consideration, the defense arising from the maxim, "*Volenti non fit injuria*," had not been affected by the act. They also held that, in the case as presented, there was no evidence of negligence arising from any breach of duty on the part of the defendant toward the plaintiff. Bowen, L. J., was of the opinion that the object of the clause of the statute which deprives the servant of the right to maintain an action where he has discovered a defect and failed to notify the master was to limit the employer's liability, not to enlarge it. Incidentally, both the Lords Justices expressed their opinion that the defense of assumption of risk was taken away in a case where the injured person had a statutory right to specific protection, "as where an act of Parliament requires machinery to be fenced." In *Baddeley v. Earl Granville*, 19 Q. B. Div. 423, in a case before the Queen's Bench Division, the question was the liability of the defendant for the death of the plaintiff's husband, who was killed, in coming out of a mine at night, by an accident resulting from the absence of a banksman expressly required by law to be present to give signals to lower the cage. Wills, J., in referring to the decision in *Thomas v. Quartermaine*, observed that, while the Master of the Rolls expressed a different opinion in that case, "both the Lords Justices thought that the maxim, '*Volenti non fit injuria*,' would not apply at all where the injury arose from a direct breach by the defendant of a statutory obligation," and remarked:

"But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to."

Grantham, J., was of the same opinion, and held that, where there was a distinct breach of a statutory obligation, the case of *Thomas v. Quartermaine* was not an authority, and, referring to the latter case, said:

"The application of that decision seems to me to be intentionally limited by the court to the case before it. If that is so, the Lords Justices agree with the Master of the Rolls that the defendant would be liable in such a case as the present."

The decisions in *Smith v. Baker & Sons*, 1 App. Cas. 325, *Osburn v. London & Northwestern Ry. Co.*, 21 Q. B. Div. 220, and *Walsh v. Whiteley*, Id. 371, add nothing material to the decisions above noted.

Upon a careful consideration of the Oregon statute and its purpose of protection to a class peculiarly subject to abuse and oppression, we incline toward the views expressed in the *Narramore* decision. In

that case the court, having reached the conclusion that the doctrine of assumption of risk rests upon contract, express or implied, said:

"The only question remaining is whether the courts will enforce or recognize, as against a servant, an agreement, express or implied on his part, to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that."

The doctrine of that decision, that the assumption of the known risk of his employment by an employé is to be considered from the view point of contract, express or implied, has been questioned and disputed in later decisions, notably in *Denver & R. G. Ry. Co. v. Norgate*, in which it was said that the doctrine has no basis in the contract, even by implication, but that it is founded on the status assumed by master and servant, and upon the maxim, "*Volenti non fit injuria*." We find high authority to the contrary. In *Yarmouth v. France*, 19 Q. B. Div. 647, Lord Esher said:

"Under the old law it would have been said: 'You (the servant) have entered into or have continued in this employment where this thing of which you complain is open and palpable, and, therefore, it is an implied condition of your contract of service that you take upon yourself the risk of accidents therefrom, and consequently you have no remedy against your employer.' As between master and servant, that was the way the immunity from liability was always stated. The maxim, '*Volenti non fit injuria*,' was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed."

In *Smith v. Baker & Sons*, Lord Watson said:

"In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury."

In *Hough v. Railroad Co.*, 100 U. S. 217, 25 L. Ed. 612, Mr. Justice Harlan said:

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation."

In *Tuttle v. Milwaukee Railway*, 122 U. S. 196, 7 Sup. Ct. 1168, 30 L. Ed. 1114, Mr. Justice Bradley quoted and approved the language of Judge Cooley as follows:

"As the servant then knows that he will be exposed to the incidental risk, he must be supposed to have contracted that as between himself and the master he will run this risk."

In *Railway Co. v. Bancord*, 66 Kan. 81-88, 71 Pac. 253, 255, the court said:

"Reduced to its last analysis, the doctrine of assumed risk must rest for its support upon the express or implied agreement of the employé that, knowing the danger to which he is exposed, he agrees to assume all the responsibility for resulting injury."

But the maxim, "*Volenti non fit injuria*," obviously expresses but a half truth when applied to the relation of master and servant and the assumption of risk by the latter. An employé who remains in the employment of his master in the face of well-known defects in his master's machinery and the risks incident to the use thereof, it is reasonable to say, is seldom volens in the sense that he willingly assumes the risk. He may, and often does, remain in the service for the reason that he is unable to find, or is unfitted for, other employment. In such a case it is idle to say that he is free to leave his master's service and seek employment elsewhere. He is not free. He remains, trusting that he may have the good fortune to escape injury from the well-known risks. It is at this point that the Legislature intervenes, and, by a humane statute founded on principles of public policy, undertakes to protect him against these risks, and makes the reasonable requirement that the master shall minimize the risks by adopting precautions which, while they impose no substantial burden upon him, greatly lessen the chances of personal injury to his employés. In *Thrussel v. Handyside & Company*, 20 Q. B. Div. 364, the court said:

"It cannot be said where a man is lawfully engaged in work, and is in danger of dismissal if he leaves his work, that he willfully incurs any risk which he may encounter in the course of such work. \* \* \*. If the plaintiff could have gone away from the dangerous place without incurring the risk of losing his means of livelihood, the case might have been different; but he was compelled to be there; his poverty, not his will, consented to incur the danger."

But we do not deem it essential to the construction of the Oregon statute to decide whether the common-law doctrine of assumption of risk is implied in the contract of employment between the master and servant, or rests in the maxim, "*Volenti non fit injuria*." If the former is the true theory, the statute enacted in the exercise of the police power of the state to afford needed protection to a large class of its inhabitants, and providing a penalty for its violation, takes from the employé the right to contract to waive the performance of the duty so imposed. To hold that he could do so would be to nullify the statute and thwart its purpose. On the other hand, if the latter is the true theory, we are confronted with the fact that the statute, in addition to denouncing a penalty for violation of the statute, expressly creates a cause of action on behalf of those who are injured through its violation. There would be no occasion to create such cause of action if it were not the legislative intention thereby expressed to deprive the master of the defense of assumption of risk when injury occurs as the result of a violation of the statute. But there is other ground for this construction of the statute.

The Oregon statute, it is admitted, was adopted from the statute



of Washington, which is substantially the same, save that the latter does not contain the express provision granting a civil cause of action to the injured employé. When it was adopted in Oregon, the Supreme Court of the state of Washington had already given the statute the construction which we have given it. The construction so settled by the highest court of the state from which the statute was taken became a part of the law when it was adopted in Oregon, and is, we think, binding upon a federal court. The question was purely one of the construction of a state statute, and its effect upon a common-law rule. This was the view taken in *Inland Steel Co. v. Kachwinski*, 151 Fed. 219, 80 C. C. A. 577, and *E. S. Higgins Carpet Co. v. O'Keefe*, 79 Fed. 900, 25 C. C. A. 220. We are unable to agree, as it was assumed in *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, that the question is one of general law, to be determined upon general principles, and not one upon which the federal courts are required to follow the decisions of the highest court of the state in which the action arises.

The defendant in error contends that the present action cannot be deemed to have been brought under the statute, for the reason that no notice was given as required by the statute. The statute provides:

"No action for the recovery of compensation of injury under this act shall be maintained unless notice of the time, place and cause of injury is given to the employer within six months, and the action is commenced within one year from the occurrence of the accident causing the injury."

The accident occurred on November 7, 1907, and the action was begun on January 29, 1908. The complaint contained all the requisites of a notice under the statute. The obvious and sole purpose of requiring such a notice is to afford the defendant timely opportunity to preserve evidence for his defense. The complaint filed within three months after the accident answered every purpose of such a notice, and we think it would be a refinement of technicality to hold that it did not dispense with the necessity of other notice. But conceding that notice was necessary, its necessity was dispensed with in this case, for it was waived by the defendant in error by its failure to object by demurrer, answer, or otherwise in the court below to the want of notice. We are referred to the case of *Johnson v. Roach*, 83 App. Div. 351, 82 N. Y. Supp. 203, where it was held, under the New York statute, that the giving of the notice is a condition precedent to the maintenance of the action, and that it is necessary not only to allege notice in the complaint, but to prove it on the trial, and that the necessity of notice is not waived by the defendant in going to trial without raising an objection on that ground. To that doctrine we are unable to assent.

The judgment is reversed, and the cause is remanded for a new trial.

## McGRATH et al. v. VALENTINE

(Circuit Court of Appeals, Ninth Circuit. February 8, 1909.)

No. 1,610.

1. PUBLIC LANDS (§ 39\*)—ALASKA TOWN SITES—ACQUISITION OF TITLE.  
Under Act March 3, 1891, c. 561, §§ 11-14, 26 Stat. 1099, 1100 (U. S. Comp. St. 1901, pp. 1467, 1468), relating to town sites in Alaska, the legal title to town lots in Juneau can only be acquired from the town-site trustee, and his decision on all questions of fact is conclusive, in the absence of fraud, unless reversed on appeal to the land department.  
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 39.\*]
2. PLEADING (§ 126\*)—ANSWER—GENERAL DENIAL.  
Under the system of code pleading a general denial is as broad as the allegations denied, and a general denial of an allegation of value or damages cannot be treated as a negative pregnant and an admission of any value or damages less than the sum alleged.  
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. § 126.\*]
3. ADVERSE POSSESSION (§ 110\*)—PLEADING—SUFFICIENCY OF ANSWER.  
An allegation in an answer in an action in ejectment that defendant and his grantors had been for more than 20 years "in the actual, open, notorious, and exclusive possession" of the premises is not sufficient to raise the issue of adverse possession under Carter's Alaska Code, pt. 4, p. 354 (Code Civ. Proc. § 1042), which provides that "the uninterrupted, adverse, notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto except as against the United States," even with the additional allegation that defendant and his grantors were the actual owners during said time.  
[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ C36-645; Dec. Dig. § 110.\*]
4. PUBLIC LANDS (§ 39\*)—ALASKA TOWN SITES—POSSESSORY RIGHTS.  
Act May 17, 1884, c. 53, § 8, 23 Stat. 26, provided that Indians or other persons in Alaska "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands are reserved for future legislation by Congress." *Held* that, as to land within the town site of Juneau, such terms were prescribed by Act March 3, 1891, c. 561, §§ 11-14, 26 Stat. 1099, 1100 (U. S. Comp. St. 1901, pp. 1467, 1468), under which such town site was located, and which provided the manner in which occupants could obtain title and for the determination of possessory rights by the trustee.  
[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 39.\*]
5. PLEADING (§ 345\*)—MOTION FOR JUDGMENT ON PLEADINGS—EFFECT OF GENERAL DENIAL IN ANSWER.  
In an action of ejectment, where the answer not only denied the title of plaintiff, but as to certain of the property alleged title in defendant, it was error to render judgment for plaintiff on the pleadings.  
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.\*]

In Error to the District Court of the United States for the First Division of the District of Alaska.

The defendant in error brought ejectment against the plaintiffs in error to recover the possession of portions of lots 1, 2, and 3 in block 3, in the town of Juneau, Alaska, of which he claimed to be the owner, and from the pos-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

session of which he alleged he had been ousted by the plaintiffs in error, and to recover the rental value thereof, which he alleged to be \$1,152. The plaintiff in error McGrath answered, denying that the defendant in error was the owner of the premises sued for, "except as hereinafter stated." He made general denial of the allegation of the rental value, denying "each and every allegation therein contained." He then alleged as an affirmative defense, in substance, the following: That the town of Juneau was entered as a town site pursuant to the act of Congress of March 3, 1891, c. 561, 26 Stat. 1095 (U. S. Comp. St. 1901, p. 1535), and on September 4, 1897, a patent was issued to the town-site trustee; that in the year 1882 one Peter Erussand entered upon and took possession of a certain described parcel of land, in which was included all the land sued for; that the same was then the open, unoccupied, public domain of the United States; that on December 9, 1899, said McGrath, by mesne conveyances, acquired all the right of said Erussand, and since said date has been in the actual occupation and exclusive possession of said premises, and that all of said premises have been in the actual, open, notorious, and exclusive possession of the said plaintiff in error and his grantors since the year 1882; that on July 20, 1898, the defendant in error falsely and fraudulently, and with intent to impose on the trustee of the town site of Juneau, represented to him that he, the said defendant in error, and his grantors, were the owners of and in the possession of and entitled to the possession of said lots 1, 2, and 3 in block 3; that said trustee on July 20, 1898, did actually hear and determine, on said false and fraudulent statements as aforesaid, said question of occupancy and ownership of said lots, and, acting under the belief that said representations were true, executed to the defendant in error a trustee's deed conveying to him the said lots 1 and 3 in block 3; that the said McGrath never had any knowledge of said hearing, and no opportunity to deny said false statements or to prove that they were false at any time or place; that he was absent from Juneau at the time of the posting of the notices of hearing by the trustee, and remained absent, and had no knowledge that such notices had been posted, or that the trustee had intended to proceed to set aside and convey the lots within the exterior boundaries of the town site of Juneau to the occupants thereof, and he never knew of the application of said defendant in error for a trustee's deed, until after the lots had been conveyed to him; that the defendant in error well knew when he made such application that said McGrath was the owner of all the premises so located by Peter Erussand in 1882, and that the same had been occupied and possessed and owned by said McGrath and his grantors from 1882, and he well knew that the said McGrath was the owner of and in possession of and entitled to the possession of all the said premises so located by Peter Erussand, and well knew that the representations which he made to said trustee, upon which the said trustee acted, were false and fraudulent; that said conveyance of said trustee to said defendant in error is void for the reason that said McGrath had no notice of the hearing of said application; that the said trustee was without power to convey or deed said land to the defendant in error; that, before the said trustee had acted upon the defendant in error's application for lot 2 in block 3, said McGrath entered a protest against the issuance of any trust deed for said lot to defendant in error, and applied for a trustee's deed conveying a portion of said lot to himself, and on December 9, 1898, a hearing was begun before said trustee to determine the respective rights of the respective claimants thereto in said lot 2, block 3, which hearing was completed on March 17, 1899; that, after hearing all the testimony, said trustee on March 28, 1899, made and entered a decision in which he awarded to the said McGrath a certain described portion of said lot; that on appeal that ruling was confirmed by the Commissioner of the General Land Office and the Secretary of the Interior, and the said trustee thereupon conveyed said portion of said lot to said McGrath.

Upon this state of the pleadings the defendant in error moved for judgment thereon on the grounds: First, that his ownership under the patent to the town-site trustee was admitted by the answer; second, that the answer admitted the rental value to be any sum less than the amount alleged; third, that the affirmative matter so alleged in the answer constituted no defense.

On the hearing there was no application to amend or to answer further. The court allowed the motion, and rendered a judgment on the pleadings, adjudging the defendant in error to be the owner of and entitled to the possession of said land so described in the complaint.

Shackleford & Lyons and R. F. Lewis, for plaintiffs in error.  
Malony & Cobb, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). We find no error in the ruling of the court that the affirmative matter pleaded in the answer constituted no defense to the action as to the tracts in lots 1 and 3, particularly described in the complaint. In *Miller v. Margerie*, 149 Fed. 694, 79 C. C. A. 382, in a similar case, this court held that, under the law and the regulations of the Secretary of the Interior, persons claiming the right to obtain legal title to lots in the town of Juneau were required to make application therefor to the trustee of the town site, that the trustee was clothed with authority to investigate and determine the rights of all persons making such applications, and that his action thereon has the same legal effect as that of the register and receiver in passing upon a claim of right to enter public land under the homestead or pre-emption laws. Said the court:

"In the absence of fraud, accident, or mistake, his decision of all questions of fact arising in such a proceeding was final, except as the same might be reversed upon appeal to the Commissioner of the General Land Office and the Secretary of the Interior. This rule in relation to the effect of the decisions of the officers of the Land Department in disposing of public lands of the United States is well settled."

In that case the bill alleged that the plaintiffs had no knowledge of the hearing, or any opportunity to learn thereof, or any opportunity to deny the false statements or any part thereof, or to prove the statements or any part thereof false, at any time or place. A demurrer had been interposed to the bill on the ground that the same failed to state facts sufficient to constitute a cause of action, in that there were no allegations of fact showing how, or the means whereby the plaintiffs were prevented from having knowledge of the hearing before the town-site trustee, and there litigating the right of possession of the lot sued for, nor was it shown that such want of knowledge or any want of opportunity to be heard before said town-site trustee was induced or caused by the defendant. The court held that it was incumbent on the plaintiffs to allege facts showing that without negligence on their part they were prevented from appearing before the trustee and submitting evidence to establish their right to enter the property. It is contended that under the denials of the answer the court, on the motion for judgment on the pleadings, could not lawfully enter judgment against the plaintiffs in error for the rental value of the premises. The judgment was rendered for \$1,128, a sum less than that which was demanded in the complaint. The answer contained a general denial of the paragraph in which the rental value was alleged. The trial court regarded this denial as an admission of any sum less than the sum alleged. In other words, he treated it as a negative preg-

nant. The earlier decisions in some of the states where the code system of pleading prevails have held a general denial of an allegation of value to be an admission of the value alleged, or, at least, of any value less than the value so alleged. *Patterson v. Ely*, 19 Cal. 28; *Lynd v. Pickett*, 7 Minn. 184 (Gil. 128), 82 Am. Dec. 79; *Moulton v. Thompson*, 26 Minn. 120, 1 N. W. 836. But we think the better doctrine is expressed in 1 Encl. of Pleading & Practice, 796, where it is said:

"A negative pregnant can only arise by the interposing of a special denial. A general denial puts in issue every allegation in the pleading to which it is a denial. It can never be construed as a negative pregnant."

In *German American Bank v. White*, 38 Minn. 471, 38 N. W. 361, the former decisions of that state were overruled, and it was held that, where an action is brought to recover liquidated damages, the allegation of their amount is not traversable, and that a general denial puts in issue every allegation of the pleading which it denies, and can never be construed as a negative pregnant. That was held in a case in which the plaintiff sued for rents and profits of lands during the time they had been wrongfully withheld from him. In rejecting the doctrine of its former decisions, the court said:

"It is unsound in principle. A negative pregnant is a negative that implies an affirmative, and from its very nature such a negative can never be found in a general denial, which is a denial in gross of all the allegations of the pleading to which it is interposed. A general denial has as wide a scope as the allegations of the pleading which it denies, and puts in issue every fact alleged in it. *Bliss*, Code Pleading, § 332; 2 *Wait's Pr.* 419, 420, and cases cited. \* \* \* In every other state, so far as we can ascertain, in which the code system of pleading prevails, a general denial is held a good traverse of every allegation of the pleading to which it is interposed."

The plaintiffs in error contend that they were entitled to an opportunity to prove the allegations in the answer that McGrath and his grantors had been in the actual, open, notorious, and exclusive possession of the land in controversy continuously since 1882; citing Code Civ. Proc. pt. 4, § 1042 (*Carter's Code*, p. 354), as follows:

"The uninterrupted, adverse, notorious possession of real property under color and claim of title for seven years or more, shall be conclusively presumed to give title thereto except as against the United States."

But the answer failed to allege that the possession so relied upon was adverse or under claim of title. It went no further than to say that the possession was actual, open, notorious, and exclusive, and that McGrath and his grantors had been the actual owners of said premises during all of said time. Such allegations fall short of showing the adverse possession which is made a defense by the Code. *Tyee Con. Min. Co. v. Langstedt*, 121 Fed. 709, 58 C. C. A. 129. While we are disposed to construe liberally the allegations and denials of the answer, and, indeed, such is the command of the Alaskan Code, we are not at liberty to disregard vital defects of pleading, especially in view of the fact that there was opportunity to amend in the court below when the defects were pointed out, as they must have been on the motion for judgment on the pleadings. We must assume that the allegations of the answer were relied upon, in the form in which they were framed, as containing the pleader's expression of all grounds of

defense. It is to be observed, also, that the plaintiffs in error, in objecting to the judgment on the pleadings, made no objection on the ground that they had alleged adverse possession or were denied the opportunity to prove it.

It is contended that the plaintiff in error McGrath was entitled to the protection of his possession of the whole tract deeded to him by Erussand under the provisions of Act Cong. May 17, 1884, c. 53, § 8, 23 Stat. 26, which provides that Indians or other persons in the District of Alaska—

"shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands are reserved for future legislation by Congress."

In answer to this, it is sufficient to say that the terms under which any one in the possession of land included within the town site of Juneau might thereafter acquire title thereto were expressed in the act of Congress of March 3, 1891, above referred to, under which the land was patented to the town-site trustee in trust for the occupants thereof.

The answer denied the title of the defendant in error except as thereafter stated, and it not only admitted no title in him, to any portion of lot 2, but it expressly alleged title in McGrath as to a certain described portion thereof, in which is included the land in that lot which by the judgment was awarded to the defendant in error. This was a distinct issue, as to which the plaintiffs in error were entitled to a trial by jury, and as to which it was error to enter a judgment for the defendant in error on the pleadings.

For the errors pointed out, the judgment must be reversed, and the cause remanded to the court below for trial.

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WHISTLER v. MacDONALD et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,623.

**SPECIFIC PERFORMANCE (§ 79\*)—MINING PARTNERSHIP—RIGHTS OF PARTNERS.**

Defendant and one of the complainants entered into a mining partnership by which such complainant purchased and paid for a mining claim for the benefit of the partnership, and defendant, who was also engaged in other business, agreed to prospect and acquire other claims, his partner to furnish supplies and money when needed, which he did. Subsequently, when they had acquired other claims, the second complainant was admitted to an equal share in the partnership on payment of \$1,000, which was turned over to defendant, and with a part of which and by the exchange of other property of the partnership he purchased the interest of another in the claims in suit, which they had located jointly. Defendant afterward leased the claims on a royalty, and they proved valuable, whereupon he denied that they belonged to the partnership, and refused to account to complainants for any part of the royalty, although the evidence tended to show that he had previously recognized their interest therein. *Held*, that neither of the partnership contracts was within the statute of frauds, nor were they inequitable, being at will and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terminable at any time by either party, but were specifically enforceable and embraced the claims in controversy.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 79.\*]

Appeal from and in Error to the District Court of the United States for the Second Division of the District of Alaska.

The appellant appeals from a decree in which it was adjudged that he held the legal title to placer mining claim No. 5 on Wonder creek, and an undivided one-half interest in the placer mining claim known as "First Tier Bench, Right Limit on Wonder Creek," also known as the "Whistler Bench," in trust for a mining partnership consisting of himself and the appellees, and decreeing that he make the conveyances necessary to convey to the appellees each a one-third interest in said claims, and pay to the appellees their proportion of certain royalties derived by him from leases thereon. Upon the pleadings and the evidence, the court made the following findings of fact: That about the end of the year 1900, the appellee Macdonald purchased an undivided interest in a mining claim in the Second Division of the District of Alaska, at the instance of the appellant, with the understanding that the appellant should own one-half of the interest so purchased, and should look after the mutual interests of himself and said Macdonald; that at the same time the appellant agreed with said Macdonald that the latter should acquire other mining properties in the District of Alaska, and oversee, prospect, and develop the same, in all of which the said parties were to be equally interested, and Macdonald also agreed to furnish the appellant supplies, equipment, provisions, and money when needed, and to help him out in a general way, so that he would be able to attend to the mutual interests of himself and Macdonald when not attending to his own other business; that pursuant to that agreement, from that date on to June 16, 1903, Macdonald furnished everything to the appellant which the latter asked for, amounting in value to over \$500; that this arrangement was to continue until the parties had made a little stake, or something to divide, after which they were to divide up, and thereafter remain together or separate, as they should agree; that by June 16, 1903, the appellant had acquired by location some eight claims in his own name and one in Macdonald's name; that during that period the appellant was also engaged in the business of photography on his own account; that in the fall of 1903 the appellant requested Macdonald to dispose of an undivided one-fourth interest in their partnership properties for the purpose of raising the sum of \$800 with which to further develop their properties for the purposes of the partnership; that subsequently Macdonald represented to the appellee Carter the arrangement then existing between himself and the appellant, stating that the latter was to look after the properties then owned by himself and Macdonald, and to acquire other properties, and to oversee, prospect, and develop the same for their joint benefit as partners, and that if he, Carter, would contribute the sum of \$800, it would be used for the purposes mentioned, and that Carter would be entitled to a one-fourth interest in their enterprise, as well in the properties already acquired as in whatever mining properties the appellant should thereafter acquire through the continuance of their arrangement; that Carter accepted the proposition, and forwarded the sum of \$1,000, instead of \$800; that on June 16, 1903, Macdonald handed to the appellant the said sum of \$1,000, communicated to him the understanding between himself and Carter, to which the appellant agreed, accepted the \$1,000, and further agreed with Macdonald to make Carter's interest an equal one-third interest instead of one-fourth, in view of the payment of \$1,000 instead of \$800; that during the year 1903, and in the years 1904 and 1905, in addition to the \$1,000 paid in by Carter, Macdonald furnished further supplies, money, and its equivalent to the appellant, for the use of the enterprise, in the sum of \$722; that in the early part of the year 1904 the appellant acquired the legal title to the properties in controversy herein—claim No. 5 on Wonder creek, and an undivided one-half interest in the mining claim known as "First Tier Bench, Right Limit on Wonder Creek," also known as "Whistler Bench Claim"; that the first of these claims was located by the appellant

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and one Bayne, each having an undivided one-half interest therein, and that subsequently the appellant purchased Bayne's interest therein, and paid therefor \$250 out of the \$1,000 so paid in by Carter, the remainder of the consideration being the loss of an interest which the appellant had acquired in another of Bayne's properties, the title to which had been lost by the foreclosure of Bayne's mortgage thereon; that the appellant acquired a one-half interest in the Whistler Bench claim by a location thereof made by him jointly with another; that the appellant has made leases upon said two last claims, and royalties have become due from the lessees in the aggregate in the sum of \$18,759.56, of which sum the appellant has received \$6,083.06; that the appellant refuses to recognize the appellees as owners of any interest in said leased claims, and since the year 1905 has not requested Macdonald to make any further contributions under their agreement; that during the period from June 16, 1903, the appellant has been engaged in business for himself as a photographer. The records show that on September 10, 1903, the appellant joined with Macdonald in a conveyance to the appellee Carter of an undivided one-third interest in three mining claims.

John Rustgard, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for appellant.

Wm. Thomas, Mark L. Gerstle, Robert N. Frick, and Louis S. Beedy, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. (after stating the facts as above). The appellant contends that there was no valid binding contract of partnership, and that, if such a contract was made, it was so unfair and inequitable that a court of equity will not enforce it. Upon the evidence in the case we find no ground to question the correctness of the finding of the court below that the appellant and Macdonald, late in the year 1900, entered into a mining partnership. It is true that the testimony is not very definite as to the precise service each party was to contribute to the joint enterprise. Enough appears to show a general agreement by which Macdonald was to purchase an undivided interest in a certain mining claim for the benefit of himself and the appellant, and that the appellant was to acquire other mining properties in Alaska, to oversee, prospect, and develop the same for the joint benefit of himself and Macdonald, and that the latter was to furnish him supplies and money when needed, and that this agreement was carried out until the date when Carter became interested in the adventure. Prior to that date, the appellant and Macdonald had discussed and agreed upon the desirability of transferring an interest in the properties which they had acquired in order to raise money for development of the same. In pursuance of that understanding, on January 19, 1903, Macdonald wrote to Carter referring to the mining claims held by him and the appellant on joint account, and said:

"But just at present we are sorely in need of \$1,000.00 to help have them thoroughly prospected. Do you want to take a flyer at that price for an undivided  $\frac{1}{4}$  interest in the lot? He is to put in all his time and is doing so, while I keep working for our mutual benefit."

In a second letter to Carter of March 9, 1903, Macdonald wrote more at length, and, among other things, said:

"Think the matter over, and if you conclude to come in you know that at least you will get fair play in any good luck that may come our way. \* \* \*



There are new finds and new districts opening up all the time so that I would consider you as owning  $\frac{1}{4}$  of any new property that we may acquire."

Carter sent the \$1,000 to Macdonald, and he turned it over to the appellant. The appellant wrote to Carter thanking him "very sincerely" for the \$1,000, and for the confidence Carter had reposed in him by placing it at his disposal. The appellant and Macdonald agreed that Carter's interest should be one-third instead of one-fourth, and on September 10, 1903, the appellant and Macdonald joined in a deed to Carter of an undivided one-third interest in certain placer mining claims. On January 1, 1904, the two claims in controversy in this suit were located. Claim No. 5 on Wonder creek was located by the appellant and one Bayne. The claim known as "Whistler Bench" was located by the appellant and one Sturtevant. Bayne's one-half interest in the first claim was thereafter transferred to the appellant for \$250 cash, and in further consideration of the loss of a one-half interest in another claim in which the appellant and Bayne had been jointly interested, but which had been lost through a mortgage made by Bayne. The appellant earnestly contends that in acquiring these properties he was acting on his own behalf, and not on behalf of the partnership. The trial court found otherwise, and, upon a consideration of the whole evidence, we think the finding is sustained. The appellant, it is true, was not bound by his promise to go on acquiring other mining properties for the benefit of the partnership. He could at any time have declined to proceed further in the acquisition of such properties, but he gave no notice of any such intention. The \$250 which he paid Bayne was paid out of the money contributed by Carter. The remainder of the consideration for Bayne's interest was an equity accruing out of the loss of a claim on Dahl creek in which Bayne and the appellant had been jointly interested. That the interest in that claim, although standing in the appellant's name, had been held by him for the joint benefit of himself and the partnership, is indicated by the appellant's letter of December 9, 1903, in which he writes to Macdonald of his hope of getting money out of that claim for use in developing other properties of the partnership. As late as November 26, 1905, the appellant wrote to Macdonald about No. 5 on Wonder creek, saying:

"Some laymen are on it and they have got onto a little streak of gold-bearing gravel that may turn out good at any time. It would set me on my feet next spring and give me a fresh start and something to prospect our other ground with."

Macdonald testified that, after paying the appellant the money received from Carter, he did not again see the appellant until June, 1904, and that then he accused him of misappropriating the money, but that the appellant made an evasive answer and seemed excited and emotional, and that he, Macdonald, did not like to press him. He testified further that in September, 1906, he had a conversation with the appellant in which the latter admitted receiving \$2,800 royalties on the lease, and said, "But I am not in a position to talk money now to either you or Carter," to which Macdonald replied, "That is all right. You know that I know that you are in a bad position, having your wife sick outside, and need all the money. We will wait until things

adjust themselves next year;" and that the appellant replied that he "would be able to next year." Macdonald testified that during the winter of 1907 he again took up the matter of these properties now in controversy by writing a letter to the appellant. In response, the appellant wrote:

"I am going to do just what I planned out in the first place as soon as I found it was likely to bring me in a little money, and that is to refund Carter his \$1,000.00 until such time as we realize from some of our Kougarok claims, and to replace the \$300.00 in the Bank of Commerce that I unfortunately drew out of yours in 1900. Had I owned the ground when I sold to you and Carter, it would have gone in with it. I made no reservations. When I went out and staked it, I hardly thought it was worth the \$2.50 to record, and had it been a 160 acre tract or anything of that kind, both yourself and Carter would have been in it. If you look up your name in the recording books, they will prove it. If the claims had turned out good so much the better. Had I cut 25% royalty up into three, it would not mean a grub stake for anybody, so I do not intend to do it. By having a few dollars, I shall be in a better position to attend to our other properties."

This letter can only be regarded as an admission by the appellant that he had not dealt fairly with the appellees. Why should he offer to refund to Carter the money which he had contributed, and to Macdonald the original purchase price of the first claim in which they became jointly interested? According to his own version of the agreement, he was not only not indebted to either of the appellees in any sum whatever, but he was under no moral or equitable obligation to repay them any sum. His whole letter seems to suggest that he thought that he, through whose immediate services these two valuable properties had been acquired, ought in justice to be entitled to the benefit thereof, and that the other partners, who had not gone into the field nor incurred any of the hardships of prospecting, ought to be content to get back the money which they had paid in. That this was in his mind is foreshadowed by some of his previous letters, in which he referred to the work he had done and the privations he had endured. It is an attitude of mind which, we have had occasion to discover, is not infrequent with the grub stake prospector when the obligation of the grub stake contract is subjected to the strain which follows upon a rich discovery of mineral.

Neither the first nor the second partnership agreement was void as within the statute of frauds. *Shea v. Nilima*, 133 Fed. 209, 66 C. C. A. 263, and cases there cited. Nor is the case one in which equity should deny specific performance on the ground that the contract was inequitable or unfair. So far as the equities are concerned, the contract is not to be distinguished from a grub stake contract. The appellees did not contribute large sums of money, but it appears from the evidence that they did all that they contracted to do. Nor did the appellant contribute his whole time to the enterprise. He was carrying on other business at the same time. It was a partnership at will. The appellant could have terminated it at any time on giving notice to the other partners. He did not choose to do so, and the fact that while carrying out the partnership agreement he acquired mining claims of considerable value, far beyond the value of the sums contributed by the appellees, is no ground for denying specific perform-

ance. The appellant seeks to draw a parallel between this case and the case of *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N. S.) 317, decided by this court. But that case differs essentially from this. It was a case in which, for a consideration of \$1,000 and the cancellation of an old debt, one of the parties agreed to convey to the other a one-fifth interest in any and all property which he might thereafter at any time acquire by location, purchase, or otherwise in the territory of Alaska. It was sought under that agreement to obtain a decree for a one-fifth interest in property, valued at \$750,000, "acquired by location, purchase, and otherwise." Specific performance was denied on the ground that the contract was vague, uncertain, and perpetual, and because its enforcement would be unconscionable.

There is no merit in the appellant's contention that relief should be denied because of the laches of the appellees. It was not until March 15, 1907, that the appellees had notice that the appellant intended to assert title to the mining claims in controversy adversely to them. The conversation had in the preceding September, so far from showing such an intention, is rather to be construed as an admission of a contrary purpose. The present suit was brought on May 9, 1907.

The decree is affirmed.

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### MONTELLO BRICK CO. v. TREXLER.

(Circuit Court of Appeals, Third Circuit. February 15, 1909.)

No. 58.

**1. FIXTURES (§ 27\*)—RIGHT OF TENANT TO REMOVE TRADE FIXTURES—CONSTRUCTION OF LEASE.**

Covenants restricting or claimed to restrict the tenant's ordinary right to remove trade fixtures are always strictly construed, and cannot be extended by implication.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 22; Dec. Dig. § 27.\*]

**2. BANKRUPTCY (§ 140\*)—TRADE FIXTURES BUILT BY BANKRUPT LESSEE—RIGHT OF TRUSTEE TO REMOVE.**

A lease for a long term of three brick plants and a separate tract of farm land described, as included therein, the real estate, "together with all its brick plants, works, \* \* \* now held or owned or leased by (lessor) or which \* \* \* may be acquired by (lessor), and all erections, extensions or additions to the same which may at any time hereafter be located or constructed on the premises," and required the lessee on the termination of the lease to return "the demised premises in good order and condition, with all improvements, additions and extensions, without any compensation to be paid for said improvements, additions and extensions." The lessor and lessee were corporations, the stockholders and directors of which were the same. The lessee built on the farm land a new and extensive brick plant, at a cost of \$770,000, with borrowed money which was unpaid when it became a bankrupt. It carried such plant on its books as an asset. *Held* that, especially in view of the relations between the parties, such provisions of the lease could not be construed to give the lessor the right to hold such plant as against the creditors of the bankrupt, but that the latter's trustee was entitled to remove it as a trade fixture.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 140.\*]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania, in Bankruptcy. For opinion below, see 163 Fed. 624.

Charles Henry Jones, Richmond L. Jones, and John G. Johnson, for petitioner.

Harry F. Kantner, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and ARCHBALD, District Judge.

BUFFINGTON, Circuit Judge. In the court below, the Montello Brick Works, a corporation, was adjudged bankrupt December 10, 1907. That company on January 1, 1903, had leased from the Montello Brick Company, a corporation, for the term of 999 years, three extensive brick plants which the latter company had been operating. In addition to the premises on which these plants stood, there was also leased a disconnected tract of farm land of 30 acres. Subsequently, the lessee determined to erect a fourth plant, to make brick under a new process. It borrowed large sums, which remain unpaid, and therewith built an extensive plant on the 30-acre farm. On the bankruptcy of the Montello Brick Works, the lessee, the trustee claimed the right to remove, as a trade fixture, the plant the lessee had thus erected. The court so ordered, whereupon the Montello Brick Company, the lessor, filed this petition to review such order.

The petitioner concedes that the brick plant in question, while of a substantial character, is a trade fixture, and falls under the general rule that trade fixtures are subject to timely removal by a lessee. It contends, however, that this plant which the lessee has built and paid for is excepted from the trade removal rule by reason of the provisions of the lease that:

"At the expiration of the term hereby created, or earlier termination in the way herein provided, Montello Brick Works shall return and surrender to Montello Brick Company the demised premises in good order and condition, with all improvements, additions and extensions without any compensation to be paid for said improvements, additions and extensions by Montello Brick Company."

In construing this lease, the burden is on the lessor to show a clear intent to except this trade fixture plant from the general trade fixture rule. That rule is one favored by courts, since it not only tends to foster trade, but enables landowners to rent their lands to advantage for trade use by others. In *Fox v. Lynch*, 71 N. J. Eq. 537, 64 Atl. 439, it is said:

"Covenants restricting or claiming to restrict the tenant's ordinary right to remove trade fixtures are always strictly construed, and cannot be extended by implication."

Reference may also be made to cases cited in 13 Amer. & Eng. Ency. of Law, p. 644. Now the lessor's contention is that this new plant, although not then erected, formed part of the premises leased, and is covered by the inclusive descriptive clause, which, following the description of three existing plants and the farm land, provides:

"Together with all its brick plants, works, machinery, fixtures, shops, buildings, structures, stables, improvements, tenements and hereditaments of whatever kind or description and wherever situate, now held or owned or leased by Montello Brick Company, or which, at any time hereafter, during the term of this demise, may be acquired by Montello Brick Company; and all erections, extensions or additions to the same which may at any time hereafter be located or constructed on the premises."

This clause, and particularly the part in italics, it is alleged, embraced the plant thereafter built on the farm land, and subjected it to a return to the lessor under the subsequent clause of the lease which is quoted above. It will thus be observed that no general principles of law are involved, but the case turns on the meaning of this particular lease. With a view to ascertain that intent, it is to be noted that the lease was not an improvement one, such as is entered into for the purpose of improving property by erections which at its termination shall become the property of the lessor as a partial compensation for the term. The property was already improved for trade purposes; three large brickmaking plants were on it, and the intent was, as stated in the lease, that the lessee was to "conduct, continue and extend the business now carried on by Montello Brick Company as fully and entirely as Montello Brick Company can or could do." Indeed, the shareholders and directors of both companies were substantially the same, and the premises were leased to enable the lessor to finance it. As the lessee undertook to pay a rental in the shape of dividends direct to the stockholders of the lessor, it is manifest that the stockholders of that company, through the agency of this lease, undertook to carry on business for themselves as stockholders of the lessee company without involving their plant in liability. This they have done, and the premises they leased are now returned to them unincumbered at the end of their disastrous venture. But they seek in addition to acquire, as an incident to 30 acres of farm land which cost them \$9,000, a trade plant thereon which cost the lessee some \$770,000. Now, when we consider that this plant was built with the money which the lessee obtained from creditors who still remain unpaid, and that the lessee on its books and in its statements on which credit was obtained carried this plant as an asset of its own, we have a construction placed on this lease by the parties themselves that cannot be lightly disregarded. True, the act of a lessee in claiming ownership of a plant as an asset could not ordinarily affect a lessor, but when, as here, the board of directors and shareholders of the two companies were the same, and they permitted such statements to be issued without objection, there is ground for saying that such acts fairly evidence the construction which all parties in interest in both companies placed upon the lease. "Tell me," said Sugden, Lord Chancellor, in *Attorney General v. Drummond*, 1 Drury & Warren, 368, "what you have done under such a deed, and I will tell you what that deed means." And their acts in treating this new plant as an asset of the company were in accord with the proper construction of the lease. In the first place, the document contemplated new erections as distinguished from the then existing works of the lessor, for the lease authorized the lessee "to erect such other works as in the judgment of Montello Brick Works may be advisable." Now, this

clause evidently referred to works not already provided for (else it was needlessly inserted), and was meant to refer to future and different erections than those mentioned in the descriptive clause preceding, viz.:

"Together with all its brick plants, works \* \* \* now held or owned or leased by Montello Brick Company, or which \* \* \* may be acquired by Montello Brick Company, and all erections, extensions or additions to the same which may at any time hereafter be located or constructed on the premises."

Indeed, the clause last quoted shows that, so far as brick plants are concerned (and it will be observed that the subject of the present controversy is a brick plant, and not a mere addition to a plant), the parties contemplated two classes of plants in such clause, viz.: First, the three plants then existing; and, secondly, those that might thereafter be acquired. The express mention of these two classes was an exclusion of others. And this implied exclusion is emphasized by the fact that in a later clause the attention of the parties was called to a third kind of plant, viz., when the lessee was authorized "to erect such other works as in the judgment of Montello Brick Works may be advisable." Moreover, the provisions for the insurance, maintenance, repair, and replacement undertaken by the lessee did not cover new plants which it might erect under the clause just quoted, so that if the contention of the petitioner is correct this new plant, which is claimed belonged to it as lessor, the lessee was not bound to insure, etc. It is therefore manifest that the words "to the same" in that part of the clause which reads, "and all erections, extensions or additions to the same which may at any time hereafter be located or constructed on the premises," refer to plants in esse, viz., "now held, or owned or leased by Montello Brick Company," and only to those particular in futuro ones, viz., which "may be acquired by Montello Brick Company."

We are therefore of opinion that a new and separate plant built by the lessee was not included in the descriptive clause above quoted; and that clause only referred to the three plants of the lessor then existing and to such future ones as it might acquire. It was conceded at the argument that unless the clause we have quoted embraced the new plant here in question, and made it part of the demised premises, there was no obligation to return it by virtue of the subsequent clause, which has been quoted. And, indeed, the fact that the return clause which, so far as structures are concerned, only embraced "all improvements, additions and extensions" (words which more aptly describe that which was done to existing plants than designate wholly new erections), would seem to strengthen the construction we have placed on the main clause.

After careful consideration, we are of opinion the order of the court should not be disturbed. That it did substantial justice we are certain, and to reverse it would take the ownership of this building from those who helped pay for it and give it to those who did not. In affirming this decree and treating this plant as an asset of the company, we are but enforcing the intent of those who, while the lessee was operating, treated it as an asset of that company.

The petition to review is therefore dismissed.

## In re CINCINNATI IRON STORE CO.

## BEISER v. WESTERN GERMAN BANK.

(Circuit Court of Appeals, Sixth Circuit. February 22, 1909.

Nos. 1838, 1839.

## 1. CORPORATIONS (§ 413\*)—REPRESENTATION BY OFFICERS—GIVING SECURITY FOR BORROWED MONEY.

The borrowing of money and giving security therefor by a corporation by its president, who was also a director and the largest stockholder, with the approval of an advisory committee created by the board of directors, who had knowledge of the general custom to make such loans and give such security, was by the implied authority of the directors, and the security so given is valid as against the corporation and its trustee in bankruptcy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1648; Dec. Dig. § 413.\*]

## 2. ASSIGNMENTS (§ 12\*)—VALIDITY—FUTURE EARNINGS UNDER EXISTING CONTRACTS.

A bridge company, engaged in building bridges under contract, from time to time borrowed money from a bank for use in its business, for which it would give the bank a note and also a written assignment of the money to become due under a particular contract described, which assignments were entered on the company's books. The contracts were retained by the company, which made the collections thereon, the debtors not being notified of the assignments. At the time of the bankruptcy of the company the bank held a number of such assignments, and the company had collected payments thereon, which it had not paid over to the bank but used in its business; but other payments remained unpaid. *Held*, that the assignments were valid between the parties as to such payments, and as against the company's trustee in bankruptcy, who represented only general creditors.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 20; Dec. Dig. § 12.\*]

## 3. PLEDGES (§ 11\*)—VALIDITY—DELIVERY OF POSSESSION.

A bridge company borrowed money from a bank, and as security for its repayment pledged a quantity of structural iron then in its possession. The pledged iron was set apart in piles on the company's premises, and the piles were marked by numbers and taken possession of by a designated employé of the company as agent for the bank, who issued a receipt therefor as such agent. The transaction was in good faith, and the piles remained intact until the company was adjudged a bankrupt. *Held*, that there was sufficient delivery to pass the property, and that the pledge was valid.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 31-35; Dec. Dig. § 11.\*]

Appeal from the District Court of the United States for the Southern District of Ohio.

C. W. Baker and H. C. Busch, for appellant.

F. H. Shaffer and H. D. Peck, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge. The Brackett Bridge Company, an Ohio corporation doing business at Glendale, Ohio, was adjudged bankrupt July 3, 1906. The Western German Bank claimed and was allowed preferential liens, under alleged equitable assignments from the bridge company, of payments to be made under construction contracts made by the bridge company with various parties, as well as upon a quantity of structural iron pledged by the bridge company to the bank. The case is brought to this court under both the appellate and revisory authority conferred by the bankrupt act. The fact that both remedies are invoked makes it unnecessary to consider which is, under the circumstances, the proper remedy, a subject which will be found discussed in various decisions of this court, from *Cunningham v. German Ins. Bank*, 103 Fed. 932, 935, 43 C. C. A. 377, to *In re Doran*, 154 Fed. 467, 468, 83 C. C. A. 265. No attack is here made upon the validity of the indebtedness claimed to be secured by the liens in question. The assault is made upon the validity of the assignments of the payments made under construction contracts, as well as of the pledge of the structural iron. The grounds of this assault will appear as the opinion progresses.

1. The first asserted ground of invalidity of the assignments and pledge is that they were not authorized by the board of directors. It is not alleged that the giving of these securities was beyond the authority of the corporation. On the other hand, it is expressly conceded in the briefs of counsel for the trustee that the corporation had the power to give the security. The notes containing the collateral assignments were signed on behalf of the bridge company by F. J. P. Brackett, president, and George A. Brackett, secretary, at least two of the notes being signed also by the members of the advisory committee hereafter referred to. The first of the assignments was made April 6, 1904. Others, either originals or renewals, were given from time to time until shortly before the bankruptcy. The president owned a very large majority of the common stock of the corporation, and was the practical bridge manufacturer and the general manager of the corporation. For several years before the bankruptcy, including the entire period covered by the securities in question, the president had been allowed practical charge of all the financial business of the company, including the borrowing of money, except that in 1903 the board of directors, by resolution, created a so-called advisory board "for the purpose of considering and passing on all contracts aggregating \$5,000.00 or more and such other business of the company as might come before it." This board consisted of the president and two other members. There was but one director in addition to these three and the secretary.

The method of raising money upon the securities was this: When the bridge company had a contract for the carrying out of which money was needed, it presented to the bank with its application for loan an assignment of the payments to be made under the contract. The money was loaned upon the strength of the assignment, passed to the credit of the bridge company, and by it checked out in the regular and lawful transaction of its business and for its direct benefit. The testimony is express and uncontradicted that the members of the



advisory committee were familiar with the transactions in question, and that the notes and assignments were made after consultation with them. As already said, some of the collateral notes in question were actually signed by all the members of the advisory committee. It clearly appears that by the acquiescence of the directors and stockholders, and through the creation of the advisory board, the president, with the advice and assistance of that board, throughout the entire period covered by the securities in question assumed and exercised the functions of the board of directors with respect to the making of loans and the giving of securities, and that the directors knew of, and, at least impliedly approved, the general course of dealing on the part of the officers and the advisory board with respect to the borrowing of money at the bank and the giving of security therefor. The borrowing of the money upon the pledge of the structural iron was made in the same general way as that loaned upon the assignments of payments under construction contracts. The assignments and pledge in question had thus the implied, if not the express, approval of the board of directors of the bridge company, and the transactions in question were necessary to the operation of the business of that company. In these circumstances, the action of the officers in giving the assignments and pledge in question was as binding upon the corporation as if such action had been authorized by express resolution of the board of directors. *Preston Nat. Bank v. Purifier Co.*, 84 Mich. 364, 381, 47 N. W. 502; *Cunningham v. German Ins. Bank*, 101 Fed. 977, 980, 981, 41 C. C. A. 609; *Mining Co. v. Anglo-California Bank*, 104 U. S. 192, 194, 26 L. Ed. 707; *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 650, 22 Sup. Ct. 240, 46 L. Ed. 366; *Sherman v. Fitch*, 98 Mass. 59. The securities being valid against the corporation, so that it is estopped to deny their validity, the trustee in bankruptcy is equally estopped, as the trustee is vested with no better title to the bankrupt's property than the bankrupt itself possessed at the time it passed to the trustee. *York Manfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. It must be held that the securities were issued by due authority.

2. The validity of the assignments of the payments under the construction contracts is assailed as being void as to creditors represented by the trustee: first, as being secret and unknown to other creditors of the bankrupt; second, for the reason that the assignor (the bridge company) retained (as alleged) full dominion and control over the assigned claims; third, that the alleged assignments are mere promises to pay out of the moneys obtained under the construction contracts; fourth, that no notice of the fact of the assignment was given to the debtors under the assigned contracts; and, fifth, that, if the assignments are valid at all, they are so valid only to the extent of the particular payments specified, and that such specified and assigned payments had been before the bankruptcy collected by the bridge company, leaving nothing for the assignment to operate upon.

The facts necessary to an understanding of these objections are these: As security for the payment of each loan, the bridge company gave a note reciting the assignment as security, together with a separate instrument of assignment. The forms used in each case were

the same, except in one particular hereafter mentioned. That used in connection with the loan on account of the Elizabethtown bridge is thus (with the exception noted) sufficiently illustrative. The note in that case contained this clause:

"Having deposited or pledged as collateral security for the payment of this note, No. 1769, Hamilton county, Ohio, for \$119,500.00 for the construction of Elizabethtown bridge"

—this clause being followed by a power of sale; the assignment being in this language:

"In consideration of \$15,000.00 loan made to us this day by the Western German Bank, Cincinnati, Ohio, for four months, we hereby transfer to them our claim as follows—in course of construction at our factory or in the course of erection, contract No. 1769, Hamilton county, Ohio, \$119,500.00: said loan to be paid out of the first money received on said claim and as received, except the first estimate."

The exception above noted is that in each of the other assignments the words "except the first estimate" are omitted. In the case of each loan the assignment was entered in full upon the books of the bridge company, and, in advance of the payment over of the money, was given to the bank with a notarial certificate attached that "the above is a true and correct copy of the entry as made this day on the books of the Brackett Bridge Company, Cincinnati, Ohio." This assignment was not filed or recorded in any public office. The bank did not keep the assignments "secret," except in the sense that they were not made public. The bridge company retained possession of the contract, and payments were made directly to it, the debtors under the construction contracts not being notified of the assignment. The bank had obviously the power to make the collections itself, had it desired to do so. The bridge company was under obligation to turn over to the bank all payments made as fast as collected. The bank expected that such course would be taken. In fact, the greater part of the payments made up to the time of the bankruptcy had been retained by the bridge company, and used in the regular transaction of its business. Large amounts, however, still remained unpaid upon the contracts in question, and it is upon these unpaid amounts that the lien of the bank was claimed and allowed. The trustee represents only general creditors, none claiming preferential liens, and none having fastened or attempted to fasten upon the property in question by attachment or other special proceeding. The action of the bank in making the loans, and in its treatment of the security, is shown to have been in good faith and with the design only of protecting its own interests in connection with the loans.

It should be noted that no question of preference under the bankrupt act is involved, it being conceded that all the preferences claimed were made more than four months before bankruptcy intervened. The subject of the validity of an assignment of the nature of those in question here is not in Ohio regulated by statute, and we are cited to no decisions of the courts of that state declaring an assignment of this nature invalid as between the original parties thereto. The validity of the assignments must therefore depend upon equitable principles applicable to the general law. It may be said, in passing, that

even if the Ohio statutes relating to the recording of mortgages of personal property were held applicable to the case of these assignments, the situation would not be altered, for the reason that under the laws of that state no creditors are entitled to complain of the lack of record except those who have fastened upon the property by some specific lien. *Wilson v. Leslie*, 20 Ohio, 161; *York Manfg. Co. v. Cassell*, *supra*. Inasmuch as the trustee in bankruptcy is vested with no better title than the bankrupt had when the trustee's title accrued, the validity of these assignments must, for the purposes of this inquiry (and in the absence of fraud), be determined by their validity or invalidity as against the bridge company. It is not open to question that under the general law assignments such as those in question, made in good faith, to enable the debtor to raise money for carrying on its business, are valid as against the debtor, notwithstanding no notice was given creditors, and in spite of the fact that the claims assigned remain in the debtor's possession. *Preston Nat. Bank v. Purifier Co.*, *supra*; *Union Trust Co. v. Bulkeley*, 150 Fed. 510, 80 C. C. A. 328. There being no fraud, the question of invalidity, as resting upon a lack of notice and of retention of dominion by the assignor, is disposed of by the foregoing considerations.

The assignments in question are not mere promises to pay money. They are assignments of "our claim," and relate to the moneys to be earned by the assignor through the performance of the contract. An assignment of future earnings from personal employment is valid (*Rodijkeit v. Andrews*, 74 Ohio St. 104, 77 N. E. 747), and, notwithstanding the assignment was of a part only of the moneys to be earned. In *Union Trust Co. v. Bulkeley*, *supra*, the assignment which was held valid was of accounts and bills receivable to be thereafter acquired. There is no reason for asserting a different rule as against the assignments of moneys to be earned under a construction contract.

It is not necessary to the validity of the assignments as against the assignor that those liable to pay the claims assigned be notified of the assignment. *Thayer v. Daniels*, 113 Mass. 129; *Marsh v. Garney*, 69 N. H. 236, 45 Atl. 745; *Copeland v. Manton*, 22 Ohio St. 404. No question of lack of notice is raised by the debtors, nor have they been prejudiced by the assertion of rights of other claimants to the fund. The contest is entirely between the assignee and the one standing in the shoes of the assignor.

The proposition that the rights of the bank have been lost by the failure to enforce payment out of the first money received applicable to the payment cannot be sustained. The assignment was not merely of the first money received on the claim: it was of the entire claim, so far as necessary to meet the debt secured. The provision for payment out of the first moneys received was manifestly for the benefit of the bank. If, without surrendering its right to later payments, it failed to receive the earlier payments, the bridge company had no right to object to the enforcement of the lien out of the later payments. There is a lack of satisfactory evidence that the bank ever intentionally relinquished its claim upon the funds assigned. The testimony indicates that the bank supposed it was actually getting the moneys as fast as received. If this is so, the bridge company would

not be permitted to object to the enforcement of the lien as against later payments; but, in the absence of such testimony, it would be inferred, from lack of testimony to the contrary, that the intention of the parties was that the liability should attach to later payments.

The objection that the lien is lost is thus not only without legal sanction, but is without equity, in view of the fact that the bankrupt estate has been benefited by the payments retained by the debtor. In our opinion, the assignments of the moneys arising under construction contracts must be held valid and enforceable.

3. As to the pledge of the structural iron: On February 17, 1906, the bridge company arranged for a loan at the bank of \$15,000, to be secured by a pledge of 520 tons of structural iron, viz., 350 tons of I-beams and 170 tons of channels. The bridge company had this material on hand at the time. It accordingly executed a written transfer of the iron in these words:

"In consideration of \$15,000.00 advanced to us this day by the Western German Bank, Cincinnati, Ohio, we hereby transfer to them as follows: 350 tons of I-beams as designed and marked lot No. 10, 170 tons of channels as designed and marked lot No. 12, 520 tons at \$36.60 per ton, \$19,032.00. The above material to be the property of the Western German Bank and to be used only on the payment of the above loan or such portion as paid from time to time."

It then set aside the 350 tons of I-beams in different piles in the yard, and had them marked as lot No. 10. At the same time it set apart 170 tons of channels in different piles, marking them lot No. 12. These lots 10 and 12 were given into the custody of one Greer, a shipping clerk of the bridge company, with instructions to retain the custody on behalf of the bank and to keep the pledged iron intact. He accordingly checked over the piles, found them to aggregate the amounts stated, and gave a receipt reading:

"As warehouse custodian for the Western German Bank, I have this day received from the Brackett Bridge Company 350 tons of I-beams designated as lot No. 10 and 170 tons of channels designated as lot No. 12. Said material is stored on the premises of the Brackett Bridge Company, is to be held intact and to be subject to the order of the Western German Bank."

The assignment was entered upon the stock book of the bridge company, and (accompanied by a notarial certificate of such entry) was delivered to the bank, together with the custodian's receipt before the money was loaned.

The objections to the validity of this pledge are: First, that it was not made in good faith, but in actual fraud; second, that there was no delivery of the iron, but that the pledgor retained possession and control of the iron and had the right to use it, no notice being given creditors; and, third, that the pledgor actually used the iron and that thus nothing remained for the pledge to attach to.

The evidence satisfies us of the good faith of the transaction. There is testimony tending to show that a portion at least of the pledged iron had been used; also that it had not been kept apart from the other property of the bridge company. There was also testimony of statements to third persons by the president of the bridge company inconsistent with the existence of a pledge of this stock. We are satis-

fied, however (as were evidently the referee and the District Judge), from the testimony on the part of the custodian and others, that the pledged iron was from the time of the making of the pledge until the bankruptcy kept apart from the other material of the bridge company, and retained in the sole custody of the original custodian entirely intact. In our opinion, a valid pledge of this stock was created and maintained as against the bridge company and its trustee in bankruptcy. If actual delivery of the thing pledged is necessary where, as here, the question arises between the pledgee, and one "standing in the shoes of the pledgor," then there must have been such a setting apart of the thing pledged and such change of possession as would preclude the right of the bridge company to control the disposition of and to use the iron without the approval of the bank. The provision in the written transfer relative to use by the bridge company only on payment of the loan in whole or in part, taken in connection with the custody of the iron by the third person, gave the company no right to use the iron without the previous assent of the bank. No such assent was ever given or asked for. A change of possession to the extent of furnishing notice to third persons becomes immaterial, as no rights of such third persons have intervened. The mere fact that the iron was stored on the premises of the pledgor company did not invalidate the pledge, provided the possession was actually changed from the pledgor to the pledgee, and the pledgor's dominion over the property otherwise removed. *Love v. Export Storage Co.*, 143 Fed. 1, 74 C. C. A. 155; *Union Trust Co. v. Wilson*, 198 U. S. 534, 25 Sup. Ct. 766, 49 L. Ed. 1154. Nor is the fact that the custodian was an employé of the bridge company, and in its sole pay, necessarily inconsistent with his lawfully and effectually acting as the representative of the bank, and with his possession being regarded in law as that of the bank. *Sumner v. Hamlet*, 12 Pick. (Mass.) 36; *Moors v. Wyman*, 146 Mass. 60, 15 N. E. 104; *Dunn v. Train*, 125 Fed. 221, 60 C. C. A. 113. The bank had agreed with the bridge company upon the custodian before the loan was made. The fact that the bank did not meet the custodian personally is immaterial. The rule is that in order to make a pledge valid the delivery must be such as to pass property, and that this rule is satisfied by depositing the pledged articles in any suitable place, provided the pledgee personally or by his representative has the absolute control over them and the right and power to take them away if he pleases. The evidence satisfies us of the fact of actual delivery, and of actual control and dominion by the bank over the pledged property, and with a parting of possession and dominion on the part of the bridge company. Had the latter converted to its own use any of the property in question without the consent of the bank, it would clearly have been liable to an action therefor.

In our opinion, the validity of this pledge is sustained upon well-settled principles, recognized in the authorities above cited. The case presented differs radically from that of *Security Warehousing Company v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, in which case the alleged change of possession was characterized as "a mere pretense, a sham."

The District Court correctly held that the claimant is entitled to the preferential liens claimed, and its order will be affirmed.

## O'HALLORAN et al. v. McGUIRK.

(Circuit Court of Appeals, First Circuit. February 18, 1909.)

No. 777.

## 1. APPEAL AND ERROR (§ 241\*)—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW—MOTION FOR DIRECTION OF VERDICT.

The fact that a motion for direction of a verdict was general on the whole record will not preclude a review of the ruling thereon by the Circuit Court of Appeals, where it is apparent that the propositions relied on were fully presented to the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1413, 1416; Dec. Dig. § 241.\*]

## 2. COURTS (§ 365\*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

What constitutes a misnomer in a criminal complaint or warrant for violation of the laws of the state is a local question, as to which the federal courts will follow the settled rule of the state courts, in the absence of any statute on the subject.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 955; Dec. Dig. § 365.\*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

## 3. FALSE IMPRISONMENT (§ 7\*)—ILLEGALITY OF ARREST—MISNOMER OF DEFENDANT—MASSACHUSETTS STATUTE.

Under Rev. Laws Mass. 1902, c. 218, § 19, which provides that an indictment of a defendant by a fictitious or erroneous name shall not be ground for abatement, and section 67, which extends the provisions of the chapter to complaints as well as indictments, the omission of the middle name of a defendant from a complaint or warrant is not a misnomer which will give the defendant a right of action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 10; Dec. Dig. § 7.\*]

## 4. ARREST (§ 65\*)—CRIMINAL CHARGE—AUTHORITY UNDER WARRANT.

While an officer making an arrest by virtue of a warrant need not exhibit the same until asked for, he must have the warrant in his possession.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 163, 164; Dec. Dig. § 65.\*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Boyd B. Jones (Winfield S. Slocum, on the brief), for plaintiffs in error.

Jesse C. Ivy (Charles S. Ensign, Jr., on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This was a suit for an alleged illegal arrest by an officer proceeding under a criminal warrant in the state of Massachusetts. The arrest is alleged to have been illegal for two reasons: First, because of an alleged misnomer in the warrant; and, second, because it is maintained that at the time the arrest was made,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the officer did not have the warrant with him. The verdict was for the plaintiff, and the defendants sued out this writ of error. It is convenient to call the parties plaintiff and defendants, in the same way in which they were described in the Circuit Court.

There were two counts in the declaration, but the jury returned a general verdict. The plaintiff maintains that, as the jury found a general verdict, any exceptions by the defendants to the ruling of the court relating to the misnomer only, even if sustained, would not be sufficient to set aside the verdict. She makes the same claim as to any ruling relating to the proposition that the warrant was out of the possession of the officer when the arrest was made. This is not the law in civil cases, though otherwise generally in the United States in criminal proceedings; but it will not be necessary to consider this proposition under the view which we take of the case in other respects.

The defendants moved the Circuit Court that a verdict be directed for them, which was refused. The motion was entirely general on the whole record, without any specification of the reasons why a verdict should be so directed. It occasionally happens that the various Circuit Courts of Appeals refuse to entertain so general a motion. This is usually on the ground that the Circuit Courts of Appeals are shy of entertaining on appeal matters which were not brought to the attention of the trial court, and justly so; but this practice has no necessary application where it is apparent that the same propositions have been fairly brought to the attention of both tribunals. Such is the fact here as to everything which we will determine.

The name of the plaintiff as given in the warrant was Florence. The same name appears in the complaint. The name which she claims is Florence B. At the common law, and in the federal courts, this would not be a misnomer, because, at the common law, everything beyond the surname and the Christian name proper is inconsequential. By the settled local practice of Massachusetts, however, the rule is otherwise; so that independently of some statute this variance would have been fatal in the courts of that state. This being purely a local question and the law being settled and the decisions of the state courts having been uniform for a long period of time we would, except for the statute to which we will refer, be obliged to follow the local rule. Following that rule the arrest would ordinarily be illegal as was explained in *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643. Of course, in all courts it would be open to the defendants to show that the plaintiff was as well known by the name of Florence as by the name of Florence B. Proper instructions were given by the Circuit Court on this proposition, but the jury must have found that the facts did not apply to it. If compelled to pass on a motion to direct a verdict for the defendants so far as related to the question of fact thus involved, we might be induced to rule for them; but the case on this point is met by Rev. Laws Mass. 1902, c. 218, §§ 19, 67, as follows:

"Sec. 19. If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is dis-

covered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name mentioned in the indictment."

"Sec. 67. The provisions of this chapter, and the forms hereto annexed, shall apply as well to complaints as to indictments, and such forms shall be sufficient in cases to which they are applicable. In other cases, forms as nearly like the forms hereto annexed as the nature of the cases and the provisions of law will allow may be used; but any other form of indictment or complaint which is authorized by law may be used."

These statutory provisions have not been under consideration by the Supreme Judicial Court of Massachusetts with reference to a mere complaint, so far as we are advised. We have nothing to do with section 19, except so far as it is necessary to explain section 67. In view of the hardship of the rule of the common law with reference to the liability of executive officers in consequence of an error of the courts in the matter of misnomer, this statute, according to the ordinary principles of interpretation, should be construed to meet every case fairly within its letter. The complaint and warrant before us are fairly within its letter, as well as fairly within its spirit, and, so far as we can perceive, section 67 affords a full defense to this branch of the plaintiff's case.

The other point on which the plaintiff rested her case is well supported so far as the law is concerned. We are unable to find any satisfactory authority to the contrary. An officer is not bound to exhibit his warrant to the person whom it authorizes him to arrest until asked for; but *Codd v. Cabe* (decided April 29, 1876) 1 Ex. D. 352, by the Court of Appeals from inferior courts, consisting of Baron Bramwell and Justices Mellor and Denman, is sufficient authority that the officer who seeks to arrest by virtue of a warrant must have the warrant in his possession at the time of the arrest. We need not undertake to define exactly what is meant by "in his possession," and must not be held to have done so. Of course, it does not necessarily mean that the warrant shall be actually in his hand. However, no subordinate question of that character arises here.

Of course, the ordinary presumption arises, although, of itself, not a very strong one, that the officer did his duty, and had the warrant in his possession when the arrest was made. Here the presumption is supported by the testimony of the officer that he had the warrant always with him, and it is in line with all the undisputed incidents in the story of the transactions involved. Therefore, some substantial evidence was required on the part of the plaintiff to overcome this presumption. It is not necessary that we should detail the proofs on this point. It is sufficient to say that we have carefully read the record, and we find in it no evidence whatever sustaining the proposition of the plaintiff that the officer did not have his warrant when he should have had it, or even raising any presumption of that character. Therefore, the normal and lawful presumption must stand; and it is impossible to sustain the plaintiff on this point.

There are certain exceptions to the instructions given by the court, but these exceptions refer in general terms to long extracts from the instructions, each covering nearly two printed pages. Under the prac-



tice in the federal courts it may well be doubted whether these particular exceptions were valid because the practical rule is that exceptions shall be taken to a certain proposition of law advanced by the trial judge and clearly pointed out. Exceptions taken to long extracts from the charge may not be valid if any portion of the extracts recites what is correct as matter of law. The federal courts have been over this rule so many times that it is not necessary to explain it further; and, under the circumstances, it is not required that we analyze this particular part of the case, because the verdict must be set aside for the reasons already stated.

We infer the plaintiff claims that there was a motion to the Circuit Court for a new trial, in which the same questions were raised which we have discussed, and that, therefore, the exceptions before us were waived in advance. We do not understand that the authorities cited by the plaintiff are to this point, nor do we understand that the practice at the common law was ever so strict as she claims. Under some circumstances the courts have, in advance, required the party deeming himself aggrieved to elect whether he will proceed by motion or by exceptions. However, in this circuit, the matter is settled by the second paragraph of rule 15, which is to the effect that no motion for a new trial shall operate as a waiver of exceptions, or of a right to exceptions, or of a right to relief by error or appeal, although the trial court may decline to hear any such motion involving questions as to which the party claiming relief has a right to proceed by error, unless that right is waived. No such requirement was made in this case.

The judgment of the Circuit Court is reversed, the verdict set aside, and the case remanded to that court for proceedings not inconsistent with our opinion passed down this 18th day of February, 1909; and the plaintiffs in error recover their costs of appeal.

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### KANSAS CITY HYDRAULIC PRESS BRICK CO. v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1909.)

No. 2,767.

#### 1. CONTRACTS (§ 136\*)—ILLEGALITY—EFFECT ON OTHER CONTRACTS.

The illegality of one contract does not extend to another, unless the two are united either in consideration or promise.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 136.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 346\*)—CONTRACTS FOR IMPROVEMENTS—ILLEGALITY—EFFECT ON BOND OF CONTRACTOR.

The fact that a paving contract with a city was illegal because not let on competitive bids as required by statute does not render illegal a bond given by the contractor and running to the state to secure his payment for labor and materials, although such bond was also required by statute to be exacted from all contractors for public improvements; it not being necessary for one furnishing labor or material, in an action to recover therefor on the bond, to prove or rely on the contract with the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 346.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## 3. SALES (§ 48\*)—VALIDITY.

A contract for the sale of brick to a paving contractor is not rendered illegal because the seller knew that the brick were to be used in paving streets and was chargeable as matter of law with knowledge that the contract under which the work was to be done was illegal because let in violation of law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 101; Dec. Dig. § 48.\*]

## 4. SALES (§ 48\*)—VALIDITY.

A brick company procured the signing of petitions by property owners for the paving of certain streets and the letting of contracts for the paving by the city on such petitions. The petitions, advertisements for bids, and the contracts all specified a brand of brick made only by the company as the material to be used. The contractor bought the brick from the company, used it, and the paving was accepted and paid for by the city, but he failed to pay for the brick. Subsequently the Supreme Court of the state decided that contracts let on specifications designating material of a particular manufacturer, when other kinds were available for the work, were illegal and void as in violation of the policy of the statute, which required the bids to be competitive. There was no fraud in the transaction, the action of the company was open, and the illegality was apparently not known to the city officers, nor was any objection made by property owners. *Held*, in an action against the contractor and the surety on his bond given to secure payment for labor and materials, to recover the price of the brick, that the fact that the company was instrumental in procuring the illegal contracts from the city did not, under the circumstances, constitute a defense to the liability of defendants.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 101; Dec. Dig. § 48.\*]

## 5. LIMITATION OF ACTIONS (§ 130\*) — ACTION ON CONTRACTOR'S BOND—KANSAS STATUTES.

Gen. St. Kan. 1901, § 4451, which provides that "if any action be commenced within due time and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits and the time limited for the same shall have expired, the plaintiff \* \* \* may commence a new action within one year after the reversal or failure," applies to an action on a bond given by a contractor for public work under sections 5130, 5131, to secure payment for labor or material furnished for such work, which is required by such statute to be commenced within six months after completion of the work.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 565; Dec. Dig. § 130.\*]

## 6. LIMITATION OF ACTIONS (§ 25\*) — ACTION ON CONTRACTOR'S BOND — KANSAS STATUTE.

Under Gen. St. Kan. 1901, §§ 5130, 5131, which provides that a bond shall be required from a contractor for public work conditioned that he shall pay all indebtedness for labor and materials used, which bond may be sued on by any person to whom such an indebtedness is due within six months after completion of the work, such right of action arises out of contract and is not given by the statute, and the limitation is not therefore a part of the right so as to exclude the application of the general provisions of the limitation statutes of the state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 119; Dec. Dig. § 25.\*]

In Error to the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 157 Fed. 620.

The defendant here and below, the National Surety Company, was the surety upon three bonds executed by W. W. Atkins, conditioned that he should promptly pay and discharge all labor and material bills incurred in paving

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

portions of two streets in Kansas City, Kan. The plaintiff furnished vitrified brick to Atkins, which were used in paving the streets. He made default in the payment of the purchase price, and this action is brought against his surety upon the bonds. Two defenses are interposed: First, that the contract is void for illegality; second, that the action is barred by the statute of limitations.

To understand the first of these defenses, a somewhat extended history of the transactions is necessary. In the month of August, 1901, the repaving of Fifth street from Reynolds avenue to Central avenue, and the paving of the same street from Central avenue to Euclid avenue, was under consideration. The Diamond Brick & Tile Company employed agents to circulate petitions among those owning property upon the street, asking the city council to take the proper steps to have the improvement made. Under the statutes of Kansas, this was the proceeding necessary to initiate such a public work. The petitions were prepared by the Diamond Brick & Tile Company, and specified that the paving should be made with "No. 1 Vitrified Paving Brick, Diamond Brand." This was a kind of brick made exclusively by that company, and the evidence shows that there were several other makes of vitrified brick that were equally fit for paving purposes. In the case of such improvements the statute of Kansas requires the petitions to contain a "specific description of the material to be used." On August 6, 1901, these petitions, at the instance of the Diamond Brick & Tile Company, were presented to the mayor and city council, and a resolution in conformity therewith, also prepared by that company, declaring the necessity for paving the street, was passed. Thereafter detailed specifications for the doing of the work were drafted by the city engineer, and in the early part of September bids were solicited by public advertisement based upon such specifications. The Brick & Tile Company requested Atkins to become a bidder. Eight bids were submitted for each improvement. Those of Atkins being the lowest, he was awarded the contracts. On the 17th day of September, 1901, formal contracts were executed between him and the proper city authorities. On the same date the defendant herein joined him in the execution of bonds conditioned as above stated. The giving of such bonds was required by a statute of Kansas before Atkins could begin work upon the streets. In the contracts, as well as in all the proceedings before the city council, the Diamond brick, manufactured exclusively by the Diamond Brick & Tile Company, were specified as the material to be used in constructing the paving.

In the month of July, 1902, similar proceedings were had for the paving of Split Log avenue, and on September 16, 1902, the contract was awarded to Atkins for the doing of that work, and a bond executed by the defendant as surety. The connection of the Diamond Brick & Tile Company with that improvement was the same in every particular as with the paving of Fifth street.

After the contracts were awarded to Atkins for the paving of Fifth street, and the bonds executed on his behalf by the defendant as surety, in September, 1901, the entire proceeding relative to that street seems to have been suspended for about a year. The next transaction consists of a written contract between Atkins and the Diamond Brick & Tile Company, bearing date October 30, 1902, whereby Atkins agrees to buy, and the corporation agrees to sell and deliver to him, brick for the paving of Fifth street between Central avenue and Euclid avenue. A similar contract was entered into between the same parties under date of December 1, 1902, for brick for the paving of Split Log avenue. Both of these contracts were on December 13, 1902, assigned in writing by the Diamond Brick & Tile Company to the plaintiff herein, and the latter agreed to carry out such contracts. On January 16, 1903, a written contract was entered into directly between Atkins and the plaintiff for brick for the paving of Fifth street from Reynolds avenue to Central avenue. It appears from the evidence that the plaintiff purchased the plant of the Diamond Brick & Tile Company where the Diamond brick were manufactured, but the date of the transaction is not given in the evidence. Mr. Atkins stated that it occurred some time during the spring of 1903. But the fact that two of the contracts between Atkins and the Diamond Brick & Tile Company for brick were assigned to the plaintiff on December 13th, and that the contract for the

brick for the other job was entered into on January 16, 1903, by Atkins, directly with the plaintiff, tends to show that between these dates the plaintiff acquired the plant of the Diamond Brick & Tile Company, or had definite negotiations looking to that result.

The paving was completed by Atkins under the supervision of the city engineer in June, 1903. The work was then examined and approved by the proper authorities, and Atkins was paid the full consideration provided in his contracts. The plaintiff furnished the brick, as required by the contracts with Atkins above set forth. He has failed to pay for the same, and this action is brought against the surety company as his bondsman. At the close of plaintiff's evidence a verdict was directed in favor of the defendant. It was held not only that the contracts between Atkins and the city were illegal, but that their illegality also destroyed the contracts upon which the brick were furnished by the plaintiff and the bonds given by the defendant.

James S. Botsford (Buckner F. Deatherage, Odus G. Young, John E. McFadden, and Robert E. Morris, on the brief), for plaintiff in error.

Frank Hagerman (A. L. Berger, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge (after stating the facts as above). The trial court based its ruling in the main upon section 747 of the General Statutes of Kansas of 1901, which requires that, when the estimated cost of a contemplated improvement amounts to \$100—

"sealed proposals for the doing or making thereof shall be invited by advertisement published by the city clerk in the official paper of the city for at least three consecutive days, and the mayor and council shall let the work by contract to the lowest responsible bidder."

The Supreme Court of Kansas, in the Case of National Surety Co. v. Kansas City Hydraulic Press Brick Company, 73 Kan. 196, 84 Pac. 1034, construed this statute, and held that, when the nature of the material to be used in a public improvement admitted of competitive bidding, such bidding was indispensable, and that the specification of a particular make of brick for paving, when the evidence showed that there were several makes equally well adapted for the purpose, was a violation of this statute, and rendered the proceedings and the contract based thereon illegal and void. This decision of the highest court of the state construing its statute, and defining the powers and duties of municipal bodies, is binding upon us; but the effect of a violation of its provisions upon collateral and independent contracts is a matter of general law, as to which it is the duty of the federal courts to exercise an independent judgment. Giving effect to the statute as thus interpreted, the contracts between Atkins and the city for these several jobs of paving were illegal and void. No action could be based thereon, either for their enforcement or to recover damages for their violation. Any party affected thereby could maintain a suit to restrain the municipal authorities from entering into such contracts, and could successfully resist the collection of assessments based thereon. These contracts, however, are not directly before the court in the present suit. They have been fully executed. The city has paid the agreed price for the paving, and the property owners are paying with-

out objection their assessments to create a fund to discharge the bonds issued to raise money to pay Atkins.

Three grounds have been advanced in argument in support of the charge that the bonds sued upon are illegal: First, it is urged that they are a part of the illegal contracts between Atkins and the city. The statute provides:

"That whenever any public officer shall, under the laws of the state, enter into contract with any person for the purpose of making any public improvements, \* \* \* such officer shall take from the party contracted with a bond with good and sufficient sureties to the state of Kansas, in a sum not less than the sum total in the contract, conditioned that such contractor shall pay all indebtedness incurred for labor or material furnished in making said public improvement."

The defendant contends that under this statute the contracts between Atkins and the city were incomplete until the bonds in suit were executed, and hence that the latter are tainted with the illegality of the former. While the statute requires public officers to exact such bonds, their failure to do so would not render either the original contract for making the improvement, or collateral contracts for labor and material used therein, illegal or void. Though the bonds and the contracts bear the same date, they are not part of one entire contract. They are between different parties, rest upon distinct considerations, and require the doing of independent acts. The illegality of one contract does not extend to another unless the two are united either in consideration or promise. *Hanover National Bank v. First National Bank* 109 Fed. 421, 48 C. C. A. 482. Such a union does not exist between the contracts in question. The bonds were not given to secure the performance of the contracts between Atkins and the city, but to secure independent contracts of materialmen and laborers. Even when a single contract embraces several agreements, some legal and others illegal, it is the duty of the court to separate the good from the bad, when that is possible. *Choctaw, O. & G. R. Co. v. Bond*, 160 Fed. 403, 87 C. C. A. 355; *Lingle v. Snyder*, 160 Fed. 627, 87 C. C. A. 529. This rule would be more readily applied when the agreements are contained in separate instruments. The plaintiff could have established its case without any aid from the illegal contracts. It is true that it pleaded those contracts in its complaint, and introduced them as part of its case upon the trial. This, however, was not necessary. The proof of the bonds, and the nonpayment of the purchase price of the brick used in constructing the improvements referred to in the bonds, would have made out a complete case in plaintiff's favor. It is what is necessary to be shown, rather than what is in fact shown, that indicates whether the union between two contracts is such as to involve one in the illegality of the other. A suggestion is also made in argument that Atkins was a mere figurehead, and that the real contractor with the city was the Diamond Brick & Tile Company. The evidence fails to support this charge. The only connection shown by the evidence between the corporation and Atkins was its request of him to submit bids for the doing of the work. There is no evidence whatever that the Diamond Brick & Tile Company supported him in the performance of his contract, or that he was in any way its agent. The purchase price of the brick was about three-eighths of the contract

price for the improvement, and there is no evidence that the brick company had anything to do with the other important features of the paving, or was concerned in supplying the brick, except to sell them at a stipulated price. We can find between the bonds sued upon, and the contracts between Atkins and the city, no such connection as would justify extending the illegality of the latter to the former.

Second, it is urged that because the plaintiff knew of the illegality of the contracts between Atkins and the city, and that the brick it supplied were to be used in the performance of those contracts, it became by reason of its knowledge a party to such illegality, so as to defeat its right to recover the purchase price of the brick. To so hold would be to extend unwisely the effect upon a contract of sale of the vendor's knowledge of the use to which property is to be devoted. It is now the holding of American courts that the knowledge of a vendor that property is purchased to be sold or used in violation of law does not defeat his right to recover its price, except in the case of heinous crimes. Wald's *Pollock on Contracts* (3d Ed.) 485. But here the use to which the bricks were to be devoted was not illegal. The utmost that can be contended is that they were to be used in the performance of illegal contracts. Even as to that, however, it should be noticed that the contracts were not illegal as to their object, but solely because they were entered into without competitive bidding. The paving of the street was, of course, a perfectly lawful enterprise. To hold that a sale of personal property is illegal because the vendor knows that the property is to be used in the performance of a contract, lawful in its object, but illegal because let in violation of law, would affix to a vendor's knowledge vitiating results beyond anything required by judicial authority or sound public policy.

It follows that, if the bonds sued upon are illegal, the vice must spring not from their connection with the contracts between Atkins and the city, but from the contracts between the plaintiff and Atkins for the purchase and sale of the brick. If the latter contracts are infected with illegality, the bonds cannot be resorted to as a means of collecting their consideration. It is elementary that all securities for the performance of illegal contracts are tainted with their vice. This brings us to the third ground upon which the defense of illegality is rested. It is urged that the Diamond Brick & Tile Company, by its conduct leading up to the award of the contracts to Atkins, became an aider and abettor of their illegality; that it was the prime mover in limiting the petitions and the specifications to its particular brand of brick; that its purpose was to induce the making of contracts in such a form that the successful bidder would be compelled to purchase the brick for making the improvement of that company; and that to allow the plaintiff to recover in the present suit would be to give judicial aid to a willful wrongdoer in gathering the fruits of his wrongdoing. This is the only defense that has apparent merit. It can have no application to the contract which was made directly between the plaintiff and Atkins for the brick used in paving Fifth street from Reynolds avenue to Central avenue. There is no evidence in the record tending to show that the plaintiff had anything to do with that transaction until more than a year after the contract was let to Atkins and the bond

given by the defendant. As to this contract, it was simply a vendor of material. It was in no way concerned either with the petition or the transactions with the city. The utmost that can be said against it is that it may have known that the Diamond brick had been illegally specified as the only brick to be used in the improvement, but it had in no way aided in causing such specification. As we have already indicated, that knowledge alone would not defeat its right of recovery. So, as to this contract, the direction of a verdict in favor of the defendant for illegality was clearly erroneous.

As to the other two contracts, the plaintiff is the assignee of the Diamond Brick & Tile Company, and stands in its shoes. If the defense of illegality would be available against that company, it must prevail against the plaintiff. Did the conduct of the Diamond Brick & Tile Company involve such moral turpitude as to deprive it of any standing in a court of justice? There is no evidence nor any charge that the company or its agents in their dealings with the property owners or the city authorities were guilty either of misrepresentation or corruption. Their conduct, so far as this record discloses, was open and aboveboard. The property owners and the city authorities must have known that the company was seeking to have its brick used in making the improvements. Their specification appeared conspicuously upon the face of all the writings and public advertisements, and the conclusion is irresistible that all parties concerned were fully cognizant of the facts. These documents were under the direct examination of the city engineer and the city attorney. Most of them were drafted by those officers. The resolutions, contracts, and ordinances, all designating No. 1 Diamond brick, were passed upon and approved by the city council and the mayor. The attention of competitive manufacturers of brick was drawn to the subject by public advertisement. There was ample time for discovery and objection. More than one year was consumed between the circulation of the petitions and the commencement of work upon the improvements. No officer of the city, no owner of property, no competitive manufacturer of brick, made any objection to the specification or challenged its legality. When those who have a direct property interest, and those who are charged with the official duty of observing the law, and whose judgment is not deceived by fraud or perverted by corruption, approve and join in the specification of the special make of brick, can it be said that the Diamond Brick & Tile Company ought to have known that such specification was wrongful and illegal? The Supreme Court of Kansas, in the case of Barber Asphalt Paving Company v. Botsford, 56 Kan. 532, 44 Pac. 3, had decided that it was legitimate for a materialman, desiring the use of his article in improving a street, to circulate petitions among property owners specifying such material, and to hire agents to urge upon such property owners and the city authorities the advantage of its exclusive use. It was the holding of a majority of American courts that, notwithstanding statutes requiring competitive bids for public work, it was still permissible to specify patented articles which, from the nature of the case, excluded competition. 1 Abbott, Municipal Corporations, 695. There had been no decision of any court of Kansas holding that, where the material admitted

of competitive bidding among different manufacturers, it rendered proceedings for the making of a public improvement void if the article of a single manufacturer was designated. Nor had there been any decision declaring the effect of the statute requiring petitions of property owners to contain "a specific description of the material to be used." It should further be noted that the specification complained of violated no express language of the statute. It was not in terms prohibited. Its illegality is not derived from the words of the act, but from the general policy which underlies it. In the light of all these circumstances, the plaintiff's conduct may well be attributed to the honest zeal of a vendor rather than to a willful purpose to promote an illegal transaction by aid and counsel. The law on the subject at the time the contracts were made was such that laymen might very well have entertained the belief that it was legitimate to secure the specification of a particular manufacture for the making of such improvements. The line that separates patented articles from those not patented, so far as the policy of the law requiring competitive bidding is concerned, is not one of conspicuous clearness, or such as would be likely to impress the mind of the ordinary business man. We do not think it can properly be said that the conduct of the brick company was willfully illegal; and it is only willful wrongdoing that ought to defeat the right of a vendor to recover the purchase price of an article sold upon a collateral and independent transaction. The whole subject involves simply the question of what will best promote a sound public policy. Even in dealings with municipal authorities, some room must be left for the zeal of vendors who are free from fraud or corruption. We think the public policy which underlies the statute in question is given its full measure of effect when the original contract is held to be void. The law requiring competitive bidding is for the protection of property owners. To allow them, or the city on their behalf, to set up at any time the illegality of the transaction, will enforce the policy which the Legislature had in view in passing the law. Such was the redress afforded in the cases which have been urged upon our notice. *Smith v. City of Syracuse*, 17 App. Div. 63, 44 N. Y. Supp. 852, and *Swift v. City of St. Louis*, 180 Mo. 80, 79 S. W. 172, were suits brought by property owners to restrain the awarding of contracts based upon specifications which prevented fair competitive bidding. In *Shoenberg v. Field*, 95 Mo. App. 241, 68 S. W. 945, and *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61, the same facts were interposed by a taxpayer as a defense to an action to enforce payment of special assessments. So far as we are aware, *National Surety Co. v. Kansas City Hydraulic Press Brick Co.*, 73 Kan. 196, 84 Pac. 1034, is the only instance in which the illegality has been extended to collateral contracts.

The important case of *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, is forcibly urged upon our attention by learned counsel for defendant as a controlling authority upon the question now under consideration. In that case plaintiff and defendant entered into an agreement to submit secret bids for a public improvement, and further agreed that, if they were successful in obtaining the contract, it should be carried out for their mutual profit or loss.



The action was brought to secure an accounting upon this contract. As the court says, the vice of such a combination "lies in the fact of secrecy, concealment, and deception." It further characterizes the conduct of the parties as follows:

"But in this case there is more even than concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids, and put in for the purpose already stated. \* \* \* The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result." Page 652 of 174 U. S., page 844 of 19 Sup. Ct. (43 L. Ed. 1117).

In the present case, as we have already pointed out, there is no showing of concealment or misrepresentation. In *McMullen v. Hoffman*, again, the suit was brought upon the original contract. If the Diamond Brick & Tile Company had been a successful bidder for the paving of the streets, and the present suit had been brought against the city to enforce a contract entered into pursuant to such bid, the two cases would have been more nearly parallel. Even then they would have been distinguished by the fact that in the present case no fraud or deception was practiced upon the municipal authorities, a feature which was the very basis of decision in *McMullen v. Hoffman*.

Neither the surety company nor Mr. Atkins ought to be permitted to vicariously assert the rights of property owners for the purpose of defeating the recovery of the purchase price of the brick which Mr. Atkins received and used in paving the streets, and for which he has been paid in full. The Supreme Court of the United States, in passing upon a similar defense in *Field v. Barber Asphalt Co.*, 194 U. S. 618-624, 24 Sup. Ct. 784, 48 L. Ed. 1142, used the following language:

"It is alleged that the tax bills should be held void because they were obtained by undue influence of the agents of the paving company improperly exercised to obtain the needed municipal action. The court below held, and an examination of the testimony has brought us to the same conclusion, that there was nothing in the case to establish the charges of fraud and corruption, although the record itself shows that an agent of the defendant company was active and perhaps influential in obtaining signatures to the petition which specified Trinidad Lake Asphalt for this improvement; yet, in the absence of fraud or corruption, we do not think the contract and resulting levies can be set aside for this reason. It is one thing to disapprove of such measures as a matter of propriety of action, but quite another to set aside the contract, especially after the full performance of its terms."

It is of capital importance in passing upon the present defense to estimate justly the degree of misconduct of which the Diamond Brick & Tile Company was guilty, because whether the taint of illegal conduct shall be extended to collateral transactions depends to a large extent upon the gravity of its moral turpitude. Mr. Justice Holmes, when speaking as Chief Justice of the Supreme Court of Massachusetts, in *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355, emphasizes this distinction:

"It may be," he says, "that, as in the case of attempts, the line of proximity will vary somewhat according to the gravity of the evil apprehended."

To sell intoxicating liquor, with the knowledge that the purchaser intends to resell it in violation of statute, does not defeat an action

for the purchase price. But if an article is sold with knowledge that the purchaser intends to use it for the commission of a felony, a different rule should be applied. Wald's Pollock on Contract (3d Ed.) 485. Judging the conduct of the Diamond Brick & Tile Company in the light of the circumstances as they existed at the time of the transactions, we cannot attach to it such moral turpitude as would justify a denial of plaintiff's right to recover the purchase price of the brick furnished for these improvements, for which the city has paid in full, and to which no objection has been made by the parties directly concerned.

The statute of Kansas requiring contractors for public improvements to execute and file a bond to secure the payment of claims of mechanics and materialmen contains a provision "that no action shall be brought on said bond after six months from the completion of said public improvements or public buildings." The plaintiff brought an action within the six months' limitation in the courts of Kansas, and recovered a judgment in the trial court which was reversed on appeal, and a new trial granted. *National Surety Company v. Kansas City Hydraulic Press Brick Company*, 73 Kan. 196, 84 Pac. 1034. Upon the remittitur coming down the plaintiff dismissed its action without prejudice on September 24, 1906, and commenced the present action September 26th of the same year. Section 4451, Gen. St. Kan. 1901, reads as follows:

"If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure."

The present action was commenced within less than one year after the dismissal of the former action, but more than six months after the completion of the improvement. So, unless it is protected by the statute last quoted, it is barred by the six months' limitation fixed by the original statute. In support of its defense, based on the statute of limitations, defendant first urges that the right of action is given by statute, and the limitation is, therefore, a part of the right, so that plaintiff had no cause of action after the expiration of the six months' period; citing *Rodman v. Mo. Pac. R. R. Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704, and *The Harrisburgh*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358. In our judgment, plaintiff's cause of action is not given by statute. The rule invoked is applied to rights unknown to the common law, and created solely by statute, such as the right of recovery for death by wrongful act (*The Harrisburgh*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *Boston & Maine R. R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; *Theroux v. N. P. R. R. Co.*, 64 Fed. 84, 12 C. C. A. 52); the right to recover damages against cities and counties for injuries caused by mobs (*Hill v. Board of Supervisors*, 119 N. Y. 344, 23 N. E. 921). In the present case, while the statute required the contractor to furnish a bond, the right of action is not created by the statute. It imposed no liability upon the defendant. On the contrary, defendant's liability arises solely out of contracts into which it voluntarily entered for a valuable

consideration. In the case of statutes creating stockholders' liability, the cause of action rests much more closely upon the statute than in the present case, and yet it is held that the limitation in such statutes is not a part of the right. The liability, "though statutory in its origin, is contractual in its nature." *Ramsden v. Knowles*, 151 Fed. 721, 724, 81 C. C. A. 105, 108, 10 L. R. A. (N. S.) 897. The limitation in the present case, therefore, is no part of the right, but relates exclusively to the remedy.

Section 4451, above quoted, giving an additional year in which to commence a new action, is a part of article 3 of the Code of Civil Procedure of Kansas, being section 23 of that Code as originally enacted. Section 4443 (being section 15 of the Code of Civil Procedure) is a part of the same article, and reads as follows:

"Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where in special cases a different limitation is prescribed by statute, the action shall be governed by such limitation."

By virtue of this section it is contended that section 4451 giving the additional year in which to begin a new action, is confined to the numerous actions provided for in article 3, and that, when a period of limitation is prescribed by an independent statute like the one here involved, the limitation is absolute, and not subject to enlargement by section 4451. We cannot adopt that construction of these statutes. Article 3 of the Kansas Code of Civil Procedure was taken almost literally from the original New York Code of Procedure of 1848. It contains a general scheme of limitations for all the ordinary civil actions. In New York, however, it was intended to fit into an immense body of statutory laws, the accumulation of half a century, among which were many specific limitations for particular actions. The same situation was true in a less degree in Kansas when the Code of Civil Procedure was adopted there. Section 4443 was designed to meet this condition. It simply ordains that, when a particular period is fixed by an independent statute for the bringing of a specific action, that period shall control rather than the period specified in the general scheme contained in article 3. It deals exclusively with the period of limitation. At the end of that article, however, are found seven sections which do not deal with the period of limitation, but with general subjects applicable to all limitations of actions. In the New York Code they are set off in a separate chapter headed "General Provisions as to Time of Commencing Actions." They involve such matters as concealment of the defendant or his absence from the state, disabilities, judicial restraints, reversal of judgments on appeal or dismissal otherwise than on the merits, part payment or other acknowledgments of liability, and when actions shall be deemed to be commenced. Most of these provisions have been a part of the law of the limitation of actions from the very inception of that law. As the New York Court of Appeals says, when discussing the same question under their Code that we are now considering:

"It is difficult to conceive how any special limitation applicable to any class of actions can be administered without producing great injustice, unless the courts are at liberty to apply to such cases, when necessary, at least some of

the general provisions mentioned, and which are necessary to a just application of all such statutes." *Hayden v. Pierce*, 144 N. Y. 512, 518, 39 N. E. 638, 640.

These provisions show by the generality of their language that they were intended to apply to the limitation of all classes of actions, unless the statute creating such limitations expressly declares a contrary intent. "If any action be commenced," "In any case founded on contract," "If a person entitled to bring an action \* \* \* be under any legal disability, every such person," such is the form of expression used in these general provisions. They clearly indicate an intention that they shall be applied to all statutes of limitation, unless such statutes themselves indicate a contrary intent. It is true that in a few exceptional cases the time for the commencement of actions may for special reasons be made absolute so as to exclude these general provisions. But to bring a statute within this class, the purpose of the Legislature must be clearly expressed. Such an intent will not be inferred from the simple prescribing of a period for the commencement of an action.

The question whether the general provisions at the close of article 3 apply to limitations created by special statutes, notwithstanding section 4443, has been frequently raised in New York, and it has been uniformly held in that state that they do so apply. *Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638, was an action against an administrator. The claim had been presented and disallowed. A special statute of the state ordained that actions must be brought upon claims disallowed within six months after their rejection. The administrator was a nonresident of the state, and the action was brought more than six months after disallowance of the claim. This chapter of the Code of Procedure of New York, the same as that of Kansas, provides that the period during which the defendant is absent from the state shall be deducted from the periods of limitation. It was contended that this general provision did not apply to limitations created by special statutes, but was governed by a section the same in substance as section 4443 of the Kansas Code. Speaking to that point, the court says:

"Do these words refer to all the provisions of the chapter, or do they refer only to those periods of time within which the various classes of actions specified therein are to be commenced? We think they refer to the latter, and not to the former; and, if this be so, it follows that there are certain provisions found in the chapter which apply, not only to the general limitations therein prescribed, but to all other limitations to be found in other statutes, and, consequently, to those 'specially prescribed by law.'"

In *Hamilton v. Royal Insurance Co.*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485, involving the same question, the court says of these statutes:

"That section (referring to the language embraced in 4443 of the Kansas Code) does not exempt limitations which are specially prescribed by law, or by the written contract of the parties, from the operation of any of the provisions of chapter 4, except so far as they establish different periods of limitation."

As to the fact that, when the original statute of limitations is six months, the saving statute granting a year after dismissal in which to

bring a new action grants a longer period by the saving statute than was originally allowed, the same court says in *Titus v. Poole*, 145 N. Y. 414, 425, 40 N. E. 228, 231:

"There is an apparent incongruity in the particular case, that the Legislature should give to a plaintiff a year after the termination of the former suit to bring an action against an executor or administrator, when the original action must have been brought within six months after the rejection of the claim. But the Legislature was declaring a general rule applicable to all cases, and made no distinction, as it might perhaps have done, if its attention had been drawn to the special case of an action to enforce a claim against the estate of a decedent which had been presented and rejected." See, also, *Conolly v. Hyams*, 176 N. Y. 403, 68 N. E. 662.

In some respects the decisions of the Supreme Court of Kansas on this subject are difficult to harmonize. *Myers v. Coonradt*, 28 Kan. 151, involved a special statute of the state fixing a limitation of five years for the bringing of an action to set aside a tax deed. Such an action was brought within the period, but dismissed for causes which did not involve the merits. The court, speaking by Judge Brewer, held that a new action commenced after the expiration of the five years, but within one year after the dismissal, is saved by section 4451. It will be noticed that the controversy, here presented came squarely within the provisions of section 4443. The statute was special, and prescribed a specific period of limitation. But the court in effect held that section 4443 did not refer to the general provisions at the close of article 3, but was confined to the periods of limitation covered by the earlier sections. The same rule is reasserted in an action to set aside a tax deed in *Douglass v. Lovell*, 55 Kan. 574, 40 Pac. 917. These decisions are not in harmony with *Beebe v. Doster*, 36 Kan. 666, 14 Pac. 150, and *Cartwright v. Korman*, 45 Kan. 515, 26 Pac. 48, where it is declared that section 141 of the tax law, prescribing a limitation of five years within which to bring an action to set aside a tax deed, is not modified, controlled, or limited to any extent by the provisions of the Code of Civil Procedure (Gen. St. 1901, § 7680), but is complete in itself except so far as it is modified by other provisions of the tax law. As we have just pointed out, the decisions first cited expressly held that the limitation prescribed by the tax law was controlled and modified by the section of the Code of Civil Procedure which allowed one year within which to bring a new action. The decisions last cited, however, are in no way inconsistent with the claim of the plaintiff in the present suit. Section 141 of the chapter on taxation is not properly a statute of limitations. By other sections of the statute the holder of a tax deed is deemed to be in possession of the property from the time the deed is recorded. The five-year limitation prescribed by section 141, therefore, is a period of prescription at the expiration of which a tax title becomes absolute, regardless of any actual defects therein. Such a limitation is identical in its results with the period of adverse possession required in ordinary cases of prescription. Such statutes are not statutes of repose affecting the remedy only, but are statutes of prescription fixing a period by the running of which an imperfect right ripens into an absolute title. *Campbell v. Holt*, 115 U. S. 620, 625, 6 Sup. Ct. 209, 29 L. Ed. 483; *Langdell's Equity Pleading*, § 118 et seq.; *Northern Pacific Railway Co. v. Ely*, 197 U.

S. 1, 8, 25 Sup. Ct. 302, 49 L. Ed. 639; *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 538, 24 Sup. Ct. 166, 48 L. Ed. 291. It is further true that the tax statute referred to shows clearly an intent of the Legislature that the limitation which it fixes should be absolute. It provides that an action to recover the land or to set aside the tax deed shall be brought within five years from the time the deed is recorded, "and not thereafter." It allows expressly for two exceptions, viz., where the taxes have been paid, or the land redeemed as provided by law. The same statute fixes a period of limitation within which land sold for taxes may be redeemed, and as to the right of redemption makes an exception in favor of minors and insane persons during the period of their disability. The court held in *Cartwright v. Korman*, above cited, that, taking all these features of the statute together, there was a clear expression of the legislative intent that no exceptions should be allowed except those expressly provided for. It is manifest that the statute here involved contains none of the features which were controlling in that case.

*Medill v. Snyder*, 71 Kan. 590, 81 Pac. 216, which is cited by counsel for defendant, also rests upon peculiar grounds. That was an action brought to set aside a decree admitting a will to probate. A statute making the probate of a will conclusive after a fixed period is not a statute of limitations, but a rule of property, and the disability of the parties interested will not operate to postpone or prevent the running of the time prescribed. *Luther v. Luther*, 122 Ill. 558, 38 N. E. 166; *Evansville Ice Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Bartlett v. Manor*, 146 Ind. 621, 45 N. E. 1060; *Cochran v. Young*, 104 Pa. 333; *Meyer v. Henderson*, 88 Md. 585, 41 Atl. 1073, 42 Atl. 241. It is likewise true, as the court points out, that the statute there involved showed plainly by its language that it was the purpose of the Legislature that the fixed period should be absolute, and not subject to such conditions as the disability of the plaintiff. This purpose was manifested not only by emphatic language, but by the fact that specific provision was made for the disability of minors; and thus the intention was clearly indicated that other disabilities should not be allowed.

In *Seaton v. Hixon*, 35 Kan. 669, 12 Pac. 22, and *Hobbs v. Spencer*, 49 Kan. 769, 31 Pac. 702, new actions for the foreclosure of mechanics' liens were permitted, under section 4451, after the running of the statute of limitation prescribed by the mechanic's lien law. The court in the first case, in support of its opinion, refers to the fact that the mechanic's lien law is a part of the Code of Civil Procedure, and provides that, in actions to foreclose such liens, "the practice, pleadings and proceedings shall be in conformity with the rules prescribed by the Code of Civil Procedure so far as the same are applicable." We cannot attach any significance, on the question of the statute of limitations, to this reference in the mechanic's lien law to the Code of Civil Procedure. "Practice, pleadings and proceedings" appropriately refer to the steps in the prosecution of a civil action, and not to the limitation of such actions. It is likewise true that any civil action in a state having a Code of Civil Procedure would be governed as to such matters by the Code. This reference in the mechanic's lien law seems to be simply a rather clumsy method of expressing the idea that such

liens may be foreclosed by an ordinary civil action. In all recent compilations of the Code of Civil Procedure of Kansas, the statute requiring contractors for public improvements to execute and file a bond for the payment of laborers and materialmen, is appropriately placed in the chapter on mechanics' lien. Gen. St. 1901, §§ 5130, 5131. Those bonds simply take the place of the property that under ordinary circumstances would be chargeable with the liens of such claimants. The reason which would exempt actions for the foreclosure of mechanics' liens from section 4443 would likewise exempt suits upon bonds given by public contractors.

The trial court committed no error in deciding the issue upon the statute of limitations in favor of the plaintiff.

The judgment below is reversed, and the cause is remanded with directions to grant a new trial.

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UNITED STATES v. SOUTHERN PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,453.

1. PUBLIC LANDS (§ 88\*)—RAILROAD GRANT—INDEMNITY LANDS—CONFLICTING GRANTS—EFFECT OF FORFEITURE.

The right given the Southern Pacific Railroad Company by Act July 27, 1866, c. 278, 14 Stat. 292, to select lieu lands within the indemnity limits for lands lost within the primary limits of the grant therein made, depends upon the status of such lands at the time of selection and not at the time of the grant, and such selections may be made of lands which were granted by the same act to the Atlantic & Pacific Railroad Company in California since the forfeiture of such grant and the restoration of the lands to the public domain by Act July 6, 1886, c. 637, 24 Stat. 123.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 267, 268; Dec. Dig. § 88.\*]

2. PUBLIC LANDS (§ 88\*)—RIGHTS UNDER RAILROAD LAND GRANT—EFFECT OF FORFEITURE—CONCLUSIVENESS OF DECREE.

A decree quieting the title of the United States to certain lands as against any right or claim of the Southern Pacific Railroad Company thereto was conclusive against the company as to any right it had to select such lands as lieu lands under grants then in force, whether such right had then been asserted or not, and the company could not thereafter make valid selections of any of such lands under the prior acts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 266, 267; Dec. Dig. § 88.\*]

Appeal from Circuit Court of the United States for the Southern District of California.

For opinion below, see 152 Fed. 303.

Robt. T. Devlin, U. S. Atty., and Geo. Clerk, Asst. U. S. Atty.

William Singer, Jr., and Wm. F. Herrin, for Southern Pac. R. Co. and other defendants.

Before GILBERT and MORROW, Circuit Judges, and DE HAVEN, District Judge.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DE HAVEN, District Judge. This action was brought by the United States against the Southern Pacific Railroad Company and other defendants to obtain a decree quieting its title to a large body of land, described in the bill of complaint, and for an accounting. Upon the pleadings and proofs a decree was entered in the Circuit Court quieting the title of the United States to certain of the lands described in the bill, and dismissing the bill as to the remainder of the lands in controversy. Both parties have appealed to this court.

The following facts are shown by the record: The lands in controversy are within the primary limits of the grant made July 27, 1866, c. 278, 14 Stat. 292, to the Atlantic & Pacific Railroad Company, and are also within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the same act. The Atlantic & Pacific Railroad Company failed to construct a road over any portion of the line definitely located by it in California, and Congress on July 6, 1886, c. 637, 24 Stat. 123, forfeited the grant made to that company, in so far as the same covered lands "adjacent to and coterminous with the uncompleted portions of the main line of its road, and embraced within the grant and indemnity limits as contemplated to be constructed under and by the provisions of the said act of July 27, 1866." After the forfeiture of the Atlantic & Pacific Railroad Company's grant, and the restoration of the lands embraced therein to the public domain, the Southern Pacific Railroad Company selected the lands in controversy as indemnity lands under the grant made to it by Act July 27, 1866, 14 Stat. 292, and the United States, prior to the commencement of this action, issued its patents to the defendant railroad company for part of the lands so selected, and that company's application to select the remainder of the lands in controversy as indemnity lands is pending in the Department of the Interior.

1. It is claimed by the United States, on its appeal, that the Southern Pacific Railroad Company could not legally select as indemnity, under its grant of July 27, 1866, lands within the place limits of the forfeited Atlantic & Pacific grant, of the same date; that, when the grant to the Atlantic & Pacific Railroad Company was forfeited, the forfeiture was for the benefit of the United States alone, and the Southern Pacific Railroad Company acquired no benefit or advantage from such forfeiture. In support of this contention the cases of the United States v. Southern Pacific Railroad Company, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, United States v. Colton Marble & Lime Co., 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, and Southern Pacific Railroad Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, are cited. We do not think these cases sustain the proposition for which the United States contends.

The first was an action by the United States to quiet its title to certain lands claimed by the Southern Pacific Railroad Company, under the grant made to it by the act of March 3, 1871, and the lands in controversy were situate within the primary limits of that grant, and of the grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866. It was held that both of the grants were



in presenti, and that title to the lands in controversy in that case passed to the Atlantic & Pacific Railroad Company under its senior grant, and that when such grant was forfeited the title to the lands within its primary limits did not vest in the Southern Pacific Railroad Company under its grant of March 3, 1871.

In the case of *United States v. Colton Marble & Lime Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, the lands in suit were within the granted limits of the Southern Pacific Railroad Company under its grant of March 3, 1871, and within the indemnity limits of the prior grant made to the Atlantic & Pacific Railroad Company, and it was held by the court, as stated in the syllabus of its opinion:

"The proviso in the act of March 3, 1871, 16 Stat. 573, c. 122, granting lands in aid of the construction of the Southern Pacific Railroad company, that the grant should 'in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company,' operated to exempt the indemnity lands of the Atlantic & Pacific Railroad Company from the grant to the Southern Pacific Company."

So, also, in the case of *Southern Pacific Railroad Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, the Southern Pacific Railroad Company claimed title to the land there in controversy under its grant of March 3, 1871, and the question whether that company had the right to make indemnity selections under its grant of July 27, 1866, of lands lying within the granted limits of the forfeited grant to the Atlantic & Pacific Railroad Company, was not discussed by the court.

The question to be here decided does not arise under the act of March 3, 1871, but relates to the right of the Southern Pacific Railroad Company to select the land in controversy as indemnity lands under Act July 27, 1866, 14 Stat. 292. By that act there was granted to that company:

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of \* \* \* ten alternate sections of land per mile on each side of said railroad line wherever it passed through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office: \* \* \*, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers."

We think under this statute the defendant railroad company was granted the right to select, as indemnity, for lands lost within the primary limits, any alternate sections of land within the indemnity limits of the grant, nonmineral in character, and not granted, sold, reserved, or otherwise appropriated at the date of the selection. In other words, the right of the defendant railroad company to make selections of indemnity lands under its grant depends upon the status of the lands at the date of selection, and not upon their status at the date of the act making the grant. This conclusion is supported by

the cases of *Ryan v. Railroad Co.*, 99 U. S. 382, 25 L. Ed. 305; *United States v. Central Pac. Railroad Co.* (C. C.) 26 Fed. 479.

There is nothing in the act above quoted which indicates any intention upon the part of Congress to exclude from selection as indemnity lands any land which at the date of selection was nonmineral public land, and not otherwise appropriated or disposed of.

In *Barney v. Winona & St. Peter Railroad Co.*, 117 U. S. 228, 6 Sup. Ct. 654, 29 L. Ed. 858, the Supreme Court, in construing a grant similar to that contained in the act of July 27, 1866, said:

"In the construction of land grant acts in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection."

See, also, *United States v. Missouri, Kansas & Texas Railroad Co.*, 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766; *Southern Pacific v. Bell*, 183 U. S. 675, 22 Sup. Ct. 232, 46 L. Ed. 383.

Our conclusion upon this point is that the lands involved in the appeal of the United States were legally selected by the defendant railroad company, because at the date of their selection they were unappropriated public lands, and that as to such lands the bill was properly dismissed.

2. The question presented by the appeal of the Southern Pacific Railroad Company is as to the effect of a final decree rendered on July 19, 1894, in an action brought by the United States against the Southern Pacific Railroad Company to quiet title to the lands involved in this appeal, and in which action it was adjudged that the United States was the owner in fee simple of said lands, and the decree further provided:

"That the defendants are, and each of them is, forever enjoined and restrained from \* \* \* claiming or asserting any right, title, or interest in or to the said lands, or any part thereof."

The contention of the Southern Pacific Railroad Company is that this decree does not bar its present assertion of title to the lands affected thereby, because the indemnity selections under which it now claims were not made until long subsequent to the entry of the decree referred to; and it is urged that by such selection the defendant has acquired a new title, one which it did not possess at the time of the rendition of the former decree, and therefore not concluded by it. There is, of course, no denial of the general rule that a judgment in ejectment or other action affecting title to real estate does not deprive the party found without title of the right to acquire a new and distinct title, and, when so acquired, to assert the same without prejudice from the former suit; but that principle has no application here, because the title under which the defendant now claims has its origin in a statute granting it the right under certain conditions to acquire the title now asserted, and this statute was in force at the date of the commencement of the action in which

the former decree was entered. The railroad company's contingent right to select and acquire title to the lands in controversy, in that action as in this, was an existing right when the former action was commenced, which, whether asserted or not at that time, is concluded by the decree. The object of the suit in which the prior judgment was entered was to quiet the title of the United States against all claims of the defendant Southern Pacific Railroad Company, and the effect of the decree was to quiet the title of the United States against all claims of the defendant railroad company arising under any statute of the United States then in force, and the Supreme Court in the case of *Southern Pacific R. Co. v. United States*, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, referring to the cases of *United States v. Southern Pacific Railroad Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, *United States v. Colton Marble & Lime Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, and *Southern Pacific Railroad Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, said:

"Of course, the decrees that were rendered in those cases are conclusive of the title to the property involved in them, no matter what claims or rights either party may have had and failed to produce; but as to property which was not involved in those suits, they are conclusive only as to the matters which were actually litigated and determined."

It may be stated, as a well-settled principle of law, that, when the title of a defendant is challenged by an action to quiet title, he is required to plead whatever right, title, or interest he has or claims to have in the land, and a final judgment in favor of the plaintiff is res judicata as to every right which the defendant then had, whether asserted or not. The object of this rule is to put an end to litigation. *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *United States v. California & Oregon Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476.

It follows from what we have said that in our opinion the decree of the Circuit Court is right, and it is therefore affirmed.

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#### SOUTHERN PAC. R. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,492.

#### PUBLIC LANDS (§ 88\*) — RAILROAD GRANTS — INDEMNITY LANDS — CONFLICTING GRANTS — EFFECT OF FORFEITURE.

None of the lands within either the primary or indemnity limits of the grant made to the Atlantic & Pacific Railroad Company in California by Act July 27, 1866, c. 278, 14 Stat. 292, were subject to selection as indemnity lands by the Southern Pacific Railroad Company under the grant made to it by Act March 3, 1871, c. 122, 16 Stat. 573, although within the indemnity limits of such grant, even after the former grant had been forfeited and the lands restored to the public domain by Act July 6, 1886, c. 637, 24 Stat. 123.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 267, 268; Dec. Dig. § 88.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Southern District of California.

For opinion below, see 152 Fed. 314.

Wm. Singer, Jr., and Wm. F. Herrin, for appellants.

Robt. T. Devlin, U. S. Atty., and Geo. Clerk, Asst. U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and DE HAVEN, District Judge

DE HAVEN, District Judge. This is an appeal by the defendants from a decree of the Circuit Court, Southern district of California, annulling a patent issued by the United States to the defendant Southern Pacific Railroad Company for certain lands in the state of California.

The bill of complaint alleges, and the agreed statement of facts shows, that part of the land so patented is situated within the primary and part within the indemnity limits of the grant of land made to the Atlantic & Pacific Railroad Company by the act of Congress approved July 27, 1866, c. 278, 14 Stat. 292. The Atlantic & Pacific Railroad Company did not construct any portion of the road located by it in the state of California, as contemplated by that act, and Congress on July 6, 1886, c. 637, 24 Stat. 123, passed an act forfeiting the lands granted to that company, in so far as they were "adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits as contemplated to be constructed under and by the provisions" of the act making the grant. The lands in controversy are within the indemnity limits of the grant made to the Southern Pacific Railroad Company by Act March 3, 1871, c. 122, 16 Stat. 573, and were selected by that company as indemnity lands after their restoration to the public domain by the act of July 6, 1886, forfeiting the grant previously made to the Atlantic & Pacific Railroad Company. It is not claimed by the United States that the Southern Pacific Railroad Company did not earn the lands granted to it, nor that it was not entitled to make indemnity selections to take the place of odd-numbered sections within the primary limits of the grant to which it failed to acquire title. But the objection urged to the validity of the selections in controversy is that the lands were not subject to selection by that company, because they are all either within the primary or within the indemnity limits of the prior grant made to the Atlantic & Pacific Railroad Company, and this was the view taken by the Circuit Court.

1. The contention of the Southern Pacific Railroad Company on this appeal is that, as the lands were public lands, open to settlement and entry, at the date of selection, such selection was valid. Section 23 of Act March 3, 1871, 16 Stat. 573, under which the appellant claims, reads:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tahachapa Pass by way of Los Angeles, to

the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions and conditions, as were granted to said Southern Pacific Railroad Company by California by the act of July twenty-seven, eighteen hundred and sixty-six: Provided however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

In discussing the effect of the proviso contained in this section, the Supreme Court, in the case of *United States v. Colton Marble & Lime Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, said:

"One thing that distinguishes the grant of 1871 to the Southern Pacific Railroad Company from most, if not all, other land grants, is the proviso, somewhat considered in the opinion in the former cases, and which reads: 'Provided however, that this section shall in no way affect or impair the rights, present or prospective of the Atlantic and Pacific Railroad Company, or any other railroad company.' Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that Congress meant by it to impose limitations and restrictions different from those generally imposed in such cases, and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right. As it could have no effect upon the lands within the granted limits, it must have been intended to have some effect upon those within the indemnity limits, they being the only lands upon which it could operate."

It is true that in the case just cited the question before the court was not precisely the same as that which is presented here, the controversy in that case relating to lands within the granted limits of the Southern Pacific Railroad Company under its grant of March 3, 1871, and the indemnity limits of the prior grant to the Atlantic & Pacific Railroad Company. But in the later case of *Southern Pacific Railroad Company v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, part of the lands in controversy were indemnity selections made by the Southern Pacific Railroad Company under the act of March 3, 1871, of lands within both the primary and indemnity limits of the grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866; and in affirming the decree of the Circuit Court which annulled patents based upon such indemnity selections the court must necessarily have held, upon the record before it, that such selections were invalid and the patents issued thereon void for that reason; and this seems to have been the construction placed upon the decision in that case by the Supreme Court, in *Southern Pacific Railroad Company v. United States*, 189 U. S. 447, 23 Sup. Ct. 567, 47 L. Ed. 896, in which the court, in speaking of the contention of the Southern Pacific Railroad Company that it had the right, under its grant of March 3, 1871, to make indemnity selections of land within the place limits of the grant made to the Texas Pacific Railroad by the same act, used this language:

"The Texas Pacific grant was declared forfeited by the act of February 28, 1885, c. 265, 23 Stat. 337, and this forfeiture inured to the benefit of the United States. *United States v. Southern Pacific Railroad Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091. It is argued further, however, that, if the Southern Pacific did not get the lands in question under its primary grant, it may take a part of them as indemnity lands. It is said that the company has a right to take them for that purpose if the status of the lands,

at the time of the selection, permits it. *Ryan v. Railroad Co.*, 99 U. S. 382, 25 L. Ed. 305. That contention seems to be disposed of by *Southern Pacific Railroad v. United States*, 168 U. S. 1, 47, 66, 18 Sup. Ct. 18, 42 L. Ed. 355, and the practice of the Land Department for many years has been inconsistent with it."

The conclusion reached by the Circuit Court is in harmony with the two cases last cited, and the decree is therefore affirmed.

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OLIVE v. ARMOUR & CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1909.)

No. 1,807.

**BANKRUPTCY (§ 68\*) — INVOLUNTARY PROCEEDINGS—PERSONS WHO MAY BE ADJUDGED BANKRUPT—FARMERS.**

A person engaged chiefly in farming, and therefore exempted from proceedings in involuntary bankruptcy by Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), cannot commit an act of bankruptcy, and does not become subject to such proceedings, by making a general assignment for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 68.\*]

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of Georgia.

Boykin Wright and Samuel H. Myers, for appellant.  
Austin Branch, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

BURNS, District Judge. On January 15, 1908, Armour & Co., doing business as Armour Fertilizing Works, the Hogrefe Hardware Company, and Mrs. Morton, as administratrix of the estate of her husband, filed petition against John T. Olive, in the usual form, seeking to have him adjudged a bankrupt upon the ground that within four months prior thereto (December 16, 1907) the defendant committed an act of bankruptcy, in that he made a general and voluntary assignment of all his assets, of every kind and description, for the benefit of his creditors. Said petition contains the further allegation that the alleged bankrupt is neither a wage-earner, nor a person chiefly engaged in farming or the tillage of the soil. On January 23, 1908, the defendant filed answer alleging that for the past two years he was chiefly engaged in farming, and therefore exempt from involuntary bankruptcy. For further plea and answer he averred that the indebtedness to Armour & Co. was for fertilizers for use upon his farms, that the indebtedness to the Hogrefe Hardware Company was for plows and other implements and the debt to the remaining creditor was balance of purchase money due upon a horse, which horse was used in furtherance of farm work, and that all of said creditors knew at the time of creating said indebtedness

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the articles so purchased were intended for farm purposes. On February 5, 1908, the issues and evidence were submitted to the court, and the same day Olive was adjudged a bankrupt within the intent and meaning of the act of Congress relating to bankruptcy, from which judgment defendant prosecutes appeal, and assigns the following error: The court having found and adjudged the facts to be that Olive, the alleged bankrupt, on the 16th day of December, 1907, made a general assignment for the benefit of his creditors, and that at said time he was engaged chiefly in farming, the court erred in holding, as matter of law, that Olive, by executing said assignment, thereby ceased to be a person engaged chiefly in farming, eo instanti divesting himself of any claim of exemption he might set up in a bankruptcy court.

Looking to the opinion contained in the record, we find the further statement:

"When he assigns his farming property he quits farming, and that property is subject to his debts, just like the property of any other man. His chief occupation is not then farming, but other pursuits. I am satisfied, so far as the evidence is concerned, that he was principally engaged in farming up to the time of the assignment. I have an impression that even though this gentleman (Olive) was largely engaged in farming, or chiefly engaged in farming, if he made an assignment of all of his property—which assignment itself would be a violation of the bankruptcy law—he would not be a farmer in contemplation of the bankruptcy act."

The record discloses that the creditors made application for the appointment of a receiver for the estate of the alleged bankrupt, the application containing the following recital:

"That the property of the said Olive consists to a very large extent of farm properties, in the cultivation of which there are engaged large numbers of tenants, croppers, and wage hands, and on which are at work large numbers of horses, mules, etc. Contracts have been entered into with said tenants for the planting and raising of crops during the current year. It is believed that the farming operations, if conducted during the current year as planned, will prove remunerative to the estate."

The above statement appears to support the finding of the court below that Olive was "chiefly engaged in farming," and that the farming plans for the current year were well matured.

The defendant testified in support of the allegation in his answer to the effect that he was chiefly engaged in farming. The evidence in support of the contention of petitioners, that Olive was not within the excepted class, and therefore a proper subject for the cognizance of a court of bankruptcy, is to the effect that he had a license to practice law—had out his shingle—held stock in a laundry concern, and, formerly, some interest in a defunct wood and coal business. The evidence shows further that within two years prior to the institution of this suit he had two cases in which parties desired a cancellation of matrimonial vows, and, not being able to give these matters personal attention, the interests of the two clients were conserved by other counsel.

A ray of light upon the occupation of Olive appears in the testimony of this witness. Hon. Henry Hammond, being offered, testified substantially as follows:

"I am judge of the superior courts, Augusta circuit, and have been for four years. I know Mr. Olive very well. Am acquainted with him intimately, and have been for a number of years. I am acquainted with his farming operations in Columbia county, and acquainted with him as a practitioner, as far as anybody could be said to be acquainted with a thing that did not exist. He has had in my court only one case, which he won by the way he struck the jury. I am also acquainted with him as a farmer, having visited his farm on three occasions, and on horseback rode over his entire farm on all three of those occasions. We have four distinguished farmer-lawyers at our bar. Mr. Olive is really a most interesting farmer; has many acres under cultivation, magnificent barns, engines, and equipments of every kind for a farm. He has established kindly relations with his neighbors, and has really revolutionized things. Am somewhat of a farmer myself, but do not agree with all of his plans and investments; still I think he has done a wonderful work, and is doing it. As to his presence in the law and farming business, they are not to be considered in the same breath by any one who knows him in those two capacities. He never practiced in the courts. I think I never saw him in an actual trial but once in the four years I have been on the bench; that was a piano case, and he had his foot on the soft pedal all the way through. Q. In which of the two occupations, law or farming, do you regard him as chiefly engaged? A. Farming, overwhelmingly."

The clerk of the city court and the two justices of the peace were offered to prove that Mr. Olive had neither clients nor retainers in their respective courts, and they abundantly support this proposition. The evidence further discloses that all articles purchased from petitioning creditors were for the purposes of the farm, such as fertilizers, plows, and other implements. The evidence as to the chief occupation shows that the alleged bankrupt was born upon a farm, the son of a farmer, and, the law venture proving unsuccessful, he returned to the simple life, intending to make a good farmer out of the poor lawyer.

The order of adjudication is based solely and alone upon the fact that, having assigned all of his estate, he thereby committed an act of bankruptcy. This is one of the recognized grounds of the act upon which the creditors may move against the debtor, but has no application to the facts in this case, for the reason that those within the excepted and favored class, the farmer and wage-earner, can commit no act of bankruptcy. They are immune from all proceedings against them in courts of bankruptcy, and that the Congress so intended is without healthy disputation. The law provides (Act July 1, 1898, c. 541, § 4, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) that any person who owes debts shall be entitled to the benefits of this act as a voluntary bankrupt. Subdivision "b" provides:

"That any natural person, except a wage earner, or a person engaged chiefly in farming, or the tillage of the soil, may be adjudged an involuntary bankrupt, upon default, or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

From a casual inspection of the above recitation it follows that the wage-earner and farmer can invoke the benefit of the law, but the creditor, by the very terms of the act, is denied the right to proceed against this debtor class in courts of bankruptcy. His remedy is elsewhere. It is full and complete by attachment and execution, levy and sale.



If the act of bankruptcy complained of in this case, namely, the general assignment, should be the basis of the adjudication, it would be a practical nullification of the law as to a person "engaged chiefly in farming." It has been repeatedly held that the avocation of a bankrupt after the act of bankruptcy is not controlling, and that a person "chiefly engaged in farming," who made a general assignment for the benefit of his creditors, is not subject to the provisions of the bankrupt act.

The receiver having been appointed upon the application of the creditors and the consent of the debtor, the property should be charged with the costs of administration, and thereupon delivered to the assignee.

For the reasons stated, the judgment of the district court will be reversed, and it is so ordered.

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### THE BOVERIC.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,637.

**MASTER AND SERVANT (§ 193\*)—FELLOW SERVANTS—HIRING SERVANT TO ANOTHER.**

Where a charter party required the ship to furnish the power, winch, and winchmen for discharging cargo, that is the contribution of the vessel to the common work of discharging, and a winchman so furnished is not a fellow servant with the men of a stevedore, employed by the charterer to do the other part of the work, although the foreman of the stevedores gives the signals for the movements of the winch; and for the negligence of a winchman, resulting in injury to one of such men, the vessel is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 485; Dec. Dig. § 193.\*]

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

The steamship Boveric was chartered by the Northwestern Steamship Company, Limited, for a voyage to Nome and Solomon, Alaska, and return to British Columbia, to carry a cargo of coal for the charterer. On arriving at anchorage off Solomon, the charterer engaged the North Coast Lighterage Company, a corporation engaged in the business of lighterage, to discharge the cargo, the ship to furnish steam winches and power and two winchmen to operate the same. The appellee was one of the stevedores of the lighterage company engaged in discharging the ship, and while working in the after hatch, loading sacked coal into the ship's slings, was injured by the falling of the sling and the scales attached thereto. The owners, answering the libel, alleged that both the charterer and the lighterage company were corporations of the state of Washington, and that the whole of the stock of each was owned and controlled by another corporation of that state, the Northwestern Commercial Company. This allegation was put in issue by the reply, and no evidence was taken to substantiate it. By the terms of the charter party, the owners agreed to operate the ship at their own expense, and to furnish a full complement of officers, engineers, and seamen. It contained the following provisions: "That the captain (although appointed by the owners) shall be un-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

der the orders and directions of the charterers as regards employment, agency, or other arrangements." "Steamer to work night and day, if required by charterers, and all steam winches to be at charterer's disposal during loading and discharging, the steamer to provide men to work the same both day and night, if required; charterers agreeing to pay extra expense, if any, incurred by reason of night work, at the current local rate." The court below found that the accident occurred through the negligence of one of the winchmen, and held that the winchman was an employé of the ship, and was not a fellow servant with the appellee, and awarded the appellee damages in the sum of \$1,500.

Dudley Du Bose, H. Y. Freedman, T. M. Clowes, Thos. R. Shepard, W. H. Bogle, and Charles P. Spooner, for appellants.

John Rustgard, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The question here is whether the appellee was the fellow servant of the winchman through whose negligence the injury occurred. The rule is well settled, as stated by Cockburn, C. J., in *Rourke v. White Moss Collier Co.*, 2 C. P. D. 209, that:

"When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

But whether the servant of one master, when temporarily placed under the direction of another master as to some particular service to be rendered, becomes the fellow servant of the employés of the latter, under the varying circumstances of different cases, often gives rise to question. It is impossible to harmonize the conflicting decisions or to evolve therefrom a test universally applicable. In *Johnson v. Lindsay* [1891] App. Cas. 371, Lord Watson, in defining the circumstances under which the servant of one may become the fellow servant with the servant of another, said:

"In order to produce that result, the circumstances must be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment."

In *Coughlan v. Cambridge*, 166 Mass. 268, 277, 44 N. E. 218, 219, it was said:

"The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired."

In the case of *The Slingsby*, 120 Fed. 748, 57 C. C. A. 52, a case similar to the case at bar, cited by the appellee, it is said that of all suggested tests the most satisfactory is whether the master to whom the servant of another is loaned has the power of substitution of one man for another. In *The Elton*, 142 Fed. 367, 73 C. C. A. 467, a case also quite similar to the present case, and relied upon by the appellant, it was said that the true test was whether both the servants were at the time of the accident working in a common employ-

ment, under the same general direction and control. We may apply any or all of these tests to the present case, and measured by none of them do we find the appellee to have been the fellow servant of the winchmen.

No complication is brought into the case by the fact that the ship was under charter. The question to be solved stands as it would if there had been no charter party and the lighterage contract had been made by or on behalf of the owners. *Leary v. United States*, 14 Wall. 607, 20 L. Ed. 756; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *United States v. Shea*, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403; *The Terrier* (D. C.) 73 Fed. 265; *McGough v. Ropner* (D. C.) 87 Fed. 534. The winchmen were in the employment of the ship. Among their specified duties, according to the charter party, was that of operating the winch in discharging cargo. In doing that work, according to the evidence in this case, they never left their master's employment, but were at all times subject to the control of the officers of the vessel who assigned them to their task. They were not lent to the lighterage company, nor were they aiding that company in the discharge of its contract. They were doing the services which the ship contributed to the common work of unloading the vessel. They were doing nothing for which the lighterage company was paid. The contract was that the ship was to furnish the power, the winch, and the winchmen, and the lighterage company was to do the rest.

The simple fact that the foreman of the stevedores gave the winchmen signals to raise and lower the winch was not in itself sufficient to place the winchmen under his control. In the very nature of the work, it was necessary that some one should give such signals, and the stevedores, who had charge of the loading of the sacked coal into the slings and unloading the same, were in the best position to give them. The lighterage company had no other control over the winchmen. In this respect the case differs from that of *The Elton*. In that case the testimony was that the officers of the ship had no direction or control of the winchman in the actual work of unloading, and that the stevedore could have removed him and put another in his place at any time. The court said:

"If the winchman showed incompetence, it would have been the duty of the stevedore to have exercised this power of removal."

In the present case the evidence is that, prior to the accident, the foreman of the stevedores complained of the winchmen to the mate of the vessel. He testified:

"I told him they were incompetent and careless. He said he could not do any better; said I would have to put up with it."

The case is identical with the leading case of *Johnson v. Netherlands American Steam Navigation Co.*, 132 N. Y. 576, 30 N. E. 505. In that case the plaintiff was in the employment of one Lithman, a stevedore engaged in unloading a vessel belonging to the defendant. Under the contract the stevedore was to be paid a stipulated price per ton for unloading and the defendant was to furnish the steam power and a man to run the winch. The plaintiff was to give

the signals to the winchman. Through the negligence of the winchman he was injured. The court said:

"It is claimed that Lithman was an independent contractor, having charge of all of the men engaged in unloading the vessel, and that the defendant is not liable for the negligent act of servants working under his direction. The question is as to whether the winchman was the servant of Lithman, and consequently the co-servant of the plaintiff. Lithman testified that he was paid by the ton; that the vessel furnished the steam power and the winch driver. This is the evidence as to the contract with the defendant. It does not appear that he had the power to order, direct, discharge, or control the winch driver farther than to signal to him by way of the gangwayman when to hoist or lower, go ahead or come back. It consequently does not appear to us that the winchman could be regarded as the servant of Lithman. It is quite apparent that it was the intention of the defendant to retain charge of the steam power and winch and operate it through its own servants and employes. And the fact that the winchman received orders from the plaintiff when to hoist and when to lower, under the circumstances of this case, does not operate to change his relations to the defendant as its servant."

In harmony with that decision and with the case of *The Slingsby*, above cited, are the decisions of the Circuit Courts of Appeals for the Fourth and Sixth Circuits in *The City of San Antonio*, 143 Fed. 955, 75 C. C. A. 27, and *Otis Steel Co. v. Wingle*, 152 Fed. 914, 82 C. C. A. 62.

The decree of the District Court is affirmed.

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UNITED STATES v. RUSCH & CO. SAME v. TITUS BLATTER & CO.  
SAME v. QUAINANCE.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

Nos. 92, 99, 100 (4,736, 5,090, 5,091).

CUSTOMS DUTIES (§ 32\*)—CLASSIFICATION—COTTON CLOTH WITH COLORED FIGURES.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 313, 30 Stat. 178 (U. S. Comp. St. 1901, p. 1659), providing a duty on figured cotton cloth in addition to the duty "provided for other cotton cloth of the same description, or condition," the intention is to impose an extra duty in addition to that imposed on "other cotton cloth of the same \* \* \* condition," etc., which has not been figured; and where the fabric is colored, but the coloring is given by the threads used to form the figures, such extra duty should be added to the duty applicable to uncolored, rather than colored, cottons.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 32.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

In the first of these causes the Board of General Appraisers decided in favor of the importer. G. A. 6,492 (T. D. 27,762). In the other two, on a fuller record, it decided in favor of the government. G. A. 6,670 (T. D. 28,447). The Circuit Court decided all three causes in favor of the importer, and from those decisions this appeal is taken.

For decision below, see 160 Fed. 279.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. Osgood Nichols, Asst. U. S. Atty.  
Comstock & Washburn (Albert H. Washburn, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The goods in question are cotton cloths in which all the ordinary warp and filling threads, whether bleached or unbleached, which form the foundation, are not colored; the foundation being embellished with designs composed entirely of colored threads interwoven with and superimposed upon the warp and filling threads to form colored figures of greater or less elaboration. Sometimes the figures are few and small, but always substantial enough to modify the plain goods. Sometimes they cover much the greater part of the foundation, so that the fabric appears to the eye as a colored one with white ornamentation. The additional threads composing the colored design are woven in the loom at the same time as the rest of the fabric.

The relevant provisions of the tariff act of 1897 are the "countable cotton" paragraphs and paragraphs 310 and 313 (Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 178 [U. S. Comp. St. 1659]), which read as follows:

"307. Cotton cloth not bleached, dyed, colored, stained, painted, or printed, exceeding one hundred and fifty and not exceeding two hundred threads to the square inch, counting the warp and filling, and not exceeding three and one-half square yards to the pound, two cents per square yard; exceeding three and one-half and not exceeding four and one-half square yards to the pound, two and three-fourths cents per square yard; exceeding \* \* \* if bleached, and not exceeding three and one-half square yards to the pound, two and three-fourths cents per square yard; exceeding three and one-half and not exceeding four and one-half square yards to the pound three and one-half cents per square yard; exceeding \* \* \* if dyed, colored, stained, painted, or printed, and not exceeding three and one-half square yards to the pound, four and one-fourth cents per square yard; exceeding three and one-half and not exceeding four and one-half square yards to the pound, four and one-half cents per square yard; exceeding \* \* \*: Provided, that on all cotton cloth exceeding one hundred and fifty and not exceeding two hundred threads to the square inch, counting the warp and filling, not bleached, dyed, colored, stained, painted, or printed, valued at over ten cents per square yard, thirty-five per centum ad valorem; bleached, valued at over twelve cents per square yard, thirty-five per centum ad valorem; dyed, colored, stained, painted, or printed, valued at over twelve and one-half cents per square yard, forty per centum ad valorem."

The blanks in the above quotation refer to goods of different weights.

Paragraphs 305, 306, 308, and 309 are similar in structure, dealing with cloths of varying count of threads to the square inch, from 50 to 400.

"310. The term 'cotton cloth,' or 'cloth,' wherever used in the paragraphs of this schedule, unless otherwise specially provided for, shall be held to include all woven fabrics of cotton in the piece or otherwise, whether figured, fancy, or plain, the warp, and filling threads of which can be counted by unraveling or other practicable means."

"313. Cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure, whether known as lappets or otherwise, and whether unbleached, bleached, dyed,

colored, stained, painted, or printed, shall pay, in addition to the duty herein provided for other cotton cloth of the same description, or condition, weight, and count of threads to the square inch, one cent per square yard if valued at not more than seven cents per square yard, and two cents per square yard if valued at more than seven cents per square yard."

Two decisions of the Supreme Court dealing with similar countable cotton clauses in an earlier tariff act, which did not contain the provisions of paragraphs 310 and 313, are helpful to a conclusion. In *Newman v. Arthur*, 109 U. S. 132, 3 Sup. Ct. 88, 27 L. Ed. 883, there were presented certain "cotton Italians," which were twilled and had upon them different figures and designs made in the weaving. It was contended, and proof was introduced to show, that it was not the custom of merchants to buy and sell such goods or determine the value thereof by the number of threads to the square inch; also that in some cases such number could not be ascertained by the use of the magnifying glass, which was the means used by merchants to determine a count of threads. The court held, however, that the goods were dutiable under the countable clause, "although the number of threads constituting the warp and woof or filling could only be counted by cutting out a square inch of the cloth and count the unraveled threads." Evidently the provisions of the "countable cloths" paragraphs are to be construed as descriptive rather than denominative, and indeed both sides seemed to concede this on the argument.

Subsequently there came before the Circuit Court in the Southern District of New York woven cotton cloth, the groundwork of which was uniform and upon which were figures or patterns woven into it by means of a Jacquard attachment contemporaneously with the weaving of the fabric. These figures in some instances covered more than half the surface of the goods. That court held that the figures were just as much cotton cloth as the ground was, and threads composing them as much entitled to a count; that in consequence the fabric was not homogeneous, as a count made within one square inch would vary greatly from counts made in other square inches. The conclusion was reached that the goods were not within the countable paragraphs, because there could be no uniform count of the threads. *Robertson v. Hedden* (C. C.) 40 Fed. 322. The Supreme Court, however, reversed this ruling, holding that:

"The groundwork being cotton cloth within the terms and provisions of the statute, and the threads thereof being countable, the goods were dutiable, by the express language of the statute, at the rate which was exacted by the collector. \* \* \* In other words, the ornamentation placed upon the groundwork of the fabric does not change its character as cotton cloth, subject to the countable clauses of the statute." *Hedden v. Robertson*, 151 U. S. 520, 14 Sup. Ct. 434, 38 L. Ed. 257.

This decision was rendered before paragraph 313 or its equivalent was inserted in tariff legislation. Apparently such insertion was intended to prevent the figured—and relatively more valuable—goods from coming in at a rate of duty less than they ought properly to pay by reason of considering the groundwork only in classifying the fabric under the countable paragraphs. Of that paragraph (313) this court held that the word "ordinary," as therein applied to "warp and filling threads," means those threads which ordinarily enter into the

construction of the ordinary plain fabric and which cannot be removed without destroying its integrity, as distinguished from extraordinary threads, which are not an integral part of the fabric, but are independent threads introduced to form a figure and for no other purpose. *Clafin v. United States*, 114 Fed. 259, 52 C. C. A. 94.

The language of the paragraph (313) seems to us quite clearly to express the idea that cotton cloth which has been differentiated from ordinary cotton cloth by the introduction in the weaving of other threads to form a figure shall pay the specified extra duty in addition to that imposed on the other cotton cloth of the same description, condition, weight, and count of threads to the square inch, which has not been thus differentiated. With the goods now before us, if the differentiating addition were eliminated, we would have bleached cotton cloth of a certain weight and count to the square. The duty on such cotton cloth plus the additional duty specified in paragraph 313 is the amount which should be assessed.

It should be noted that the importers concede that if there were any colored threads in the ordinary warp and filling the cotton cloth would be no longer plain bleached or unbleached, but colored; and certain samples covering such goods are withdrawn from consideration. The concession is a proper one and in accord with our conclusions.

The questions presented upon this appeal are not discussed in *United States v. Riggs*, 203 U. S. 136, 27 Sup. Ct. 39, 51 L. Ed. 127, and we find nothing in that decision which calls for any modification of what has been said supra.

Decision affirmed.

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#### HORRAX v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 118 (4,787).

#### 1. CUSTOMS DUTIES (§ 37\*)—CLASSIFICATION—BRAIDS OF COTTON AND RUBBER—“MANUFACTURES IN CHIEF VALUE OF INDIA RUBBER.”

In Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), the provision for braids “wholly or in chief value of \* \* \* cotton, \* \* \* whether composed in part of india rubber or otherwise,” applies only to braids in which cotton is the chief or only component. Braids in part of cotton and in chief value of rubber are dutiable under Schedule N, par. 449, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678), as “manufactures in chief value of india rubber.”

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4361.]

#### 2. CUSTOMS DUTIES (§ 17\*)—STATUTORY CONSTRUCTION—LEGISLATIVE INTENT—INCONSISTENCY IN DUTIES.

The fact that inconsistency in duties may result is not adequate ground for holding that Congress meant the opposite from what it said.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 17.\*]

Coxe, Circuit Judge, dissenting.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Southern District of New York.

The Circuit Court affirmed a decision by the Board of United States General Appraisers (G. A. 6,496, T. D. 27,778), which had affirmed the assessment of duty by the collector of customs at the port of New York. The opinion below reads as follows:

HAZEL, District Judge. The merchandise in question, consisting of braids made of cotton and india rubber, of which india rubber is the component material of chief value, was assessed for duty by the collector and Board of General Appraisers under paragraph 339 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]). I concur in the reasoning by which the conclusion was reached, notwithstanding that india rubber is concededly the component material of chief value. The argument of counsel for the importer that the board ignored the apparent limitation contained in the paragraph that the article must have been composed wholly or in chief value of cotton or vegetable fiber is fairly met by the opinion of Judge Coxe in *Hague et al. v. United States* (C. C.) 73 Fed. 810, together with *United States v. Churchill* (C. C.) 106 Fed. 672, which in effect holds that, where articles are stated to have been "made of" a material, such material must be deemed to be the component part thereof of chief value, and by the evident intention of Congress to increase the duty on elastic braids. Paragraph 339 is not as clear as it might be, and upon reading it would seem to require that the articles must be composed wholly or in chief value of cotton, etc.; but I think that Congress, in transferring such article from paragraph 263 of the tariff act of 1894 (Act Aug. 27, 1894, c. 349, § 1, Schedule I, 28 Stat. 529), and including it with "embroideries and all trimmings" in paragraph 339 of the act of 1897, intended to increase the duty thereon. The earlier act, which was in issue in the case of *Hague v. United States*, does not specifically contain the words "composed wholly or in chief value of." Nevertheless the court seems to have read that phrase into it and reached the conclusion that the paragraph was not limited in its application, but that the words "in part of india rubber or otherwise" must be interpreted to mean articles composed in part of india rubber, irrespective of its value.

The decision of the Board of General Appraisers is affirmed.

Walden & Webster (Henry J. Webster, of counsel), for appellant.  
J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The merchandise in question consists of braids composed of cotton and india rubber, the latter being the component material of chief value. The government contends that it is dutiable under these provisions of paragraph 339 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]):

"Braids \* \* \* composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem."

The importer claims that the merchandise should be assessed under paragraph 449 of said act:

"Manufactures of \* \* \* india rubber \* \* \* or of which these substances or either of them is the component material of chief value, \* \* \* thirty per centum ad valorem."



Paragraph 339 by its express language applies only to braids "composed wholly or in chief value" of cotton or of certain other materials. The braids in question are not composed wholly of cotton, and cotton is not the component material of chief value. There is little room for construction. The merchandise simply does not come within the statute. How can it be said that an act expressly limited in its application to braids composed in chief value of cotton applies to braids composed in chief value of india rubber?

But it is urged that, if the statute applies only to braids composed in chief value of cotton, no effect is given to the clause "whether composed in part of india rubber or otherwise." This is not entirely true. The clause is explanatory. Braids composed wholly or in chief value of cotton are the specific articles to which the statute applies. The clause explains that these articles come within the statute, whether they contain some india rubber or not. This explanation is undoubtedly unnecessary. The presence of india rubber—not sufficient to make it the component material of chief value—would not affect the application of the statute without the explanatory clause. But explanatory clauses are often unnecessary. And whether necessary or unnecessary, they can seldom override the direct and positive provisions of a statute.

The government relies in support of its contention upon the decision in *Hague v. United States* (C. C.) 73 Fed. 810. The provision construed in that case, in *Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule I, 28 Stat. 529*, reads:

"Cords, braids \* \* \* made of cotton or other vegetable fiber, and whether composed in part of india rubber or otherwise."

It was said that cords in which india rubber was the component material of chief value fell within the provision. But the very words which control this decision—"composed wholly or in chief value"—were not in the statute construed in the *Hague Case*; and that decision, therefore, cannot be regarded as an authority against the construction which we have placed upon the present statute. And as the phrase adjudicated in the *Hague Case* is essentially different from that of this provision, the rule that an adjudicated phrase is employed in its adjudicated sense when incorporated in a later statute, is inapplicable. On the contrary, it must be presumed from the language employed that when Congress, in view of the decisions, placed braids in a paragraph applying to articles "composed wholly or in chief value of flax, cotton, or other vegetable fiber," it intended that for the future braids composed of cotton and india rubber should be assessed under the vegetable fiber schedule only when cotton was the component material of chief value. That this conclusion may lead to inconsistencies in duties is not adequate ground for holding that Congress meant the opposite from that which it said.

The merchandise should have been assessed under paragraph 449, and not under paragraph 339, of the tariff act of 1897.

The decision of the Circuit Court is reversed.

COXE, Circuit Judge, dissents.

In re DANA, Judge, et al.

(Circuit Court of Appeals, Eighth Circuit. February 3, 1909.)

No. 85.

1. BANKRUPTCY (§ 217\*)—RESTRAINING PROCEEDINGS IN STATE COURT—POWER OF COURT TO GRANT INJUNCTION.

A District Court of the United States, in which proceedings in bankruptcy are pending and which is in the actual possession of real property conceded to belong to the bankrupt, has jurisdiction to determine the amount and order of priority of liens thereon and to liquidate such liens, to the end that the property may be sold free of incumbrances, and in aid thereof to enjoin the lienholders from prosecuting the foreclosure of their liens in a suit brought in a state court before the commencement of the bankruptcy proceedings, but within four months thereof; and this, though the lienholders object, and it is not contended that their liens are preferential or fraudulent or invalid for any other reason.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 323; Dec. Dig. § 217.\*]

2. BANKRUPTCY (§ 217\*)—RESTRAINING PROCEEDINGS IN STATE COURT—SCOPE OF INJUNCTION.

An injunction issued by a court of bankruptcy restraining litigants from prosecuting a suit in a state court against a bankrupt should not be extended to the court or the judge thereof, unless in case of imperative necessity, assuming that the court has power to so extend it.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 217.\*]

On Petition for Review.

Edwin A. Austin, for petitioners.

Mulvane & Gault and D. R. Hite, for respondent.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. The principal question arising on this petition to revise is whether a District Court of the United States, in which proceedings in bankruptcy are pending, and which is in the actual possession of certain real property conceded to belong to the bankrupt, has jurisdiction to determine the amount and the order of priority of liens thereon, and to liquidate such liens, to the end that the property may be sold free of incumbrances, and in aid thereof to enjoin the lienholders from prosecuting the foreclosure of their liens in a suit brought in a state court before the commencement of the bankruptcy proceedings, but within four months thereof; and this, though the lienholders object to such jurisdiction, and it is not contended that their liens are preferential or fraudulent, or invalid for any other reason. Bearing in mind the property was the property of the bankrupt, the title to which had passed to the trustee in bankruptcy, and that it was in the actual possession of the District Court of the United States, we think an affirmative answer should be given upon the authority of *In re Schermerhorn*, 76 C. C. A. 215, 145 Fed. 341, *In re Eppstein*, 84 C. C. A. 208, 156 Fed. 42, and the cases therein cited. In such a case the power of the court is not affected by section 57h of the bank-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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ruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]).

The injunction in this case ran, not only against the parties to the suit in the state court, but also against the state court itself and the judge. Assuming, without deciding, that power exists so to extend the writ, clearly it should never be exercised, except in case of imperative necessity. An injunction operating upon the litigants alone will rarely fail to accomplish all that is needed, and it should not be anticipated that a judge of a state court will of his own motion insist upon proceeding after the parties in interest have been restrained by a court whose jurisdiction in the particular matter is paramount. A considerate regard for the dignity of the courts of the states, so essential to harmony in our intricate judicial systems, forbids an assumption that they will not be equally solicitous to observe the Constitution and laws of the United States, which constitute the supreme law of the land binding upon all the courts. Indeed, it appears that before the injunction in question was awarded the state court, which by its receiver had the actual possession of the property, voluntarily surrendered it to the receiver appointed in the bankruptcy proceeding upon request being made.

The order of injunction should be amended by discharging therefrom the court of the state and the judge; otherwise, the petition to revise is denied.

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DE LAMAR v. HERDELEY.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 122.

1. TRIAL (§ 143\*)—QUESTIONS FOR JURY—CONFLICTING EVIDENCE.

It is within the province of a jury to weigh the evidence and to base a verdict for plaintiff on his uncorroborated testimony, although contradicted, and even though it involves a finding that the execution of a release was procured by fraud.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.\*]

2. RELEASE (§ 24\*)—AVOIDANCE AT LAW—FRAUD IN PROCUREMENT.

A release may be avoided for fraud in an action at law in a federal court in which it is set up as a defense, where the fraud alleged relates to its execution and goes to the question of its existence as a valid instrument.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 44; Dec. Dig. § 24.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Frank Verner Johnson, for plaintiff in error.

Lester & Graves (Harmon S. Graves, Charles S. Yawger, and Robert M. Miles, Jr., of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NOYES, Circuit Judge. A summary of the facts in this case appears in our opinion in 157 Fed. 547, 85 C. C. A. 209. It is unnecessary to re-examine them in passing upon the present assignments of error.

It is urged, in the first place, that the trial court should have directed a verdict for the defendant because the plaintiff's contention was unsupported by any evidence other than his own testimony, which was contradicted by that of other witnesses. But the jury had the right to base their verdict upon the uncorroborated testimony of the plaintiff. It was for them to weigh the evidence.

The second contention is that the testimony offered by the plaintiff should not have been received for the purpose of showing that he had been induced by false and fraudulent representations to execute the release set up by the defendant. The gist of this contention is that the release was valid until canceled in a suit in equity. This contention is not well founded. The fraud sought to be proved went to the question whether the instrument ever had any legal existence as a release. The plaintiff admitted that he signed the paper, but claimed that he did not execute it as a release. The evidence offered related to the execution of the instrument, and it was unnecessary to resort to a court of equity. There was no error in receiving it. *Such v. State Bank* (C. C.) 127 Fed. 450. See, also, *George v. Tait*, 102 U. S. 564, 26 L. Ed. 232; *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605.

The third contention is that the evidence offered by the plaintiff to show fraud in the execution of the release was not of that clear and convincing character required to annul written instruments. But here again it was within the province of the jury to weigh the evidence. If they believed the plaintiff's testimony, they were justified, in view of all the circumstances, in sustaining his claim of fraud.

The final contention is that the trial court erred in declining to charge that the plaintiff was guilty of such gross negligence in signing the release without obtaining an explanation of its meaning as to estop him from avoiding it upon the ground that he was ignorant of its contents. We think, however, that the plaintiff was justified in relying upon the statements of the interpreter furnished by the defendant. The situation of the parties was such that the defendant was not entitled to the instructions asked for.

The judgment of the Circuit Court is affirmed.

## UNITED STATES v. CATTUS.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 135 (5,014).

## 1. CUSTOMS DUTIES (§ 37\*)—CLASSIFICATION—ARTIFICIAL SHAMROCKS—"TOYS"—"ARTIFICIAL LEAVES."

Artificial shamrocks are not "toys," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1674), but are dutiable as "artificial leaves, under paragraph 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7038, 7818.]

## 2. CUSTOMS DUTIES (§ 37\*)—"TOYS."

Toys are playthings for the amusement of children, used throughout, or in different seasons of, the year; and artificial shamrocks, that are used by the Irish of all ages as a national emblem and are not commercially known as "toys," are not toys, though usually to be obtained in toy shops. Not everything in a toy shop is a toy.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 144; Dec. Dig. § 37.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The court below, without opinion, reversed a decision by the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York.

D. Frank Lloyd, Asst. U. S. Atty.

John G. Duffy (Everit Brown and Kammerlohr & Duffy, on the brief), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The goods in question are artificial shamrocks made of silk and metal, silk chief value. They have been assessed as artificial leaves, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), the relevant portion of which is:

"And artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this act, fifty per centum ad valorem."

The importers claimed they should have been assessed as toys under paragraph 418:

"Dolls, doll heads, toy marbles of whatever materials composed, and all other toys not composed of rubber, china, porcelain, parian, bisque, earthen or stone ware, and not specially provided for in this act, thirty-five per centum ad valorem."

The judge of the Circuit Court sustained the contention of the importer. Though these articles are imported by toy dealers and are generally sold in toy shops, they are sold as shamrocks, and are used by the Irish of all ages as a national emblem on St. Patrick's Day.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Toys are playthings for the amusement of children, used throughout, or in different seasons of, the year.

The importer relies on the case of *Cadwalader v. Zeh*, 151 U. S. 171, 14 Sup. Ct. 288, 38 L. Ed. 115, which holds that words in the tariff act which have an established commercial meaning must be understood in that sense, even if different from the ordinary meaning. These articles have no established commercial designation as toys. They are sold as shamrocks; and, though they are usually to be obtained in toy shops, not everything in a toy shop is a toy—e. g., base-balls and bats, firecrackers, bows and arrows, checkerboards, playing cards, etc.

Judgment reversed.

# UNITED STATES v. STROHMEYER & ARPE CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 136 (4,957).

**CUSTOMS DUTIES (§ 30\*)—CLASSIFICATION—CAULIFLOWERS IN BRINE—"VEGETABLES IN THEIR NATURAL STATE"—PREPARED—PRESERVED—"VEGETABLES PREPARED OR PRESERVED."**

Cauliflowers that have been trimmed, washed, and packed in brine for preservation during transportation, and to keep them in their natural state, and that when taken out of the brine and washed are still in their natural state, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650), as "vegetables in their natural state," rather than under paragraph 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), as "vegetables prepared or preserved."

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The Circuit Court affirmed a decision of the Board of General Appraisers (G. A. 6,593, T. D. 28,174), reversing the action of the collector. The following is the opinion of Platt, District Judge, in the court below:

The merchandise in question consists of cauliflower, trimmed, washed, and packed in a weak brine. It was assessed for duty at 40 per cent. ad valorem under the provision in Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), for "all vegetables prepared or preserved, including pickles and sauces of all kinds." The importers protested, claiming the same properly dutiable at 25 per cent. ad valorem under paragraph 257, covering "vegetables in their natural state."

Let me add only a word to the majority opinion in this case, with which I feel bound, under the law as it now stands, to coincide. Without brine cauliflower would not keep more than two or three days in warm weather. It is a vegetable very susceptible to decay. Our home pickle manufacturers, then, must put the cauliflowers which they buy for pickles into brine before they finally treat them for pickles. Is not a cauliflower bought from a Dutchess county farmer by a New York pickler still in its natural state until it is finally subjected to the pickling process? The weak brine has been used to hold the vegetable in a state as near as possible to that of nature. It does not take much longer to get the vegetable from a foreign country than from many of the outlying farm districts at home. The domestic manu-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facturers put the local product in a stronger brine than that used upon the imported article. Such a brine may act as a preservative; but the weak brine of the imported article does not appear to have the same effect. The latter is a mere temporary expedient to arrest decay and retain the form which nature gives to the article. It is not capable of preventing decay for any appreciable length of time. It is conceded by the government that, if the cauliflowers were brought over in cold storage, they ought to be classified as in their natural state. I can see no distinction between such a case and the method adopted herein.

The decision of the Board of General Appraisers is affirmed.

D. Frank Lloyd, Asst. U. S. Atty.

Everit Brown, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The merchandise in controversy is cauliflower trimmed, washed, and packed in brine for preservation during transportation. The collector assessed duty at the rate of 40 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), which provides for "all vegetables, prepared or preserved." The importer contends that it should have been classified under paragraph 257, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650), which provides an ad valorem duty of 25 per cent. for "vegetables in their natural state."

The Board and the Circuit Court concur in the opinion that the importers' contention is well founded, and we see no reason for reaching a different conclusion. The question, briefly stated, is whether the imported cauliflower, concededly a vegetable, when it arrived at the port of entry was in its natural state or prepared or preserved.

The tariff act, like all statutes, must be given a common-sense construction. If paragraph 257 be construed literally it would result in the prohibition of the importation of all vegetables, for the moment a vegetable is cut from its growing stem or taken from the ground it ceases, in this restricted sense, to be in its natural state. If an exceedingly strict construction were adopted, it would exclude vegetables which have been washed or trimmed or from which decayed or superfluous leaves or stems have been removed; for these too, strictly speaking, are not in their natural state. Of course such a construction is absurd and no one contends to the contrary. The statute must be so interpreted as to give force to the evident intent of Congress to permit vegetables, as they are known and dealt with in this country, as they come from the farm and garden, to enter by paying a duty of 25 per cent.

The higher duty imposed by paragraph 241 indicates that it was intended to apply to those vegetables which have been advanced in value by being prepared or preserved. It was not seriously disputed at the argument that the contention of the government would render paragraph 257 nugatory, except as to vegetables coming here from Canada, Mexico, and possibly some of the West Indian Islands, for the reason that, unless some artificial means were adopted to prevent it, the vegetables would decay on the voyage. It was suggested that

where refrigerating ships and railway cars were available decay might be prevented. The expense of such transportation would probably be too great for practical application. However, if a vegetable may be kept in its natural state by an elaborate system of cold storage, it is not entirely plain why a like result may not be produced by immersing it in weak brine. We think the cauliflower in question was clearly in its natural state before being placed in the brine, that this was done to keep it in its natural state, and that when taken out of the brine and washed it was still in its natural state. Any doubt upon this question was removed by an inspection of the exhibits, which concededly represent the imported merchandise.

The facts are so clearly and fully stated in the opinions below that it is wholly unnecessary to restate them in extenso. The testimony is overwhelmingly to the effect that the merchandise is placed in the weak brine to preserve it during transportation. This is precisely what is done in this country when it is desired to prevent cauliflower from decaying. We cannot believe that this effort to keep the cauliflower in "the way the farmer brings them to you" can be regarded as having a directly opposite effect, changing them from their natural state to a prepared or preserved state.

The decision is affirmed.

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#### A. KLIPSTEIN & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 127 (5,205).

CUSTOMS DUTIES (§ 24\*)—CLASSIFICATION—GLYCEROPHOSPHATE OF LIME—"MEDICINAL PREPARATION"—OCCASIONAL USE—"CHEMICAL COMPOUND."

Glycerophosphate of lime, though occasionally dispensed medicinally, is almost always used in combination with other drugs in the preparation of elixirs. *Held*, that it is not a "medicinal preparation," but a "chemical compound," within the meaning of Tariff Act July 24, 1897, c. 11, § 1. Schedule A, pars. 3, 67, 30 Stat. 151, 154 (U. S. Comp. St. 1901, pp. 1627, 1631).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 32; Dec. Dig. § 24.\*

For other definitions, see Words and Phrases, vol. 5, pp. 4465-4466; vol. 8, pp. 7720, 7600.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The opinion below reads as follows.

PLATT, District Judge. The merchandise covered by this appeal is described as glycerophosphate of lime. Duty was assessed thereon at the rate of 55 cents per pound under the provisions of Act July 24, 1897, c. 11, § 1. Schedule A, par. 67, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631), as a "medicinal preparation containing alcohol, or in the preparation of which alcohol is used." The importer in his protest set forth various claims, but upon the argument relied chiefly upon the provision in paragraph 3 of said act for "chemical compounds." The Board of General Appraisers overruled the protest, sustaining the classification of the collector.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



The merchandise as imported can be and is used as a nerve tonic by simply dissolving it in water. It can also be mixed with other ingredients to make a pleasant dose; but in and of itself it is a good tonic and will alleviate pain. Up to this time it may have been more largely devoted to use as one of the ingredients of an elixir or other composition; but it is clearly capable of use as it comes, and is so used. If we were kindly about the classification, that use might increase prodigiously.

The decision of the Board of General Appraisers is affirmed.

Everit Brown, for appellants.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The importation in question is glycerophosphate of lime. It was assessed by the collector as a medicinal preparation under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 67, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631), and his decision was affirmed by the board and by the Circuit Court. The importer contends that it should have been assessed as a chemical compound not specially provided for.

The proofs show, that the article is a chemical compound in the preparation of which alcohol is used, and that, though it is occasionally dispensed medicinally in its imported form, it is almost always used in combination with other drugs in the preparation of elixirs.

Paragraph 3 is as follows:

Alkalies, alkaloids, distilled oils, essentials oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act, twenty-five per centum ad valorem.

Paragraph 67 is as follows:

Medicinal preparations containing alcohol, or in the preparation of which alcohol is used, not specially provided for in this act, fifty-five cents per pound, but in no case shall the same pay less than twenty-five per centum ad valorem.

The article is not specially provided for, but as a chemical compound is enumerated in paragraph 3. If a medicinal preparation, it is also enumerated in paragraph 67 and should be classified under it as the more specific. *Fink v. United States*, 170 U. S. 584, 18 Sup. Ct. 770, 42 L. Ed. 1153. But we have held under similar paragraphs of the act of 1890 that crude cocaine, a drug which is occasionally dispensed in its imported form, but generally used in combination with other drugs to make medicinal preparations, is not itself a medicinal preparation. *Hirzel v. United States*, 58 Fed. 772, 7 C. C. A. 491. The Circuit Court for the District of Massachusetts took the same view in the case of scammony resin. *United States v. Martin*, 155 Fed. 264.

Following these decisions, the judgment is reversed.

## FIEGEL v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 104 (4,659).

## CUSTOMS DUTIES (§ 36\*)—CLASSIFICATION—"CREPE PAPER."

The provision for "crepe paper" in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 397, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1671), was intended to apply to paper that has been subjected to a creping process; and a paper made by that process and resembling crepe paper generally, but somewhat heavier, and treated with sizing for waterproofing purposes, is dutiable under that provision.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 115-120; Dec. Dig. § 36.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The Circuit Court affirmed the decision of the Board of General Appraisers (G. A. 6,471, T. D. 27,683), sustaining the action of the collector in assessing the imported merchandise as "crepe paper" under Act July 24, 1897, c. 11, § 1, Schedule M, par. 397, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1671). The decision below is reported in 160 Fed. 285.

Comstock & Washburn (Albert H. Washburn, of counsel), for appellant.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The imported merchandise was assessed by the collector as "crepe paper" under Act July 24, 1897, c. 11, § 1, Schedule M, par. 397, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1671), which is as follows:

397. Papers commonly known as copying paper, stereotype paper, paper known as bibulous paper, tissue paper, pottery paper, and all similar papers, white, colored or printed, weighing not over six pounds to the ream, \* \* \* six cents per pound and fifteen per centum ad valorem; \* \* \* crepe paper and filtering paper, five cents per pound and fifteen per centum ad valorem.

The importer insists that the paper in question should have been classified under paragraph 402 "as paper not specially provided for in this act, 25 per centum ad valorem." 30 Stat. 188, 189.

The term "crepe paper" appears for the first time in the tariff act of 1897. The paper in question is illustrated by an exhibit introduced before the board and presented at the argument in this court. In general appearance it bears a close resemblance to the exhibit conceded by both sides to be crepe paper. The only differences pointed out are that the paper in question is heavier and contains sizing, which renders it available for covering flower pots, which is its principal use. It is not strictly, but only relatively, waterproof; sufficiently so, perhaps, for the purposes to which it is intended to be applied. It has been passed through the creping machine and bears the same resemblance to the silk fabric, from which it derives its name, as the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

crepe paper in existence at the date of the passage of the act. We find nothing in the law or in the testimony to indicate that crepe paper must be confined to paper of a certain, unvarying weight. In *Dennison Company v. United States*, 72 Fed. 258, 18 C. C. A. 543, this court decided that "crepe tissue paper" should not be classified as tissue paper under the act of 1890, for the reason that it was crinkled to resemble crepe, was tougher than tissue paper, weighed from 24 to 48 pounds per ream and sold for \$1 a pound, whereas tissue paper sold for from 65 to 80 cents per pound. Obviously, weight is not a controlling factor if this court was correct in holding that crepe paper might vary in weight from 24 to 48 pounds per ream. Neither can the sizing introduced to make it applicable for a particular use change its tariff nomenclature.

Indeed, it may be noted that, in the manufacture of crepe, size or gum is used to thicken the threads of the warp, inducing a tendency to curl and produce the appearance desired. Whether a similar result would be produced by the use of size on paper does not appear; but it is manifest, we think, that Congress did not intend to relegate merchandise which would otherwise be crepe paper to the general catch-all clause because additional sizing has been used. We are convinced that Congress intended that paper which has been subjected to the creping process, its value being largely increased thereby, and which presents the peculiar crinkled effect shown in both the exhibits in evidence, should pay duty as crepe paper. We find nothing in the authorities cited by appellant in conflict with this view.

The decision of the Circuit Court is affirmed.

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E. J. MANVILLE MACH. CO. v. EXCELSIOR NEEDLE CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 137.

1. PATENTS (§ 26\*)—PATENTABILITY—COMBINATION.

The fact that a completed product is developed by successive steps in the same machine does not prevent the organized mechanism which produces this result from being considered as a combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 27; Dec. Dig. § 26.\*]

2. PATENTS (§ 176\*)—CONSTRUCTION—PARTS OPERATING "SIMULTANEOUSLY."

The word "simultaneously," used in a patent to describe the operation of the parts of a machine which in fact operate progressively to complete the article produced, must be construed to mean that the parts operate unitedly, harmoniously, and in concord, and not at the same instant of time.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 251, 251½; Dec. Dig. § 176.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6319.]

3. PATENTS (§ 328\*)—INVENTION AND INFRINGEMENT—MACHINE FOR MAKING NIPPLES.

The Campbell patent, No. 594,457, for a machine for forming threaded nipples, such as are used in building wire spoke wheels for bicycles and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

similar vehicles, was not anticipated and discloses invention; also *held infringed*.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the District of Connecticut.

The decree of the Circuit Court (162 Fed. 486) sustained claims 1, 2, 3, 4, 5, 23, 24, 25, 26, 27, 28, 31, and 35 of letters patent No. 594,457, granted November 30, 1897, to Andrew C. Campbell, assignor to the E. J. Manville Machine Company, for improvements in machines for forming threaded nipples from headed blanks. The application was filed May 26, 1897.

Charles L. Sturtevant and Joseph C. Fraley, for appellant.

Oscar W. Jeffery and Edmund Wetmore, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The patent in suit relates to a complicated machine for forming nipples employed in building wire spoke wheels for bicycles and similar vehicles. The drawings contain 29 figures having 146 numbered parts and the description and claims cover 9 closely printed pages containing over 9,000 words. It is obvious that no beneficial result can be obtained by an elaborate description of the machine or a discussion of its minute details. Such a description would unduly extend this opinion and would serve no useful purpose. The parties in interest already understand the machine, presumably, much better than the court, and need no further information or instruction on the subject. We shall content ourselves, therefore by stating our general conclusions as briefly as possible.

The Campbell machine—and the defendant's as well—is a wonderful piece of mechanism. A number of headed blanks, cut from a coil of wire, are thrown promiscuously into the hopper and in a few moments they emerge completed nipples (the slot in the head excepted) drilled, threaded, formed and fitted for use in bicycle and other wheels having suspension spokes. The machine so changed existing conditions that it was not possible for a manufacturer using the old methods to compete successfully with one who used the new machine. The defendant fully recognized this fact and purchased one of the machines soon after the patent was issued. It was operated for about a year. The reason for its abandonment may best be stated in the language of the defendant's superintendent, Dayton, who built the infringing machine. He says:

"I first saw the Campbell machine, I should say, along about 1898. I went to the E. J. Manville Machine Company and bought one machine and we had it shipped here and run it; then we tried to deal with them for a number of machines of their patent, and we couldn't make any arrangements satisfactory; and then I told our people that I could make a better machine for considerable less money."

In other words, the defendant recognized the utility and efficiency of the combination and because it could not agree upon the price of other machines, concluded to build one of its own which does the iden-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tical work of the patented machine in substantially the same way. To the casual observer the defendant's machine differs in appearance from that of the complainant, but upon a more critical examination it is found to contain all the elements of the latter or well-known equivalents therefor. In addition, the defendant has attached a slotter. Its machine does all the Campbell machine does plus the slotting of the nipple. This addition is, of course, immaterial. If the defendant uses the complainant's combination it is of no materiality that it uses something in addition thereto.

The fact that the completed nipple is developed by successive steps in the same machine does not prevent the organized mechanism, which produces this result, from being considered as a combination. *Forbush v. Cook*, 2 Fish. Pat. Cas. 669, Fed. Cas. No. 4,931; *National Cash Reg. Co. v. American Co.*, 53 Fed. 367, 3 C. C. A. 559. From the very nature of the case the nipple cannot be formed into a commercial device by the simultaneous action of all the parts in the sense that they all act at the same moment and by a single movement of the machine. A construction of the claims requiring such simultaneous action would relegate even such a marvelously organized machine as the Mergenthaler linotype to the unprotected and defenseless class of aggregations. *Mergenthaler Co. v. Press Co.* (C. C.) 57 Fed. 505.

Campbell produced the first commercially successful nipple maker by doing in a single machine the work which had previously been done by a number of slow, inaccurate and unsuccessful machines, each advancing the nipple a step or more, but none turning out a device which could be transferred to the bicycle makers ready for use. Where it is obvious from the operation of a machine that the various parts do not all co-operate at the same moment, but do operate progressively to produce the desired result, such action is sufficient to avoid the criticism that it is for an aggregation merely. Even though the word "simultaneously" be used it should be construed in the light of the description and drawings and should not be given a harsh and illiberal meaning. In the case at bar the word could not have been intended, in a strict sense, as descriptive of a machine which operates successively in the formation of the nipple. Though the word "simultaneously" applied to such an environment was, perhaps, not well chosen, it can readily be construed to mean that the parts operate unitedly, harmoniously and in concord. In any other sense the word is manifestly a misnomer.

It is admitted that no one of the claims in controversy is anticipated by any of the prior patents. It is, however, argued that the prior art so limits the field of invention that it did not require the exercise of the inventive faculty to produce the Campbell machine. We think the best reference relied on by the defendant is the Timm and Krummel machine and patent. It is unnecessary to decide whether this patent is proved to be prior to Campbell's invention for the reason that, assuming it to be prior, it does not invalidate the patent in suit. The testimony convinces us that the Timm and Krummel machine was never a commercial success. It never got beyond the experimental state. Such nipples as it was able to produce were not of the length demanded by customers and the speed attained was only about one-fourth that

of the Campbell machine. The correspondence between the makers of the machine and would-be customers indicates unquestionably that experiments were still going on and that the machine was at all times in an embryonic condition.

In September, 1896, the makers wrote a letter to the Prentiss Tool & Supply Company, which is an explicit acknowledgment of failure accompanied with a hope that they might be able to do the required work with two machines. They say:

"We regret very much to be obliged to state that our nipple machine will not make nipples as per samples sent us. \* \* \* We are working on a new scheme now, viz., to head and flatten simultaneously and then drill, tap and slot in a second machine."

It does not appear that they ever succeeded in accomplishing the desired result even with the two machines.

The patent covering this machine adds nothing of importance to the discussion. If the machine itself were a failure it is altogether improbable that the patent describes a machine that was a success. The defendant's expert says that the following elements of claims 1, 2 and 5 of the Campbell patent are not found in the machine of the Timm and Krummel patent: (1) A receptacle for receiving the blanks. (2) Jaws for grasping the blanks. (3) Feed mechanisms for transferring the blanks from the receptacle to the jaws of the carrier. (4) An ejector moving independently of the tools for discharging. (5) Jaws of the carrier. (6) Means for opening and closing the jaws of the carrier.

The machine does not feed metal blanks thrown promiscuously into a hopper to the drilling, tapping and milling tools; on the contrary a rod is fed into the machine which is first cut and headed before being subjected to the other operations. This rod must be of exact diameter and the pieces must be cut with the utmost accuracy. The ejector does not move independently of the other tools and there are several minor points upon which it seems unnecessary to dwell for the reason that we are convinced that the Timm and Krummel patent describes one of the several failures which preceded Campbell. There are many points of similarity but the fundamental difference is that one does the work and the other does not. We think that something more than the skill of a mechanic was required to convert the Timm and Krummel machine into a commercial success. In competition with Campbell its inevitable destination was the scrap heap.

The patent to Charles E. Roberts, applied for January 27, 1896, and issued December 1, 1896, is even more remote. It is for an improvement in "machines for finishing spoke-nipples for bicycles." The specification says:

"This invention is designed to cut the nick for the reception of the screw-driver in the heads of the nipples, to slab or flatten the body of the nipple upon opposite sides so as to adapt it to be turned by a wrench and to tap or thread the central bore of the nipple. These several operations have heretofore been performed in separate machines, but are now by my invention combined in one machine which is wholly automatic in its action. The principal feature of my invention is found in the means which I use for cutting the *nick* and for cutting and slabbing the sides."

As before stated Campbell has no nicker, or slotter, in his machine, therefore the "principal feature" or one of the principal features of Roberts was no feature at all with Campbell. Clearly they had different objects in view and produced different combinations to accomplish them. It seems unnecessary to repeat what is an axiom of patent law that a claim for a combination is not defeated by showing that all the separate elements were old or that several of them had previously been combined. The only question to be considered is, Was the combination old? The nipple is centered, pointed and drilled before it reaches the Roberts machine. Campbell does on one machine what Roberts does on two.

It is evident that the years 1895-97 were periods of great activity in the art and a large number of skilled men were striving to produce a machine which would turn out finished nipples in sufficient numbers to make the machine a commercial success. We have no hesitation in saying that though Timm, Krummel and Roberts displayed ingenuity and ability of a high order, Campbell alone succeeded. The others went a long distance on the road in Campbell's company but he finally passed them and was the first to cross the line.

There can be no doubt as to the defendant's infringement. The machines are different in appearance but an examination will disclose the fact that the defendant has copied the patented machine in all essential features, the differences being of form and not of substance—such as are always produced by the substitution of well-known equivalents for non-essential parts. In *Wagner Typewriter Co. v. Wyckoff et al.*, 151 Fed. 585, 593, 81 C. C. A. 129, we had before us a somewhat similar attempt to avoid infringement by the substitution of equivalents and immaterial changes of parts. What was said in that case is applicable here.

We do not deem it necessary to enter upon an analysis of the claims as we are satisfied with the disposition made of them by the judge of the Circuit Court and agree with what he has said regarding them.

The decree is affirmed with costs.

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COLE v. CORDLEY et al.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 121.

PATENTS (§ 328\*)—INFRINGEMENT—WATER COOLER.

The Cole reissue patent, No. 12,352 (original No. 745,571), for an improvement in water-cooler equipments, construed, and *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The Circuit Court dismissed the bill in an action based on reissued letters patent No. 12,352, dated May 30, 1905, for an improvement in

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

water-cooler equipments. The Circuit Court found that the claims in controversy were not infringed.

Leslie R. Palmer (Philip C. Dyrenforth, of counsel), for appellant.  
Harold S. Mackaye (A. P. Greeley, of counsel), for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The patent in controversy No. 12,352 (original No. 745,571) was reissued May 30, 1905, to James T. Cole for an improvement in water-cooler equipments. The specification relates to that class of coolers in which a large glass bottle containing pure, potable water is inverted upon a receptacle containing ice, which surrounds a conduit for the water located in the receptacle. In this way the water is kept cool and may be drawn off by a faucet, in which the conduit terminates, at the bottom of the receptacle. In short, the water after being cooled is delivered to the drinker direct from the bottle through an air-tight passage which prevents contamination from an exterior source. The claims involved are as follows:

"1. In combination with a water-cooler, a support for a water-holder in inverted position, comprising a neck having closed communication in the cooler-tank with a conduit therein and a seat about the outer end of said neck, and a water-holder in inverted position on said support with its neck within the neck of the support and its shoulder engaging said seat.

"2. In combination with a water-cooler, a support for a water-holder in inverted position, comprising a neck having closed communication in the cooler-tank with a conduit therein and an expanded rim about the outer end of said neck, and a water-holder in inverted position on said support, with its neck within the neck of the support.

"3. In combination with a water-cooler, a support for a water-holder in inverted position, comprising a neck communicating with a pipe-coil in the cooler-tank and an expanded rim about the outer end of said neck, and a water-holder in inverted position on said support with its neck within the neck of the support and its shoulder seating upon the rim thereof."

Claim 3 was the first claim of the original. No criticism is made of the patent in suit as a reissue. In other words, it is not now contended that the patent was improperly reissued or that any adverse rights intervened.

Prior to the argument the appellees moved to dismiss the appeal on the ground that the appellant has, since the trial in the Circuit Court, taken a license under two patents granted to Isaiah Newell for improvements in water-coolers. It was conceded at the argument that the application for the earlier Newell patent No. 895,781 was prior to the invention of the Cole patent in suit. In the brief filed in opposition to the motion to dismiss the appeal, counsel for appellant states the situation as follows:

"Newell has two presumably valid patents, one of which dominates the Cole reissue and the other does not. Cole on the other hand, has a presumably valid patent for a certain species of the genus covered by the Newell patent No. 895,781. It is a species which does not appear in the Newell patent."

It was also conceded by counsel for appellant that the earlier Newell patent might be considered as if introduced in evidence and that the statements in the specification might be considered by the court as de-



scriptive of Newell's prior invention. The discussion is thus simplified and confined within narrow limits, making it unnecessary to examine the prior art in detail, as Cole's contribution is now admitted to be confined to specific improvements upon Newell's fundamental invention.

Newell says in his specification:

"By the use of my invention, the users of mineral and distilled waters, are enabled to use the water directly from the original package, and thus absolutely prevent any contamination of the water by coming in contact with the ice, or becoming contaminated by disease germs in any manner whatsoever, which insures the user that he is receiving the mineral or distilled water in its original pure condition, and at a proper cool temperature for pleasant drinking. \* \* \* By means of a cooler of this form, less ice is required, and as before stated, contamination of the pure water absolutely prevented. There are no valves or siphon action in this device, and it is so simple that any one can use or operate it, and it enables the user to obtain water from the original package, which is an absolute assurance of obtaining the water in its original condition."

It is quite evident, therefore, that Cole, being a mere improver, is not entitled to a broad construction of his claims, and, if entitled to invoke the doctrine of equivalents at all, they must be confined within narrow limits. So far as we are able to ascertain from an examination of the Newell patent the only improvement made by Cole which has any substantial value is the air-tight passage from the water in the bottle to the faucet. In the Newell construction it appears that the receptacle, 12, does not have an air-tight connection with the top of the body portion and that air from the ice chest may reach the small surface of water exposed in the receptacle.

It would seem that the danger of contamination from this source was rather apparent than real and that the moment it arose the remedy would immediately suggest itself. If a tight connection were needed at the point indicated it could be made in many different ways and this would seem to be the work of the mechanic rather than the inventor. For instance, the drawings of the Cole patent show a vent-tube, i, which apparently permits the outside air to reach the surface of the water in the holder support, to a limited extent. Should it be found that such contact produced injurious results it could hardly be maintained that he who plugged the vent rose to the dignity of an inventor. Indeed, the Cole specification expressly states that the vent-tube "may be provided with a vent-cock to exclude dust and the like."

The same problem presents itself in each instance and in neither is it necessary to call into being the "intuitive faculty of the mind." However, we are not wholly in accord on the proposition that the Cole patent shows no patentable novelty over the Newell construction. Assuming that it does show this, do the appellees infringe?

The first claim contains, in combination with a water-cooler, the following elements: (1) A support for a water-holder in inverted position, comprising a neck having closed communication in the cooler-tank with a conduit therein. (2) A seat about the outer end of said neck. (3) A water-holder in inverted position on said support with its neck within the neck of the support and its shoulder engaging said seat. The second claim substitutes "an expanded rim" for the "seat"

of the second element, as above stated and omits the limitation of the third element—"and its shoulder engaging said seat." In the third claim the neck of the first element is described as "communicating with a pipe-coil in the cooler tank" and the claim restores the limitation of the third element of the first claim—"and its shoulder seating upon the rim thereof."

In order to infringe these claims, therefore, a cooler must have an inverted water-holder held in position by a support comprising a neck, an expanded rim, and a seat about the outer end of said neck or rim. In order to infringe the first and third claims the shoulder of the water-holder must engage the seat, or rest upon the expanded rim. The ice tank of appellees' cooler when in operation is completely closed. In this tank is fixed a cylindrical vessel of unvarying inside diameter from top to bottom. In the exhibit shown at the argument it resembles a wide mouthed earthen jar. The diameter of the jar being approximately one-half that of the water-holder, the inner upper edge which extends above the tank furnishes a suitable seat or support for the shoulder of the water-holder or bottle. Above the tank, the outer surface of the jar is given an outward flare to admit of a groove being formed on the inner upper edge in which is seated a gasket which gives additional stability to the seat. The jar rests on the bottom of the tank and is connected with a faucet on the outside of the tank at the bottom; there being closed communication between the inside of the jar and the faucet on the outside of the tank. The construction may be rudely illustrated by inverting an ordinary glass bottle so that its shoulder rests on the rim of a tumbler.

It is unnecessary to determine whether, in view of the prior art, the patentee could have made his claims broader, it is enough that he has not done so and we are not permitted to rewrite them. We must take them as they are. The Cole invention centers entirely about the funnel-shaped flaring-rimmed support, C. This the appellees do not have. Their support has nothing in common with the support of the patent except that it holds the inverted bottle in position by engaging its shoulder. They do not have the neck, as shown and described in the patent, and it necessarily follows that they do not have a seat or expanded rim about the outer end of said neck. As before stated the shoulder of their bottle rests on a gasket, of rubber or other suitable material, recessed in the inner rim of the jar. The neck, the seat and the expanded rim are all absent in the appellees' structure. The closed communication with the conduit is present but the communication to the conduit and the cooler-tank belong to entirely different types of construction.

The decree is affirmed with costs. It seems hardly necessary to add that the motion to dismiss the appeal is denied.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CONDIT ELECTRICAL  
MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 120.

## PATENTS (§ 328\*)—INFRINGEMENT—AUTOMATIC CIRCUIT BREAKER.

The Wright & Aalborg patent, No. 633,772, for an automatic circuit breaker, is for a new combination of old elements, and discloses invention, and, while in no sense a pioneer, is entitled to some range of equivalents. As so construed, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 159 Fed. 144, 154.

Clifton V. Edwards and Edward P. Payson, for appellant.

Kerr, Page & Cooper (Thomas B. Kerr and John C. Kerr, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit for the alleged infringement of claims 2 and 5 of letters patent No. 633,772 granted September 26, 1899, to Gilbert Wright and Christian Aalborg, assignors to the complainant, for an improvement in automatic circuit breakers. The invention—according to the patent—"relates to devices employed for automatically opening electric currents upon the passage therethrough of a current materially in excess of that which the circuit is intended to carry." The fourfold object of the invention—according to the patent—

"is to provide (1) a circuit breaker that shall have a large current-carrying capacity in proportion to the mechanical dimensions of the device, (2) which shall be easily brought into operative position and locked therein, (3) which shall be certainly and quickly opened whenever the current in the circuit exceeds that for which the locking mechanism is set, and (4) which shall serve to interrupt the circuit without danger of injury to the main contact terminals."

The first object is accomplished by employing movable laminated copper terminals with beveled ends so pivoted that they can be moved into contact with the faces of two vertically aligned copper stationary terminals. The arrangement is such as to require but little lateral space upon the switchboard, and the use of the laminated member and the method of contact give large current-carrying capacity in proportion to the dimensions of the device. The second object is accomplished by the use of a lever arm and toggle mechanism by which the movable terminals are readily and with powerful compression brought into contact with the stationary terminals where they are locked by an automatically

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

acting latch. The third object is accomplished by means of a magnetic circuit operating an armature which trips the latch holding the terminals in position and opens the circuit whenever the current exceeds that for which the locking mechanism is set. The fourth object is accomplished by the use of a stationary shunt terminal of carbon above the main terminals, which contacts with a movable shunt terminal likewise of carbon pivoted and spring actuated upon an upward extension of the frame bearing the main movable terminals. When the circuit breaker is brought to a closed position, the shunt terminals contact before the main terminals. When it is opened, the shunt terminals remain in contact until after the main terminals have separated. By this early closing and late opening of the shunt circuit the danger to the main contact terminals from the electric arc is prevented.

But while these are the general objects of the invention and the means employed for attaining them, the objects were old and the means—as individual elements—not new. The invention is in no sense a pioneer one. The patent can be sustained, if at all, only as a combination of old elements producing a new result, or, at least, producing an old result in a more efficient way. The complainant recognizes this, and the especial advantages which it claims for the invention are: (1) The breaking of the circuit upward in a straight line, away from the main terminals and switchboard, so that the resulting arc is less liable to injure the apparatus. (2) The final separation of the parts with the highest velocity and over the widest space possible, so that the extinction of the flame is certain and rapid and the chances of injury slight. (3) The vertical arrangement of the different contacts, so that but little of the valuable lateral space upon the switchboard is occupied. (4) The relation of the contacts to the manipulating apparatus, so that they are readily and efficiently brought into and held in position as well as readily separated. By reason of these advantages it is claimed that the device of the patent has gone into extensive use.

The defendant contends, however, that both the elements of the combination of the patent and the combination itself are old, and are anticipated by earlier patents. But while several of the devices shown in the prior art present different features of the patent, we are not satisfied that the combination is anywhere shown. Giving the most careful consideration to the contentions of the defendant, we still regard it as extremely doubtful whether the patent can be properly held invalid for lack of invention in view of the prior art. In this situation the decision of the Circuit Court of Appeals for the Third Circuit in *Westinghouse Electric, etc., Co. v. Cutter Electrical, etc., Co.*, 143 Fed. 966, 75 C. C. A. 152, sustaining the claims of the patent now in suit, is entitled to great weight. That decision was rendered upon substantially the same testimony presented here. Any prior patents which are here and were not there are far less persuasive in the defendant's favor than those which were there. It seems to us that this is a case where it is most appropriate that we should follow the decision, made after careful consideration, by a court of co-ordinate

jurisdiction. We therefore hold that claims 2 and 5 of the patent are valid, and the remaining question is one of infringement.

These claims are as follows:

"2. In an automatic electric circuit breaker, the combinations with base and stationary main and shunt contact terminals located in approximately vertical alignment thereon, of a movable laminated contact member pivoted to said base, a movable shunt-contact member pivoted to said laminated contact member, toggle levers for operating said movable members, means for locking the breaker in closed position, and a tripping device projecting into a magnetic circuit."

"5. In a circuit breaker, the combination with main stationary contact terminals and a stationary shunt terminal located above the same, of a pivoted main contact member, a shunt-contact member pivoted to said main member at a distance from its axis of movement, means for yieldingly holding the movable shunt contact in a position in advance of the plane of the faces of the main movable member when in open position, toggle-lever mechanism for closing the breaker, a latch and electromagnetically-actuated means for tripping the latch, said toggle lever, latching and tripping mechanism being located below the main and shunt separable terminals."

The defendant's device obviously possesses all the elements of these claims in similar combination, with the possible exception of the "movable shunt-contact member pivoted to said laminated contact member" of claim 2, and the "shunt-contact member pivoted to said main member at a distance from its axis of movement," of claim 5. In the defendant's device the carbon contact member is not pivoted to the main member, but is attached and held by a spring. That is the only difference.

In both devices the function of the movable carbon is to so adjust the contact between it and the stationary carbon as to permit the main contact to close after the carbon contacts are closed and open before the carbon contacts are opened. The motion is the same, the movement is in the same direction, and the result is the same. The two devices are practically interchangeable. The spring-pressed pivot member would work upon the defendant's structure and vice versa. Indeed, we think the complainant's expert justified in thus describing the action of the two devices as mechanically the same:

"The action of the spring is the same as the pivot of the device shown in the patent in suit. Mechanically it is the same, since there is the same turning action in defendant's device as in the structure shown in the patent; but the pivotal point, instead of being located in close proximity to the carbon, is distributed throughout the length of the spring support."

While, in view of the prior art, the complainant is not entitled to a broad construction of the patent, we think that it is entitled to a sufficiently liberal construction to cover as an equivalent the defendant's structure. If it has the right to any range of equivalents at all—and we hold that it has—the spring must be treated as an equivalent for the pivot.

But the defendant urges that, if a spring-mounted shunt device is the equivalent of a pivotal shunt device, there were several such devices in the prior art; that, if the defendant's device would infringe, the earlier devices would anticipate. This contention might be well founded if the patent covered merely a pivotal shunt contact. But,

as we have already seen, it covered a combination of which such contact member was only one element. The fact that this element by itself may have been anticipated does not affect the validity of the patent for the combination. As we have already seen, all the elements may be old, and yet, if the combination and results be new, a patent may be valid.

The decree of the Circuit Court is affirmed, with costs.

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GENERAL SUB-CONST. CO. v. NETCHER et al.

(Circuit Court, N. D. Illinois, E. D. February 11, 1909.)

No. 28,238.

1. PATENTS (§ 160\*)—CONSTRUCTION—READING SPECIFICATION INTO CLAIMS.

For the purpose of sustaining a patent, as where a nonpatentable principle or function appears to be claimed, but the specification shows that the patent was sought for a machine, device, or process which is patentable, the specification may be read into the claims, but not for the purpose of escaping anticipation or establishing infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 235; Dec. Dig. § 160.\*]

2. PATENTS (§ 160\*)—CONSTRUCTION—READING SPECIFICATION INTO CLAIMS.

A feature of a process not covered by the claims of a patent, but merely recommended in the specification, instead of being required or stated to be an essential part of the process, cannot be read into the claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 235; Dec. Dig. § 160.\*]

3. PATENTS (§ 328\*)—ANTICIPATION—PROCESS OF MAKING SUBSTRUCTURES FOR BUILDINGS.

The Ewen patent No. 718,441, for a process of making substructures for buildings, as such process is described in the claims, is void for anticipation, the real process as practiced by means of the appliances described in the patent not being covered by the claims.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

Parker & Carter, for complainant.

Moses, Rosenthal & Kennedy, for Netcher.

George S. Payson and Russel Whitman, for Holabird, Roche & Renwick.

Offield, Towle & Linthicum, for John Griffiths and John Griffiths, Jr.

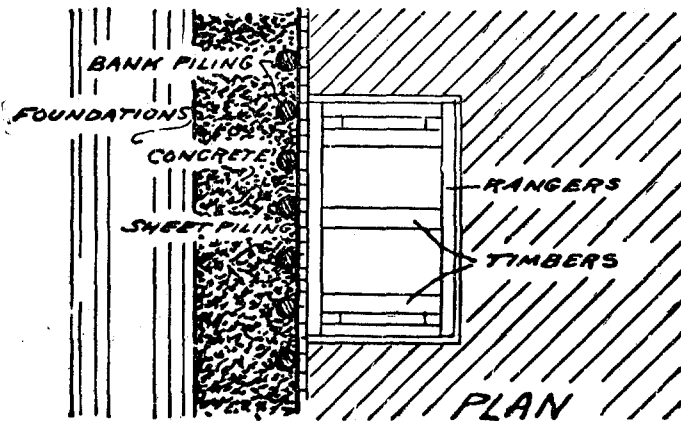
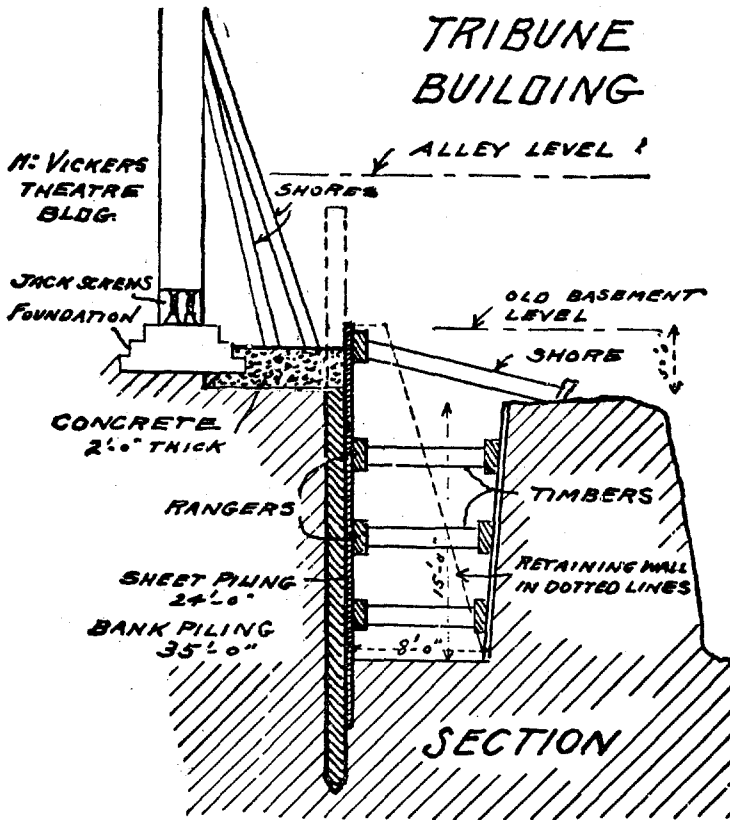
SANBORN, District Judge. This is a suit in equity for the alleged infringement of letters patent No. 718,441, issued January 13, 1903, to John M. Ewen, covering a mechanical process or method of making substructures for buildings. The general purpose of the inventor was to so construct the exterior wall trench, extending around the proposed building, as to sustain and equalize the lateral pressure from adjoining buildings and streets, without the necessity of shoring or underpinning them. While the owner of land may

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not remove the lateral support of adjoining land in its natural state, he may do so as to artificial structures, provided he uses ordinary care. This is the common law. But in a large city a builder cannot afford to stand on his common-law right. Business necessity and the convenience of his neighbors, his own power to proceed uninterruptedly with his building, the probability of litigation over the vexed question of ordinary care—always a troublesome question, and one immensely difficult in lateral support cases—all combine to influence him to find some means of sustaining adjoining structures while proceeding with his own. Indeed, it has become the general if not universal custom in large cities for builders to do this, and contracts for large buildings commonly so provide; so the necessity in building operations in large cities for some practical means of sustaining adjoining buildings is apparent. Another important element of the problem is the deep basement, lately made more important by the construction of the Chicago Subway.

The problem of lateral support in building operations has always been an important and difficult one, and it was partly solved more than a hundred years ago. In 1803 the center-core system, as it has been called, was used on the Tronquoy Tunnel in France, and has been ever since employed in some form. This system is the leading feature of the Ewen patent, and has long been applied to parallel longitudinal trench open-cut tunneling. Its simplest illustration is a street subway. Two parallel trenches are dug, one on each side of the street. These are lined with planks or timbers, braced with pieces of timber to prevent caving. The middle of the street is the center core. A stone wall is built in each trench, girders laid from the top of the walls to a column set in the street center, and the street surface constructed upon the girders. The core of earth is then removed, and the tunnel complete. This description is not technically accurate, but good enough to illustrate the plan of overcoming lateral pressure by the center-core system, with its trenches, trench linings, and braces, the girders finally taking the place of the core. It was employed in the great Boston subway, built in 1896 and 1897, and was fully known to the inventor when he conceived his invention in 1902. The system is completely described in the Goodredge patent of 1882, No. 262,403, except that sheet piling or plank driven into the earth, edge to edge, is used to line the trenches, without braces; was applied to a single trench by Friestedt, in his patent of 1890, No. 435,492, for supporting and lowering building foundations; and the feature relating to the use of linings and extensible braces is covered by the McKiernan patent of 1873, No. 145,116. Some features of the system also appear in other illustrations of the prior art, among others the Washington patent of 1900, No. 654,426. It was also employed on the east wall of the Tribune Building in Chicago in 1901, where a rigid wall was constructed on the outside of the wall trench, and a flexible lining on the inside against the earth core, the space between the two being braced by jackscrews. This is shown by the following cut:





It was the Tribune building, the first deep-basement construction ever put up in Chicago, and the difficulties experienced in building it, which led the patentee to study the subject of subconstruction, and resulted in his application for the patent in suit in 1902. It is now insisted by the patentee that his improved system was never used in building operations or elsewhere, prior to his application, was never conceived, understood, or intentionally applied by anybody, and had never in any way been anticipated. His process may now be described.

It is nothing more than a simple application of the center-core system to the skyscraper deep-basement problem, with some improvements of process which are said to be vital. The patent is for a process, an operation done by rule to secure result, or a mode of treatment of materials producing a result. It is not a machine, device, or function of a machine, but simply a method of doing things. A trench is dug to any desired depth on two or four sides of a proposed building, and in place of the removed earth linings and jackscrews are substituted to hold the trench walls in place, and thus interpose as nearly as possible the same resistance to lateral pressure as existed before the trenches were dug. Walls are then built in the trenches, continually braced meanwhile by the adjustable jackscrews, against the center core on one side and the adjoining property on the other, so as to constantly maintain the requisite resistance to lateral pressure, and thus prevent settling, and finally the walls are braced on the inside by basement floor girders, and the earth core removed.

From this general description it will be seen that so far nothing appears to distinguish the process from the center-core system used a hundred years ago, except it is employed for a new purpose. But from a more specific description a number of other features, claimed to be essential parts of the process, will appear. From the description and claims of the patent and the testimony in explanation of it, the mode of operation, more in detail, is as follows: Around the whole building site, with heavy buildings on two or three sides and across the street, a trench is dug of any desired width, one foot in depth according to the patent, and five feet deep in practice. This trench is not commenced at the street level, but it is customary in applying the method of the patent to dig out the earth under the proposed new building down to a point opposite the footings of adjoining buildings, as this may usually be done with safety, meanwhile shoring their walls. The trench is then dug five feet deep and eight or ten feet wide all around the site. A sheath or lining of planks is set up endwise on each wall of the five-foot trench around the whole site. Crosspieces called "walings," about 12 feet long, are then placed crosswise on each lining, and are held in place by jackscrews, thus dividing the lining into loose sections 5x12 feet. The planks are not fastened together, nor are the walings fastened to the plank linings in any way, but the planks are generally matched staves so as to make a tight connection. The banks of the trench are sustained and braced by the operation of the jackscrews

against the crosspieces or walings, the screws being kept tight by manipulation where necessary. The lateral thrust or pressure from the earth outside the trench is thus taken up by the center core, just as in the old system, and the screws or braces kept tight. This process is repeated for the next five feet, and so on until the desired depth is reached; but variation in the conditions may require a variation in the process.

It is easily seen, if the soil is as described by the witnesses, composed of plastic clay, with quicksand pockets, full of strata containing water and gas, that, when the trench is dug out near the footings of a heavy building, the gas, water, quicksand, and mud are liable to come out into the trench, even before the lining can be adjusted, and also be forced up from the bottom of the trench by the lateral thrust. Water will also at first run through the cracks of the lining between the lining planks unless matched staves are used, as in the County Building. This soil movement will allow the adjoining buildings to settle to some extent, and even buildings from half a block to a block distant may be slightly affected; and it will displace the soil in the outer banks of the trench, and affect the pressure there localized.

It is at this point that the alleged invention appears, the part of the process not used in the prior art, and which is the one discovery claimed by the patentee. The discovery is said to be this: that it is found, if the jackscrews be constantly manipulated and kept tightly screwed up, and the movable sections of the linings of the trench, approximately five feet by twelve, be kept firmly pressed against the trench walls, a constant and even distribution of the lateral pressure from the earth outside the trench, through the jackscrews to the supporting core inside the trench, will be maintained, and the adjoining buildings protected from substantial injury. Other constructors and inventors, in considering the solution of the problem, had, it is said, fixed their attention on the adjoining building, and had attempted, by shoring, piling, and other like devices, to hold it up. Ewen, on the other hand, regarded only the earth, and the feasibility of preserving the lateral support of the center core, existing before the trench was begun, and, so far as possible, maintaining original conditions. This is stated by complainants' counsel as follows:

"To excavate this core or open a trench for the substructure, it is necessary to uncover one side of the building support, and this results in: First, a tendency of such support to move bodily or en masse toward the excavation; and, second, a tendency of the earth support to flow, to change its nature, structure, density, and, in short, its character, as a supporting medium (giving away in detail), and thus let the building sink and crumble, although it may not fall into the excavation.

"Either of these tendencies will wreck the old buildings, and hence must be resisted. With buildings light or far removed from the trench or with a shallow trench, the first tendency is easily resisted, and the second is negligible, but no one before Ewen had ever overcome the first tendency under the conditions of the problem, and no one had ever appreciated or tried to overcome the second tendency under any conditions."

This use of the thin lining, called the "floating" or "flexible" lining, and this constant operation of the jackscrews, are claimed to

be the two vital features of the invention, which distinguish it radically from the prior art. If Mr. Ewen is really entitled to them, I should have little hesitation in sustaining his patent. The art is a most difficult and important one, and any person who can find a process for safely sustaining lateral pressure in the business district of Chicago and other large cities is certainly entitled to all the benefit afforded by the patent laws. I am inclined to think he did discover them, without himself knowing it, but that he never fully understood or claimed them, and that his discovery has become public property.

It seems clear from the specifications, from Ewen's advertising matter, and his actions, that he never fully understood his system, although he knew enough to vaguely describe it. Thus, in the specifications, discussing the work at a stage when the trench has been fully completed and sealed up, and the wall built, he says:

"Obviously up to this point the conditions of stress and pressure between the exterior of the proposed building and the core of earth on the site of the building are practically undisturbed, and whatever weight there was on the exterior, as, for example, the weight of some building, is properly sustained against the core of earth within the building site. The pressure is taken up by the jackscrews, and then by the shorter jackscrews which act through the vertically arranged I-beams."

How this could have been written by an able and experienced engineer, describing his own patent, understanding that the danger point, the cutting of the trench, had long since been passed, is difficult to understand. Further than this, the operation of the jackscrews is not mentioned as a part of the process while that is being described, but is stated as a result, following from the necessary operation of the process. Thus, after fully describing how he does it, but without saying anything about the flexible lining or manipulation of jacks, he says it is obvious that the substructures may be carried downward to any desired depth, because the inner core carries the same load and sustains the same pressure all the time; but how or why it does so is not explained. Then a sort of parenthetical clause is thrown in, to the effect that jackscrews are used (instead of rigid braces, supposedly) because they are adjustable, and in large buildings (not in small buildings or medium-sized buildings surrounded by skyscrapers, but only in large buildings, no matter what the weight on the adjoining property) would be constantly attended and operated so as to keep the condition substantially uniform. Of course, the size of the building being erected is not an important factor, but the weight on the adjoining soil. All this loose talk in the specification shows how little the inventor really appreciated or understood his own invention.

When we come to the claims of the patent we find even less to suggest these vital features. They are twelve in number, and contain a page and a half of closely printed matter, but not one of them has any suggestion of the flexible lining or constantly operated jacks. All but one of them call for trench linings and braces between them, "so as to transmit the exterior pressure to the core of earth within such proposed wall," but nothing more. Claims 2 and 10, relied on as infringed, are as follows:

"(2) The process of making and placing in position substructures for build-ings and the like, which consists in forming a suitable trench where the exterior wall is to be erected, and simultaneously placing in position a lining for said trench, from the top downward, as the work of forming the trench progresses, then placing braces between the two linings, so as to transmit the exterior pressure to the core of earth within such proposed wall, then erecting within the trench a wall of less thickness than the width of the trench, and, as the wall progresses, substituting for the braces between the two linings braces between one of the linings and the wall."

"(10) The process of making and placing in position substructures for build-ings and the like, which consists in forming a suitable trench where the exterior wall is to be erected, and simultaneously placing in position a lining for said trench, from the top downward, as the work of forming the trench progresses, then placing braces between the two linings, so as to transmit the exterior pressure to the core of earth within such proposed wall, then erecting within the trench a wall, then substituting for the core of earth within such proposed wall suitable permanent braces to take the exterior pressure transmitted through the wall."

Not only is it true that Mr. Ewen did not express or describe his invention, as he now claims it, in his patent, but he never fully understood it for more than five years after the patent issued. Very soon after he obtained his patent he undertook a thorough campaign to introduce his method. He opened an office in Chicago to exploit the invention, employed engineers, draughtsmen, and an architect for the purpose, and kept the office open nearly a year. During this time he personally endeavored to induce architects and engineers to adopt the process, and circulars were sent out, and correspondence had with architects, builders, and engineers throughout the country. He tried to induce all the principal contractors, engineers, and architects engaged in similar work in Chicago to adopt his process. They all spoke highly of it, but doubted its patentability, and hesitated to try it on any building. So far from receiving a general acceptance, the contrary is shown by all the evidence. Mr. Ewen was a prominent builder, for years connected with one of the largest firms in Chicago, a most able and skillful engineer. Anything coming from him deserved and would receive respectful attention. Yet every one doubted the practical efficiency of his process, as he then understood it. As will be seen later, he did not emphasize the now important and vital point—the manipulation of the movable or floating lining. Speaking of a pamphlet circulated by him to show his method, Mr. Ewen says:

"This pamphlet contained a full description of my process, with many illustrations showing its application. \* \* \* No one seemed to appreciate it or wished to apply it."

But there is not a word in the pamphlet which calls attention to the floating lining or manipulation of the braces, except a general conclusion that the method is safe "because the inner core of earth sustains the same pressure at all times during the progress of the work." This it might do with rigid braces, and without manipulation.

About the time the pamphlet was published Mr. Ewen wrote a descriptive article for a Chicago newspaper called "The Inland Architect and News Record." This was in February, 1903. Like the pamphlet, it does not mention the two vital features of the invention, although using the language above quoted.

Nor did counsel for complainant, in adducing evidence to show infringement by the construction of the basement of the Boston Store, in the *prima facie* case, call attention to these vital and important features. They put in evidence an article on the Boston Store taken from the Engineering Record, a Chicago publication, and also the testimony of Malcom Ewen. The article contains some slight suggestion, perhaps, of the flexible lining and manipulated brace, but not enough to enable a person to find them who did not know they were there. Nor does Malcom Ewen say anything about them in his testimony.

It would seem that if the flexible lining, and the constantly manipulated jackscrew, with their ability to sustain the varying lateral pressure, had been really invented by Mr. Ewen, it would have found expression when he was trying to convince the most critical and practical body of men in the world that he had a feasible process. Leaving in the center core was as old as the Tronquoy Tunnel. Building the superstructure before the cellar was equally old, and was extensively practiced on the Boston Subway; not just as Mr. Ewen does it, but without great variation. Indeed, it was more than five years after the patent issued that Mr. Ewen discovered, through his expert witness Charles S. Burton, that he had really invented the floating lining. This discovery was made at the proper time to avoid the defense of anticipation. It was not until February 28, 1908, almost two years after the bill was filed, and after defendants had closed their case in defense, that these important and vital parts of the process were ever explained or applied.

At this stage of the case complainant called Mr. Charles S. Burton, a patent expert. By him these so-called great conceptions of the inventor are for the first time fully set forth and elaborated. This performance is called by counsel "Burton's Reissue of the Ewen Patent," and a most able and ingenious specimen of "specifications and claims" it certainly is. He says that the floating and flexible linings, and the adjustably extensive braces, transmitting the pressure from the adjoining land from and to the center core both before and after the wall is built, and up to the time the center braces take the place of the core, are the two vital features of the invention, and are to be employed by constant attention to the jackscrews, keeping them adjusted so as to hold the planks against the trench walls by following up any yielding which may be detected as the screws are tested in the process of constant inspection, so as to uninterruptedly maintain the status or condition of the surrounding territory in respect to its capacity for upholding the buildings so that no initial disturbance can occur. He thinks these two vital features were clearly appreciated by Mr. Ewen, from the language above referred to. By a practical engineer, he says, this language would be taken to point to the capacity of the jackscrews by their adjustment to keep the pressure always on the lining planks, so as to transmit it fully without permitting any actual yielding or slipping of the trench wall back of the linings. The adjustable feature of the jacks would be of no importance, have no part in the function of sup-

port except as the changing character or condition of the earth gives occasion for using this feature. To put it in more concrete and less general terms, if water runs out between the lining planks, or the earth rises in one part of the trench, or on turning a screw it is found loose, the lateral pressure at these points has been lost or impaired, according to the witness, and must be restored and again carried through the jacks to the center core. It would seem that the enormous pressure of the adjoining buildings would "follow up" any loss of earth or flow of water behind or below any particular part of the lining, or any rising of the earth in the bottom of the trench; but the testimony seems to indicate that this may not happen at once, so that if the jacks are watched, and "turned up daily," the original lateral pressure may be approximately maintained during the sinking of the trenches, and absolutely preserved from the time the I-beams for the trench walls are in place; the trench at that time being practically sealed at its bottom and sides. Thus the earth core which sustained the lateral pressures before the building process commenced sustains them at every stage of the process, and until the floor beam structure takes its place, as indicated in the tenth claim.

Now, it is clear that these two vital features were dimly present to the mind of the inventor when he wrote the specifications, but his subsequent conduct shows that he never appreciated their importance, or considered them as vital or even important parts of his process, until Mr. Burton had testified, and it was necessary, in order to escape anticipation, to find them in the patent. The question is thus presented whether these vital and important things can be found in the specifications and from there read into the claims, so as to narrow the claims to avoid anticipation on the one side, and show infringement on the other. It is perfectly clear that the claims do not contain these features and, assuming that they are found in the description, the question is whether they may be read into the claims.

For some purposes, descriptive parts of a specification may be read into the claims. The statute, section 4888 (U. S. Comp. St. 1901, p. 3383), provides that applicants for a patent shall file a written description thereof, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, compound, and use the same; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. For the purposes of sustaining a patent, as where a nonpatentable principle or function appears to be claimed, but the specification shows that the patent was sought for a machine, device, or process which is patentable, the specification may be read into the claim. *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. But where the purpose is to escape anticipation or establish infringement, this cannot be permitted. The following citations show this clearly:

"The developed and improved condition of the patent law leaves no excuse for ambiguous language or vague descriptions. The public should not be deprived of rights supposed to belong to it without being clearly told what it is that limits those rights. The genius of the inventor should not be restrained by vague and indefinite descriptions of claims in existing patents from the right of improving on that which has already been invented. It seems to us that nothing can be more fair, both to the patentee and to the public, than that the former should understand, and correctly describe, just what he has invented, and for what he claims a patent." *Merrill v. Yeomans*, 94 U. S. 573, 24 L. Ed. 235.

"As patents are procured *ex parte*, the public is not bound by them, but the patentees are, and the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public." *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344.

"The courts should not enlarge by construction the claim the Patent Office has admitted, and the patentee has acquiesced in, beyond the fair interpretation of its terms." *Burns v. Myer*, 100 U. S. 671, 25 L. Ed. 738; *Lehigh Valley Railroad Co. v. Mellon*, 104 U. S. 112, 26 L. Ed. 639; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303; *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 10 Sup. Ct. 570, 33 L. Ed. 963.

"We know of no principle of law which would authorize us to read into a claim an element which is not present for the purpose of making out a case of novelty or infringement." *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358.

"A claim cannot be narrowed by construction, and thus rendered more likely to be infringed." *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723; *McClain v. Ortmayer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800.

"A feature of a process not covered by the claims, but merely recommended in the specifications, instead of being required, or stated to be an essential part of the process, cannot be read into the claims." *Sewell v. Jones*, 91 U. S. 171, 23 L. Ed. 275; *Holliday v. Pickhardt (C. C.)* 29 Fed. 858.

In the *Wilson v. McCormick Co. Case*, 92 Fed. 167, 34 C. C. A. 280, the Court of Appeals for this circuit decided that an element not named in a claim cannot be read into it, citing (page 174 of 92 Fed., page 287 of 34 C. C. A.) *McCarty v. Railroad Co.*, 160 U. S. 110-116, 16 Sup. Ct. 240, 242, 40 L. Ed. 358, where the court says:

"There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are so described in the specification and exhibited in the drawings. It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that if we once begin to include elements not mentioned in the claim in order to limit such claim and avoid a defense of anticipation, we should never know where to stop. If, for example, a prior device were produced, exhibiting the combination of these claims plus the springs, the patentee might insist upon reading some other element into the claims, such, for instance, as the side frames and all the other operative portions of the mechanism constituting the car truck, to prove that the prior device was not an anticipation. It might also require us to read into the fourth claim the flanges and pillars described in the third. This doctrine is too obviously untenable to require argument."

On his claims, therefore, the patentee must stand. Confined to them, he has discovered nothing new. If we might aid them by referring to the description, it might be possible by a liberal construction to

find there the invention now claimed which Mr. Ewen has thus dedicated to the public, and which is now being used to its great advantage. In the specifications of the Cook County Building, recently erected, the defendants Holabird and Roche required that the contractor should maintain a gang of experienced house raisers to keep the screws turned up daily during the digging of the trenches, setting of steel, and refilling with concrete. And there is some proof that the complete process was employed in two or three other buildings. Holabird and Roche do not admit that they used the Ewen process, although I think they did; but the matter is immaterial in view of the conclusion reached.

If the use of the flexible lining and manipulated jackscrew was so inherent in the process described by Mr. Ewen in his claims that the process could not be performed without them, or if skilled workmen everywhere had uniformly found in the practice of the patented process the two vital features in question, it is possible that the charge of anticipation might be avoided. *American Fiber-Chamois Co. v. Williamson* (C. C.) 69 Fed. 247; *Id.*, 72 Fed. 508, 18 C. C. A. 669; *Good-year Tire & Rubber Co. v. Rubber Tire Wheel Co.*, 116 Fed. 363, 53 C. C. A. 583; *Consolidated Rubber Tire Wheel Co. v. Finley Rubber Tire Co.* (C. C.) 116 Fed. 629. But it is obvious that neither of these principles is applicable, since the claims do not mention adjustable nor extensible braces, and as the patented process has not been fully accepted, recognized, practiced, or used.

The conclusions reached, that the patent is invalid for anticipation, renders it unnecessary to consider whether the process as Ewen now claims it was used in the buildings, referred to in the testimony, constructed prior to his patent. I do not think it was used in any of such buildings, including the Tribune Building.

A decree will be entered dismissing the bill, with costs.

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#### FERNALD v. ONEIDA NAT. CHUCK CO.

(Circuit Court, N. D. New York. February 22, 1909.)

##### 1. PATENTS (§ 35\*)—PATENTABILITY—EVIDENCE OF INVENTION.

While the commercial success of a patented device may be important on the question of invention and may determine such question in a close case, it is not alone sufficient evidence of mental conception, amounting to invention, to sustain a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.\*]

##### 2. PATENTS (§ 328\*)—PATENTABILITY—INVENTION—THILL-COUPLING.

The Fernald patent No. 747,874, for an improvement in thill-couplings, construed, and *held* void for lack of invention in view of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. Demurrer to bill to restrain alleged infringement of let-patent and for an accounting.

Hugh C. Lord and George E. Rendel, for complainant.

Robinson, Martin & Jones, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



RAY, District Judge. The bill of complaint, in the usual form, charges infringement of United States letters patent for improvement on thill-couplings, No. 747,874, dated December 22, 1903, and granted to George H. Fernald, and is accompanied by the said letters patent, and also makes profert of the alleged infringing device which is filed with the bill. The defendant demurs on the grounds that the bill, with letters patent, shows on its face that the patent is void for want of patentable invention; that it appears from the bill that the alleged infringing device is not an infringement of the patent set forth; and that it appears from the bill that defendant has not made and sold thill-couplings formed in the manner set forth and claimed in the letters patent set forth in the bill and alleged to have been infringed.

The patent is for a mere improvement, and in its specifications states the prior art, and specifies the particular improvement thereon wherein the invention alleged to be disclosed by the patent is claimed to reside. As the alleged infringing device is filed with the bill, and is simple and easily understood, the question of infringement is easily determined. I do not see that expert testimony is essential, or can aid to a clear understanding of the prior art shown in the bill, or of the device set forth in the patent, or of the alleged infringing device.

The claims of the patent, four in number, read as follows:

"(1) In a thill-coupling, a draft-eye, a coupling-pin, and a spring to take up the lost motion between the parts, a lever and a link operatively connected to tension the spring, the lever having a transverse aperture enlarged between its ends, and the link having its ends inserted in the aperture and deflected into the enlargement out of alinement with the swinging axis of the link.

"(2) In a thill-coupling of the class described, a lever having an opening therethrough and enlarged intermediate its ends, and a link-bar having its ends inserted in the opening and disposed at an angle with its axis.

"(3) In a thill-coupling of the class described, a lever having an opening therethrough and enlarged intermediate its ends, and a link consisting of a U-shape bar having its extremities deflected inwardly and upwardly from the sides and inserted in the aperture.

"(4) In a thill-coupling of the class described, a lever having a split boss, and a U-shape bar having its ends inserted between the jaws of the boss and bent at an angle other than a right angle with the sides of the bar, the jaws of the boss being closed over said inserted ends for the purpose set forth."

We have in combination a draft-eye and coupling-pin, and a spring to take up the lost motion between the parts; the lever and a link operatively connected to tension the spring, the said lever having a transverse aperture enlarged between its ends, and the link having its ends inserted in the aperture and deflected into the enlargement out of alinement with the swinging axis of the link.

Thill-couplings having a draft-eye and coupling-pin and a spring to take up the lost motion between the parts, with a lever and a link operatively connected to tension the spring, are so old and well known that I think a court is justified in taking judicial notice of their existence. They are as well known as wagons and sleighs. However, the patentee in his specifications says:

"This invention relates to improvements in thill-couplings, in which a link and a lever are operatively connected to tension a spring to hold the draft-

eye in close contact with the coupling-pin, and thereby prevent rattling of the parts."

He then says:

"The link is formed from a single piece of wire or similar material, and its opposite ends are inserted in an aperture in the lever from opposite sides to pivotally connect the two parts together."

This is descriptive of the prior art. The patentee then says:

"Heretofore I have relied upon the tension of the arms of the link to hold the ends in the aperture; but I find that, when subjected to a severe pull or other strains which would tend to separate the ends of the link, said ends would sometimes be drawn from the apertures, and thereby disconnected from the lever."

This tells us how the U-shaped link formed of wire or similar material has in the prior art been connected with the lever, to wit, as shown in the drawings the free ends of the U-shaped link have been bent inwardly towards each other and inserted in the apertures or holes in the lever, made large enough for the insertion thereof. As stated, the tension of the arms of the link would hold these free ends thereof in the aperture or apertures provided for their admission into the lever. Left in this way, it is evident that a severe strain or pull upon the bent or curved end of the link would tend to draw the free ends thereof from the apertures in the lever. A blow or pull side-wise upon one or both of the arms of the link would pull the free ends from the apertures. This might be done accidentally. As pushing the lever into place so that the link would hold and prevent rattling of the thill-coupling entire would bring a severe strain upon the link, the tendency was to pull the free ends of the link from the aperture or apertures. The purpose the patentee had in view was to prevent this, and he says:

"My object, therefore, is to prevent the accidental disconnection of the link from the lever."

What he means is that he purposes to do something to prevent the escape of the free ends of the link from the apertures or aperture in the lever when strain is brought to bear upon the link by pulling or accidentally by blows against the arms of the link which would tend to drive them away from the lever. Such disconnection of the free ends of the link from the lever sometimes occurred, in actual experience, by a blow from a flying stone thrown by the foot of the horse or the wheel of the wagon, and striking inside or between the arms of the link.

The patentee then proceeds to tell us how he forms his link and lever and connects them so as to obviate the difficulty mentioned; that is, how to prevent the free ends of the link from becoming disconnected from the lever by a pull upon the link or pressure in the manner indicated. The lever has two arms, and between these arms the patentee has his aperture for the insertion of the free ends of the link. At the place where he has his aperture he makes the lever solid, and says:

"This aperture is formed in a split boss, 14, and gradually increases in diameter from its outer ends inwardly; but the lever is first formed with the jaws, as 15, of the aperture open, so that the angular ends, 12, may be

readily laid in the opening, after which the jaws are closed together around the extensions, 12, to hold them from withdrawal laterally."

This means, simply, that at the solid portion where the aperture is formed the bent free ends of the link are inserted in the aperture, which aperture is made to increase in size as we go towards the central point between the two arms of the lever from either side thereof, and thus the outer openings are of a size sufficient to admit the ends of the arms of the link, but in its central portion this aperture is considerably larger. To prevent the pulling out of these free bent ends of the link, the patentee now bends such ends again, and the sole and only purpose of this enlargement of this aperture as described is to receive this further or additional bending of the free ends of the link and at the same time permit their free play or movement. Here, in again bending the free ends of the link, and in enlarging the aperture to permit the free play of these bent ends, resides the invention of the patent. This is the improvement over the prior art. This is the new or novel idea disclosing patentable invention, if any there be. Practically, whether the lever is made solid at the point or points where the free ends of the link are inserted or not is immaterial. We may dispense with the split boss and its enlarged aperture entirely, and the result and effectiveness of the device is the same. If we provide at this point two apertures, one in each arm of the lever, having them opposite each other, and insert therein the free ends of the link respectively, and then again bend these free ends at a right angle, or substantially so, in any direction, these free ends will move without obstruction, except that they will not be drawn out of the apertures in the arms of the lever except by the exercise of such force as will straighten the bent ends. The same force would withdraw the free ends of the link from the aperture in the split boss mentioned. The whole idea of this improvement in a thill-coupling was to my mind covered and anticipated by the horseshoer who bent over or "clinched" the end of the horseshoe nail after being driven through the hole in the shoe and the hoof of the horse, such clinching being for the purpose of preventing the nails from pulling out. The same idea is covered in the bent-up free ends of the handle or bail of a water pail where they engage respectively with the ears of such pail on the opposite sides thereof. The ears of the water pail each of which has an aperture, stand perpendicularly and correspond to the two arms of the lever in this thill-coupling. The handle or bail of the pail corresponds to the link of the patent, and is quite similar in shape. The free ends of the handle or bail where they engage with the ears are bent inwardly at nearly a right angle to the arms of the bail or handle, and are inserted in the apertures in the ears. We may now lift the pail, the bent ends of the bail coming into engagement with the ears. If, however, the load is too great, the arms of the bail will spring apart and draw the bent ends out of the apertures in the ears. To remedy this and prevent such disconnection, for generations pailmakers have bent up the extreme ends of the free ends of the handle or bail after insertion in the apertures, so as to form a hook and thus prevent the withdrawal of such free ends from the

ears accidentally or by means of the strain on the handle or bail when the pail was filled.

Carpenters for generations have had and utilized the same idea. In the patent in suit it is simply the bending over at an angle the free ends of this U-shaped link after their insertion in the aperture or apertures so as to prevent their withdrawal therefrom except by the exercise of such force as would rebend such ends. This was no application of an old idea to a new situation to meet a novel exigency. The usual skill of the ordinary mechanic was fully competent to cope with the situation, and, to my mind, there is an utter absence of any mental conception amounting to patentable novelty. The Supreme Court of the United States has many times said that not every improvement amounts to patentable invention. This court has many times had occasion to say that it is frequently difficult to draw the line between mental conception, accompanied by means to make it available, amounting to patentable invention, and the exercise of thought and judgment by the skilled mechanic, which he must always do to meet the exigencies of his trade, and which discloses no patentable invention. Here, however, I find no such difficulty. The complainant's counsel says in his brief:

"To carry out the invention, the lever has a perforation into which the bent ends of the link extend, and this perforation must be intermediately enlarged to permit of the bending of the ends of these extremities, so as to prevent their withdrawal. The invention, therefore, involves two changes from what the inventor had previously done, as expressed in the patent: The deflection or bending of the inturned ends of the link, so as to prevent their withdrawal from the perforation; and the enlargement of the perforation or opening between the sides of the lever, so as to permit of the free play of these bent extremities.

"That this is an improvement over what the inventor had done before seems too obvious for argument. That it attains most beneficial results can perhaps be no better evidenced than by the fact that defendant has adopted it. In articles of this class, where the total selling price is measured in cents and the fraction of a cent may represent the profit, very small advantages are often the life of a business. We believe that complainant should be allowed to show the greater popularity of this form of device, its superiority over what has gone before, and the advantages incident to it in the way of manufacture."

I do not doubt that bending over the ends of the free ends of the link within the apertures made the couplings more efficient and rendered the lever less liable to displacement, but the idea is one that would have occurred to any mechanic skilled in the art. The complainant's counsel assumes that the defendant has adopted the improvement disclosed in the complainant's patent. If we are to rely upon the exhibit, defendant's alleged infringing device, filed with the bill, as the extent of defendant's offending, then defendant does not infringe. The defendant has the two arms to his lever, but it has no solid portion between such arms at the places where the free ends of the link are inserted, and no split boss or equivalent therefor. It has two apertures, one in each arm, and these apertures are opposite each other; but it has no split boss with an aperture therein which gradually increases in diameter from its outer ends inwardly. True, the defendant bends the ends of the free ends of its link to prevent their withdrawal from

the apertures in the two arms, but this it had the right to do without infringing any patent or patented device. In no other respect does it encroach upon the claims of the patent in suit.

In the recent case of *Kuhn et al. v. Lock-Stub Check Co.*, 165 Fed. 445, decided November 16, 1908, the Circuit Court of Appeals in this circuit, citing many cases, held:

"A court may properly declare a patent void on a demurrer to a bill for its infringement, when convinced from an inspection that it cannot be sustained."

In the case in hand, if there be an improvement in the thill-coupling, we have no new result except in degree, and we have no new function performed by the lever or by the link or by the coupling as a whole, or by any part of it. All we have is less liability to detachment of the free ends of the link from the aperture or apertures in the lever, and this is done by so bending the free ends of the link at their extremities as to prevent their escape from the holes in which inserted.

The complainant says he ought to be permitted to show large and increased sales and commercial success as bearing on the question of patentable invention. It is decided by the Supreme Court that commercial success in a close case is oftentimes important and will or may determine the result, but alone it is not sufficient evidence of mental conception amounting to patentable invention to sustain a patent. At best, in improving the prior device, the patentee has resorted to a well-known expedient, that of bending the end of a wire to prevent its being drawn out of a hole into which it has been introduced, making the interior of such hole large enough to permit such bending and the free movement of the bent end therein. The link with its free ends thus bent is probably more efficient in that it will more surely remain in place, but it performs no new or added function, and it produces no new or better result. Its operation is precisely the same it was before. The split boss performs no new or different function, and discloses no patentable invention. The aperture therein is larger at its center than at its ends, so that the turned-up ends of the link will have free play. This split boss between the two arms of the lever acts as a receptacle for these bent ends, but does not keep them in position or aid their operation. The open space between the two arms of the lever, having apertures therein to receive the ends of the link, serve the same purpose, and this is defendant's only construction, so far as appears. I cannot see any possible invention. See generally, 30 Cyc. (title "Patents," III, "Patentability") 828, 829.

The demurrer is sustained, with costs.

## WHITEHEAD &amp; HOAG CO. v. BASTIAN BROS.

(Circuit Court, W. D. New York. October 1, 1908.)

No. 277.

## 1. PATENTS (§ 328\*)—INFRINGEMENT—BILL HOOK.

The Studebaker patent, No. 615,921, for a bill hook combined with an advertising card, discloses novelty and patentable invention, but is of narrow scope, and is restricted by the prior art to the peculiar arrangement by which the eye in the hook enables the latter to lie flat against the supporting plate or to be held in a position at right angles to it. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

## 2. PATENTS (§ 328\*)—INFRINGEMENT—BILL HOOKS.

The Hornich patent, No. 789,218, for a bill hook, the principal feature of which is the method employed for locking the hook in its position on the supporting plate, discloses patentable novelty in such feature, and is entitled to a moderate range of equivalents. Also, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On final hearing.

Howard P. Denison and William A. Jones, for complainant.  
Osgood & Davis, for defendant.

HAZEL, District Judge. The bill alleges the infringement of three letters patent, the Studebaker patent, No. 615,921, dated December 13, 1898, the Hornich patent, No. 653,296, July 10, 1900, and Hornich patent, No. 789,218, of May 9, 1905, now owned by complainant. The patents relate to improvements in bill hooks. The object of the patentee, Studebaker, was to construct an adjustable bill hook attached to a placard, and to construct it in compact form so as to facilitate distribution and to afford an economical, attractive, and useful advertising medium. The single claim of the patent reads as follows:

"An advertising article, consisting of a placard having a plate secured thereto; and a bill hook movably secured to said plate, the said bill hook having an eye, 5, and being adapted to be turned so as to lie flat in relation to said placard and plate when at its upper plane of movement, and to be held from thus turning by means of said eye when adjusted for use, substantially as and for the purpose specified."

The elements of the placard and plate or support for the hook secured thereto were not new at the date of the invention in suit, and the element of a movable bill hook having an eye secured thereto, the same being assembled to permit folding it for convenience in packing, distribution, or mailing, though new and novel, does not, in view of the antecedent art, entitle the patent to a broad construction. Although a patentable combination, because of the inclusion of a new element, was disclosed, yet I think the claim must be limited to a movable bill hook with an eye at its upper end and constructed so as to permit collapsing said hook or holding it in a position at right angles to the plate when used for the suspension of bills, documents, or other articles. There

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was some novelty in the particular method of construction by which the patentee accomplished his intention to make a cheap bill hook combined with an advertising card, and adapted to be folded by moving the hook upward in the groove or guide of the plate, and in adjusting it to prevent lateral turning. It is shown that the eye, 5, at the upper end of the hook, coacts with the plate support when adjusted in position, and arrests turning the hook in any other direction. Such functional result was obtained by the opposed bearing faces or by lateral projections of the eye coming in contact with the plate. This, in my estimation, was the only novel feature that can fairly be found in the patent. It was old in the art to attach wire or metal hooks to a support or backing in such a way as to lie parallel therewith, and, further, to attach the hook at right angles to the support, backing, or plate when articles were suspended from the hook. In the prior patents to Putnam, Hubbard, Nottingham, and Johnson are shown hooks which may be folded for convenience in packing and turned to a right angle position for suspending articles therefrom. That such hooks relate to clothes hooks, as distinguished from hooks upon which bills or other articles may be suspended, is not thought of material importance. It makes no difference whether the hook is attached to a wooden, tin plate or card support, specially as its operation is not essentially different from the operation described in the prior patents. *Jones v. Cyphers* (C. C.) 115 Fed. 324. The claim of complainant that no metallic substance in place of the cardboard plate or backing is within the terms of the patent is unwarranted, and the claim is not limited to exclude a wood, rubber, or metallic backing, nor, indeed, is the patentee's design of printing advertisements on a paper backing or support a patentable element. Advertisements could easily have been placed upon the supports or backing for hooks of the prior art. There was no legal hindrance to such use, even though the idea of doing so did not originate with such patents. *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267. An inspection of the file wrapper would seem to support this construction of the claim, namely, that the patent must be restricted to the peculiar arrangement by which the eye in the hook enabled the hook to lie flat in relation to the support, and also to be held in position at right angles to the plate. In view of the Gatling patent, No. 447,565, dated March 3, 1891, it would seem to be an expansion of the claim in suit to hold the patentee a pioneer in the art, and to give the patent the broad construction contended for by the complainant. In the Gatling patent is described a fixed hook arrangement having at its upper end a so-called pocket in which a card, label, or advertisement may be held. It would seem, therefore, that Studebaker was not the first to use an advertising card or placard in connection with a bill hook. That he attached to his advertising card a movable hook, and adapted it to be folded flat or turned out at right angles (which is the distinguishing feature from the Gatling patent), will not allow giving the claim a liberal scope, in view of the weight which must be accorded other prior patents hereinbefore mentioned. Thus construed, the defendant is not an infringer of the patent in suit, for by its adaptation or bill hook arrangement the result is not brought about by equivalent

means, although its operation is substantially the same. Walker on Patents, 352, 353.

No testimony was given by complainant to show infringement by the defendant of the first Hornich patent, No. 653,296, and said alleged infringement, not being pressed, will not be herein considered.

The second Hornich patent, No. 789,218, is claimed by complainant to be an improvement of the said original bill hook in controversy. Claims 3, 4, and 5 thereof are involved. Such claims disclose a similar bill hook to that described in the Studebaker patent, except that, instead of having an eye at the upper end of the shank of the hook to prevent the hook from turning, an offset at one side of the axis is used. When the shank of the hook is turned downward in the channel or guide in the supporting plate, the offset or projection engages the notch or socket, locking the hook and preventing it from swinging. The claims in issue are for a specific method of constructing the bill hook in combination with a supporting plate, and in several particulars concededly include elements not found in the prior patents to Studebaker and to Hornich. The principal feature of the invention consists in the method employed for locking the hook in its position to prevent lateral or longitudinal movement. Considering the narrowness of the art, the bill hook in question was probably a slight improvement over the Studebaker and first Hornich patents. I think the claims are entitled to a moderate range of equivalents. At least, they should not be so narrowly construed as to deprive the inventor of what he has achieved, where it is clear that the defendant has evaded the patent and taken the substance thereof. Even though the second Hornich patent is merely an improvement of what in the art was known before, yet, having made a cheaper, more durable, or more perfect structure, his invention is entitled to protection, though, of course, not to that wide range of equivalents which would be accorded to a pioneer. *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100. None of the patents of the prior art show the locking arrangement of claims 4 and 5, which was the element differentiating the structure from the Studebaker device, the first Hornich patent, and, in fact, the prior art. It is this element in the combination which produces the result. The eccentric portion in the side of the shank of the hook necessitates a socket or notch in the guide or rib extending down the middle of the plate or hook support to hold the hook in position and prevent it from moving upward or to the side. No such disclosure is made in the prior art. True, there are prior patents which show projections in the hook that coact with the socket to prevent lateral movements of the hook, but such locking means are not adaptable to complainant's structure. Hornich provided two thin supporting plates of similar dimensions, preferably of circular form, and placed them together one over the other. In the overlying plate he formed a groove or rib extending along the middle of the plate, having a socket or depression near the edge, the underlying plate being used to protect the cardboard from the strain and wear to which it is subjected by engagement and disengagement of the hook which lies in the socket.



Does the defendant infringe the claims? There was much discussion as to the scope of claim 3, which emphasizes the "co-operating, yielding connections between the two (the hook and the guide) for retaining the hook in adjusted position." The yielding connections mentioned are contained in the overlying plate at its edges, the fastening together of the two plates being so arranged as to produce such yielding when the shank of the hook is inserted in the groove. The defendant urges that this claim must be construed to mean a structure in which the socket is placed in the groove to prevent turning or swinging of the hook. In my estimation, it is wholly immaterial whether the socket is actually in the groove of the upper plate, or whether the lower plate is slightly grooved or recessed to retain the hook. In its structure the defendant employs two plates, the smaller superposed upon the larger. In the smaller or upper plate is a channel or guide in which the shank of the hook slides, as in complainant's device. On the shank of the hook a projection is formed which co-operates with the socket of offset placed in the under plate (not in the upper plate, as in the device of complainant), by which means the hook is locked when adjusted for use. The identical result of complainant's patent is attained by the defendant's arrangement, and no new object is achieved. In fact, the change or alteration of parts merely operates as a reversal of the specific means shown in the Hornich patent. Under these circumstances, as already indicated, the defendant's adaptation is a palpable evasion of complainant's principal element, the locking or adjusting means in question. Aside from what has been stated, it is not thought necessary to discuss claims 4 and 5, which with greater detail claim the specific method of construction of the structure in suit.

Complainant is entitled to a decree for injunction upon the involved claims of the Hornich patent, No. 789,218, and an accounting, and defendant is entitled to a decree of noninfringement of the Studebaker patent, No. 615,921. No costs to either party.

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ACME-KEYSTONE MFG. CO. v. DEARBORN et al.

(Circuit Court, S. D. New York. February 16, 1909.)

1. PATENTS (§ 298\*)—INFRINGEMENT—SEWING MACHINE.

Infringement of the Dearborn patent, No. 639,669, for a sewing machine, *held* not so clearly shown as to warrant the granting of a preliminary injunction provided defendant files a bond.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 479; Dec. Dig. § 298.\*]

2. PATENTS (§ 328\*)—INFRINGEMENT—SEWING MACHINE.

The Dearborn patents, Nos. 679,553 and 705,326, each for a sewing machine, *held* infringed on motion for a preliminary injunction.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

In Equity. On motion for preliminary injunction.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hillary C. Messimer, for complainant.  
Knight Bros., for defendants.

NOYES, Circuit Judge. This is an application for a preliminary injunction in a suit to restrain the infringement of letters patent Nos. 639,669, 679,553, and 705,326, granted to the defendant Dearborn, and assigned by him to the complainant. As said defendant is estopped to deny the validity of his own patents, the only question to be considered upon this application is one of infringement.

At the outset it must be observed that there are two structures manufactured by the defendants presented in evidence. One structure, designated as "Complainant's Exhibit Defendants' Machine," was made by and purchased from the defendants. They claim, however, that its manufacture was an accident, and that it differs from their regular machine. The structure designated as "Defendants' Exhibit Defendants' Machine" is the one which the defendants admit that they manufacture and sell.

(1) Complainant's Exhibit Defendants' Machine.

It is claimed, in the first place, that this machine infringes claim 1 of patent No. 639,669 which reads as follows:

"In a sewing-machine, the combination, with a feeding mechanism, of a needle arranged to reciprocate horizontally, or approximately so, and transversely to the line of feed, mechanism for operating said needle, a looper-rod provided with a looper located above the work-support and presser-foot, and co-operating with said needle and the acting portion of which looper is eccentric to the longitudinal axis of said looper-rod, and mechanism for operating said looper-rod to cause the same to have a forward longitudinal movement to carry the looper forward above the work at one side of the line of stitches to take a loop from the needle above the work, then an axial or rocking movement to carry the looper across the line of stitches to the other side thereof, and then a longitudinal receding or rearward movement above the work to enable the looper to present the loop to the needle, and then a second axial or rocking movement to carry the looper again across the line of stitches to its first position, from which it may again move to take another loop, substantially as set forth."

It is admitted that the machine in question embraces all the elements of this claim, provided its looper has the specified movement. As stated in the complainant's brief, the question is, "Has the defendants' looper a rocking movement?" Upon this question the witnesses differ. The complainant's expert says that the looper of the defendants' machine does have such a movement and that it is the equivalent of the movement of the looper in the complainant's own structure. On the other hand, the defendants' expert points out that the loopers of the two machines are in different form, and says that they also differ in the method of manipulating the thread and controlling the loop, as well as in the actual movement and the mechanical means for imparting it. While my impression is that the defendants' looper does have the rocking movement required by the claim, the question, in view of the conflicting testimony, is too doubtful to be determined as the basis for granting a preliminary injunction.

It is contended, in the second place, that the machine in question infringes claim 2 of patent No. 679,553, which reads as follows:

"In a sewing-machine, the combination of suitable stitch-forming mechanism, with a stationary presser-foot, a yieldingly-mounted feed-frame, a ridge-forming rib adjustably mounted in said feed-frame and adapted to engage the work beneath the presser-foot, and a feed device yieldingly mounted upon said feed-frame and independent of the ridge-forming rib, substantially as set forth."

It is obvious that the machine embraces all the elements of this claim provided it has the element "a ridge-forming rib adjustably mounted in said feed-frame." It is contended by the defendants that the ridge-forming rib found in the machine in question is not adjustably mounted. It seems to me obvious, however, that it is adjustably mounted. Infringement of this claim is clear, and should be restrained.

It is claimed in the third place that the machine infringes claim 3 of patent No. 705,326, which reads as follows:

"In a blind-stitch sewing-machine, the combination of a suitable stitch-forming mechanism, and a stationary presser-foot, with a ridge-forming rib constructed and arranged to engage the foot beneath the presser-foot, and an upper feed device constructed and arranged to engage the upper exposed face of the work adjacent to said ridge-forming rib, substantially as set forth."

Reading the claim upon the machine in question, it is clear that it possesses every element, including the stationary presser-foot. Infringement is obvious, and should be restrained.

## (2) Defendants' Exhibit Defendants' Machine.

The looper of this machine is in the same form and has the same movement as the looper of the first machine. Therefore, while the same contention is made regarding it, it can only be said that infringement is not so obvious as to call for a preliminary injunction. It is obvious, also, that no infringement of patent No. 679,553 is shown in this machine. It does not possess the "ridge-forming rib adjustably mounted."

But the complainant strenuously urges that this machine, like the other, infringes claim 3 of patent No. 705,326. To do so it must possess a stationary presser-foot or its equivalent. In fact, however, its presser-foot is yielding, and not stationary, and defendants' expert asserts that advantages attend this yielding action—that the cloth is stretched and smoothed over the rib, and that clearance is given for the feed action. On the other hand, the complainant's expert says that the yielding movement of the presser-foot is wholly without function. Here, as in respect of the movement of the looper, I am inclined to the opinion that the defendants are merely attempting to get away from the precise forms of the patents, while retaining their advantages. But I am not so certain that this will be the view of the court at final hearing that I feel warranted in closing the business of the defendants pending suit, provided they will file a bond. Possibly, had the complainant acted with more speed, I should feel differently.

A preliminary injunction may issue, restraining the defendants from manufacturing or selling any machine in the form of "Complainant's Exhibit Defendants' Machine." A similar injunction may be issued with respect to the other machine, unless within two weeks from the filing of this opinion the defendants file a bond of sufficient amount and with sufficient surety to pay all damages or profits which the complainant may recover upon a final decree. In case the parties cannot agree as to the amount or sufficiency of the bond, the matter may be presented upon affidavits, and will be determined by the court.

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THE RELIABLE

THE W. E. GLADWISH.

(District Court, E. D. New York. February 15, 1909.)

**COLLISION (§ 95\*)—STEAM VESSELS CROSSING—BOTH VESSELS IN FAULT.**

A collision occurred in the North River, near the ends of the New Jersey piers, between the tug *Reliable*, going up with a tow, and a tow on the side of the tug *Gladwish*, which had just come out of a slip and had given a signal of two whistles, indicating a desire to cross ahead. Instead of going straight ahead, however, she turned up the river, and the *Reliable*, turning toward the shore at the same time to pass under her stern, ran into her tow. The *Reliable* had also given a signal of one whistle, but did not insist on her right to cross ahead, as she should have done. *Held*, that both tugs were in fault and equally liable for the injury to the tow.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 200-202; Dec. Dig. § 95.\*]

In Admiralty. Suit for collision.

Wray & Callaghan, for libellant.

Carpenter, Park & Symmers, for *The Reliable*.

James J. Macklin, for *The W. E. Gladwish*.

CHATFIELD, District Judge. The present accident occurred upon the North River just above the Communipaw ferries, and within a short distance of the pierheads. The tug *Gladwish* was coming out with a tow, and, under a flood tide, attempted to turn as nearly as possible up the river, around a pier called the "Packer Dock"; this turn being so made as to enable the tug *Gladwish* and the tow to barely clear a string of canal boats which were lying in three tiers, angling out from a pier to the north, known as "Game Cock Pier." The *Gladwish*, upon starting out, pursued a direction substantially across the river, until a point was reached where the turn to port could be made. She thus had all the boats coming up the river, along the western shore, on her starboard hand, and it was possible to see several hundred feet down the river at that point, inasmuch as there is no pier immediately to the south of the slip from which the *Gladwish* started. The *Gladwish* saw a tug with a tow, the *Reliable*, coming up the river some 500 or 600 feet away, past the series of Lehigh Val-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ley piers, and heading either straight up the river along the pierheads, or working closer in as if to enter the slip known as the "Morris Canal Basin." The Gladwish gave a two-whistle signal to indicate that she wished to cross the bow of the tug coming up.

It may be assumed that if the tug coming up the river, the Reliable, had gone into the Morris Canal Basin, or had stopped before reaching Game Cock pier, no accident would have occurred. The evidence would seem to show that the Reliable was out a sufficient distance when going by the Lehigh Valley piers to have passed up the river sufficiently far from the pierheads to have avoided the rule laid down by the courts in *The Breakwater*, 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139, and the cases therein cited. Further, the Reliable's testimony is that she blew one whistle, which would have been the proper signal if she had intended to go up the river, to prevent the Gladwish from coming out. The captain of the Reliable also testifies that before the collision he put his helm to port and tried to sheer off to avoid the collision. But this was evidently not done until too late to have been of any service, and therefore neither relieves the Reliable of any responsibility, nor would be of any importance, except that it throws some light on the position of the boats at the time of the collision.

The testimony of all the witnesses is that the blow was straight in through the side of the barge, which was lashed on the starboard side of the tug, and penetrated clear into the coal. It is reasonably certain that, if the Gladwish had succeeded in making the turn so as to be headed substantially up the river, the Reliable could not have struck such a blow on any course, unless she were headed almost at right angles for the Jersey shore. Such a blow could still less be delivered if the Reliable had turned to starboard to any appreciable extent under a port helm. On the other hand, the testimony of all the witnesses shows that the Gladwish was making a turn, and that the blow was struck after she had worked somewhat to port from a straight across the river course. It is also evident, from the position of the canal boats, angling out from the Game Cock pier, that the accident must have occurred below that pier, and not much further out in the river than the lowest tier of canal boats.

Under these circumstances it is difficult to see how the Reliable struck the barge, if her story that she was proceeding straight up the river, some 400 feet from the piers, under a one-whistle signal, with a turn to starboard, just before the accident, is to be believed. It may be assumed that the Gladwish was a crossing vessel, and that her two-whistle signal was wrong under the circumstances, especially if, instead of crossing, she intended to turn around in the path of the Reliable and proceed up the river, a maneuver which would be likely to consume more time than to pass straight across. The Reliable had the right to assume that the Gladwish heard her one whistle, or that, if the Gladwish did not hear it, no attempt to cross the bow of the Reliable would be made, under a cross-whistle, or a failure to elicit response. *The John King*, 49 Fed. 469, 1 C. C. A. 319; *The George S. Shultz and Others*, 84 Fed. 508, 28 C. C. A. 476.

But the position of the boats and the physical peculiarities of the situation show to the satisfaction of the court that the testimony of the witnesses, to the effect that the Reliable headed in, is correct. In other words, it seems to the court that the Reliable assumed that the Gladwish was proceeding straight out into the river, and, even if the Reliable gave a one-whistle signal, that after hearing the two by the Gladwish, and estimating the distance between them, the Reliable attempted to work in closer to the piers and to pass astern of the Gladwish, which, under the circumstances, she had no right to do. She should have held her course and insisted on her signal, or have proceeded at such a rate of speed that the Gladwish could have gotten out of the way. The string of canal boats was in plain sight, and the Reliable should have taken them into consideration in proceeding up the river. But the Gladwish was clearly at fault in giving a two-whistle signal, under the circumstances. She should have assumed that she would be treated as a boat coming out from a slip, and (under rule 19) thus obligated to take care of all boats approaching on the starboard; or, if she intended to have the Reliable pass up the river outside, a one-whistle signal would certainly have indicated the portion of the river which was needed by the Gladwish better than the two-whistle signal.

It is evident from the testimony of the pilot of the Gladwish that he gave the two-whistle signal because he assumed that the Reliable was going into the slip rather than up the river. Even a two-whistle signal might have been justified, if made a little later, after the Reliable had shown by her course that she would pass astern, and if the Gladwish had passed on across. But in the face of a failure to answer the two-whistle signal, which had already been given by her, and inasmuch as the Gladwish did not proceed out in the river far enough to give the Reliable room to pass astern if she had wanted to, it is difficult to see how the Gladwish can be relieved from all responsibility. When the Gladwish had once started upon her crossing course, the effect of the flood tide would increase the difficulty of avoiding the canal boats directly to the north, unless the course were pursued sufficiently to clear; and under such circumstances, even if in fault, the Gladwish might have avoided the accident by going straight out into the river; but by turning up the river she made it impossible for the accident to be prevented, unless the Reliable had consistently pursued her original course and paid no attention to the signals of the Gladwish.

While the Gladwish might have been at the outset entitled to assume that the Reliable would do this, nevertheless, after the mistakes on the Gladwish's part, and after the failure to receive the signal, it seems to be reasonably certain that the Gladwish could not ignore the difficulties caused by her own acts, and then insist that the Reliable should previously have insisted on her own rights.

The libellant is the owner of the coal barge which was run into and sunk, and both the Gladwish and Reliable seem to be responsible for the injury, and should both, therefore, be held liable equally for the damage.

In re RESNEK et al.

(District Court, E. D. Pennsylvania. February 9, 1909.)

No. 3,069.

**BANKRUPTCY (§ 287\*)—LIENS ACQUIRED BY LEGAL PROCEEDINGS—EFFECT OF LEVY AND SALE BEFORE BANKRUPTCY—REMEDY OF TRUSTEE.**

Where an execution was issued against an insolvent debtor within four months prior to his bankruptcy, and a levy and sale made, and the proceeds paid over to the judgment creditor before the filing of the petition, the case does not fall within Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), avoiding liens obtained through legal proceedings, and the referee is without power to summarily direct a repayment of the money; the remedy of the trustee, if any, being by a plenary action to recover the amount as a preference under section 60b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 444; Dec. Dig. § 287.\*]

In Bankruptcy. On certificate of referee.

Calvin F. Smith, for Albert H. Resnek.

Frank Reeder, Jr., for trustee.

HOLLAND, District Judge. In this case the judgment had been entered in the court of common pleas of Northampton county, the levy and sale made, and the money paid over to Albert H. Resnek on the 9th day of December, 1907, within four months of the filing of the petition in bankruptcy against the alleged bankrupts, which took place on the 16th day of March, 1908, and the adjudication was entered April 16, 1908. Upon the presentation of a petition, the referee summarily directed Albert H. Resnek to pay over to the trustee in bankruptcy the net proceeds received from the sheriff on the execution, to which order Resnek excepted, and the question is certified to this court for determination as to whether the referee, under the circumstances, had jurisdiction to make this summary order.

Where, within four months before the filing of a petition in bankruptcy against an insolvent debtor, an execution has been issued and levy and sale made and the proceeds paid over to the judgment creditor before the filing of the petition, the case does not fall within the provisions of section 67f of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), and the lien created by the judgment and levy is not rendered void by the adjudication. The remedy, if any, the trustee has against the creditor, is under the provisions of sections 60a and 60b of the bankrupt act in a plenary action, where it will be necessary to allege and show that the creditor had reasonable cause to believe that the bankrupt, by suffering judgment to be taken against him, intended to give a preference. In re Blair (D. C.) 102 Fed. 987; In re Bailey (D. C.) 144 Fed. 214. And this is true, even though the proceeds of the execution are insufficient to satisfy the claim of the judgment creditor. In re Knickerbocker (D. C.) 121 Fed. 1004.

It follows, therefore, that the order of the referee must be reversed. It is so ordered.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## CAPEWELL HORSE NAIL CO. v. MOONEY.

(Circuit Court, N. D. New York. January 30, 1909.)

## 1. TRADE-MARKS AND TRADE-NAMES (§ 4\*)—MARKS SUBJECT OF OWNERSHIP—ARBITRARY DEVICE.

A check figure formed of intersecting lines, impressed on the under or beveled face of the heads of horse nails, or on pictures of such nails on packages containing the same, as an arbitrary mark to designate them as the product of a certain maker, is a legitimate trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 8; Dec. Dig. § 4.\*]

Arbitrary descriptive or fictitious character of trade-marks and trade-names, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.]

## 2. TRADE-MARKS AND TRADE-NAMES (§ 3\*)—ORIGIN AND ADOPTION OF MARKS.

If a manufacturer had originally two or more purposes in adopting a particular mark for his goods, as, for instance, to indicate the quality and also the origin, and also to ornament the article, and the goods bearing this particular mark, and by reason thereof, had come to be known as the goods of that manufacturer, irrespective of grade or quality, there is no reason why he may not adopt such mark as a general trade-mark to indicate origin solely, no other person having adopted or used it.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.\*]

## 3. TRADE-MARKS AND TRADE-NAMES (§ 3\*)—ORIGIN AND ADOPTION OF MARK—PURPOSE OF USE.

Where the primary purpose of a manufacturer in adopting an arbitrary mark as a trade-mark was to indicate and identify the origin of the goods, he is not debarred from protection because it has incidentally come to indicate also the quality of the goods.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.\*]

## 4. TRADE-MARKS AND TRADE-NAMES (§ 26\*)—EXTENT AND MANNER OF USE.

Where a mark adopted by a manufacturer as a trade-mark has come to indicate and identify goods as of his make, it is immaterial that he did not advertise nor state on the packages the fact that such mark was claimed as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 29; Dec. Dig. § 26.\*]

## 5. TRADE-MARKS AND TRADE-NAMES (§ 28\*)—EXTENT AND MANNER OF USE.

A trade-mark for horseshoe nails is not invalid because the owner does not use it on all grades of such nails made by him, but he may have different trade-marks for different grades where the primary purpose of each is to indicate origin and not quality.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 31; Dec. Dig. § 28.\*]

## 6. TRADE-MARKS AND TRADE-NAMES (§ 25½\*)—EXTENT AND MANNER OF USE—USE OF DIFFERENT TRADE-MARKS.

A manufacturer of horseshoe nails of different grades and sizes which are put up and sold in packages and boxes and also sold and used loosely may adopt and use, and be protected in using, at least two trade-marks, the primary purpose of which is to indicate origin, for the same grade of nails, one to be imprinted on the nail itself and the other on the packages and boxes containing such nails; and this is so even if such manufacturer has other trade-marks primarily adopted to indicate the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



same origin, but which incidentally indicate grade, and which he uses on other grades of his manufacture.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 25½.\*]

7. TRADE-MARKS AND TRADE-NAMES (§ 4\*)—MODE OF AFFIXING MARK—ORNAMENTAL DEVICE.

The fact that a mark imprinted on a horseshoe nail may add to its appearance does not prevent such mark from being appropriated as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 4.\*]

8. TRADE-MARKS AND TRADE-NAMES (§ 27\*) — NAMES — MODE OF AFFIXING MARK.

The fact that a trade-mark for a horseshoe nail is cut or stamped into the nail itself does not affect its validity.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 30; Dec. Dig. § 27.\*]

9. TRADE-MARKS AND TRADE-NAMES (§ 43\*)—REGISTRATION—RIGHT TO REGISTRATION.

A statement made in an application for registration of a trade-mark that the applicant's use of such mark has been exclusive is not false, so as to deprive him of the right of registration or estop him from maintaining an action to protect his right because it may appear that some one else had previously used such mark in violation of his exclusive right.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 43.\*]

10. TRADE-MARKS AND TRADE-NAMES (§ 4\*)—INFRINGEMENT—HORSE NAILS.

A check figure, formed of intersecting lines impressed on the beveled face beneath the heads of horseshoe nails, *held* a valid trade-mark and infringed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 8; Dec. Dig. § 4.\*]

In Equity. Suit to restrain alleged unlawful infringement of trade-mark and alleged unfair competition in trade.

Edmund Wetmore and Oscar W. Jeffery, for complainant.

Robert W. Hardie and Charles A. Munn, for defendant.

RAY, District Judge. The complainant, Capewell Horse Nail Company, is a Connecticut corporation, and has its factory and main and principal place of business at Hartford, in that state. The defendant, Walworth M. Mooney, is a citizen and resident of the state of New York, and has his factory and place of business at Ausable Chasm, in said state.

The parties are competitors in the business of manufacturing and selling horseshoe nails. The complainant company has been engaged in the business since 1881, and is one of the largest manufacturers and sellers of such nails in the United States. That it manufactures and sells a high grade of nails at a high price is shown and not seriously questioned. The nail in question, and referred to as the "Capewell" nail, the highest or best grade nail made by it, constitutes about 75 per cent. of its entire output. The complainant's alleged trade-mark has been used by it in marking and designating its nails since 1892, and consists of a pattern of small but uniform checks stamped on the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under or beveled face of the head of each nail. It is stamped on one face only, viz., the front beveled face, and covers it. That it is a distinguishing mark cannot be questioned. This alleged trade-mark was registered in the Patent Office under Act Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1907, p. 1008), on the 9th day of October, 1906, No. 56,605. In the statement filed June 5, 1905, it was described as consisting of "a check formed of intersecting lines on the under or beveled face of the nail heads." In a communication of September 2, 1905, the Patent Office so recognized the claim. The original drawing showed, not only the check-mark claimed on the nail in its proper place, the beveled face of the head, but the entire nail. Pursuant to an order of the Patent Office, the applicant filed a new drawing showing only the intersecting lines forming the check-mark; that is, the check-mark independently of the nail. October 23, 1905, the Patent Office reversed its holding, and notified the applicant that the original illustration of the mark claimed was the correct one, and that a new drawing should be filed so as to show the mark claimed on the beveled face of the head of the nail according to the description in the original statement. This direction was complied with. However, pending the application, the practice in the office was so changed as to omit descriptions of trade-marks in applications therefor, and required applicant to state that he has "adopted the trade-mark shown in the drawing." This rule was not applied in this case, and the whole proceeding and file wrapper show that the "trade-mark" applied for, described, and registered was the "check-mark" and not the "nail with the check-mark" thereon. The nail was retained, under the ruling of the department made at the time, to show the location of the trade-mark thereon, and not as a part of the trade-mark. The statement reads:-

"To All Whom It may Concern:

"Be it known that The Capewell Horse Nail Company, a corporation duly organized under the laws of the state of Connecticut, and located in the city of Hartford, county of Hartford, in said state, and doing business at Nos. 57 to 69 Charter Oak avenue and 36 to 84 Governor street, in said city of Hartford, has adopted for its use the trade-mark shown in the accompanying drawing.

"This trade-mark has been continuously used in the business of said corporation since the latter part of 1892 or the early part of 1893.

"The class of merchandise to which the trade-mark is appropriated is class 13, metal manufactures not otherwise classified, and the particular description of goods comprised in said class upon which said trade-mark is used is horse-nails.

"This trade-mark is impressed on the under side or beveled face of the heads of the nails and on the packages and boxes containing the nails.

"The Capewell Horse Nail Company,

"By George C. F. Williams, Sec'y."

I do not think that under the proofs in this case and the practice of the Patent Office as it was at the time of the pendency of this application, especially the filing thereof, the defendant's contention can be sustained that the trade-mark claimed, allowed, and registered is the nail with the check-marks thereon. To hold otherwise would do violence to the plain intent and purpose of the applicant as shown by the file wrapper. In the original statement it said:

"The trade-mark consists of a check formed of intersecting lines on the under or beveled face of the nail head. This trade-mark has been continuously used in our business since the latter part of 1892 or the early part of 1893."

The letter of the Commissioner dated September 2, 1905, said:

"The mark claimed consists of a check formed of intersecting lines on the under or beveled face of the nail head."

This was the statement also of D. L. Pittman, acting examiner. After the applicant had filed his new drawing showing simply the check-mark, the same examiner said, and this was communicated to the applicant October 23, 1905:

"Applicant has filed a new drawing, and it does not show the trade-mark as described or as used. The original illustration of the mark is the correct one, and a new drawing should be filed. [Signed] D. L. Pittman, Acting Examiner."

In view of his prior description of what the trade-mark claimed actually was, it is impossible to say that this examiner was leading the applicant into a trap and inducing him to claim and register "a horseshoe nail with the check formed of intersecting lines thereon" as his trade-mark. The applicant had not made that claim, and, to have so broadened it, would have made the accompanying declaration under oath false. The trade-mark used had been, not a nail with the check thereon, but the check alone. This "trade-mark," the check, was used on a horseshoe nail or on the package containing the nails. It may be that under the practice subsequently adopted, or adopted during the pendency of this application, the drawing filed was the trade-mark allowed and registered in subsequent cases, but this practice was not applied to this case.

The defendant insists that this check-mark was not the subject of a valid trade-mark at common law or under the statute; that it was in common use in the manufacture of various useful articles, and the common property of all the people, and that it could not be appropriated by this claimant as a trade-mark for horseshoe nails. It must be conceded that similar checks, composed of or formed by lines crossing each other at right angles, or diagonally, and cut into the metal, had been in use for years to form gripping surfaces, as in forceps, tweezers, vises, etc., where they are cut on the interior surfaces of the jaws of the gripping devices. They had also been used on the exterior surfaces of the handles of various tools to prevent the slipping of the hand of the workman when grasping the tool.

I do not think the mere fact that the general design of this alleged trade-mark is composed or made up of a form of marks found elsewhere in general use for purposes of utility deprived the complainant company of the right to adopt this particular check-mark, of this particular form, used in this particular place on the horseshoe nail itself, or representations of such nail, as its trade-mark to designate its goods as those of its make or manufacture.

In *Hutchinson v. Blumberg* (C. C.) 51 Fed. 829, 830, the symbol of a star was held a valid trade-mark. In that case the word "star" was used in connection with the symbol, but I cannot see that this was ma-

terial. Stars—that is, figures and symbols of stars, and paintings and signs with stars painted and engraved thereon, etc.—have been used for more than a hundred years both for ornamentation and utility, and, so far as I know, any one had and has the right to use the symbol or cut of a star for such purposes, but it seems that it could be and was appropriated as a valid trade-mark. In *Johnson v. Brunor* (C. C.) 107 Fed. 466, Judge Lacombe restrained the infringement of a trade-mark consisting of a red cross. Now crosses have been used by the general public both for ornamentation and utility for generations.

In *Hier v. Abrahams*, 82 N. Y. 519, 523, 37 Am. Rep. 589, the court said:

“Trade-marks are of two kinds. They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in.”

In *Popham v. Cole*, 66 N. Y. 69, 23 Am. Rep. 22, the trade-mark consisted of the figure of a hog, with the name of the manufacturer and the words “prime leaf lard.” The court, per Rapallo, J., held that the words, being descriptive merely, could not be appropriated as a trade-mark. The court also held that there was such a distinction between the fat, plump, well-conditioned hog of complainant’s trade-mark and the lean, scrawny, ill-conditioned wild boar of defendants’ device that there was no infringement. The court took occasion, however, to say, in speaking of the sign or symbol of the hog:

“The sign or symbol may be employed with equal truth in respect to any parts of the dead swine or the products of that animal put up for sale, and no one dealer has a greater right than any other to appropriate it to his own purposes. A serious question might be made as to the right of the plaintiff to appropriate to his exclusive use as a trade-mark the picture of the animal from which not only his lard but the lard of all other dealers and manufacturers of lard is derived, especially when the same emblem or symbol has been used by dealers in lard and other products of the slaughtered hog indiscriminately as they have had occasion. But, passing this question, there are other difficulties in the plaintiff’s case which are insuperable.”

In *James Trade-Mark*, 33 Ch. D. 392, the judge said:

“Why a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Suppose you tanned pig skin into leather, I do not know why a pig should not be a good trade-mark for tanned pig’s hide.”

In *Harrison v. Taylor*, 11 Jur. N. S. 408, 12 L. T. (N. S.) 339, it was held that the figure of an ox on mustard, which from the figure had come to be called “Ox-Mustard,” was a good trade-mark. In *Orr-Ewing v. Johnston*, 13 Ch. D. 434, it was held that the figures of two elephants used on a label for yarn exported to India, and which had come to be known as “Elephant Yarn,” was entitled to protection as a valid trade-mark.

There are several cases holding that numerals arbitrarily selected may become the subject of a valid trade-mark. *Humphreys H. M. Co. v. Hilton* (C. C.) 60 Fed. 756; *Dawes et al.*, 1 O. G. 27; *Gillott v. Estbrook et al.*, 48 N. Y. 374, 8 Am. Rep. 553. In the last case cited

the trade-mark consisted of the figures "303." Figures, all the numerals, are the common property of all, and all have the right to use them generally in any sort of combination. It cannot be doubted that the general public had the right to use the figures "303" for any useful purpose, except to designate their own goods or goods of their own manufacture after the plaintiff had appropriated those numerals as his trade-mark. I do not see that the complainant here was debarred from appropriating this peculiar check-mark as his trade-mark for the reason that similar check-marks and the general use thereof for other purposes was a right common to the general public. The general public has the right, as stated, to use the numerals and all combinations thereof; to use the pictures and figures of elephants and the figures and pictures of oxen, etc.; but if one firm or person has appropriated such pictures or symbols to his exclusive use, as his trade-mark, and the general public has permitted him to do so until the picture, symbol, or combination of numerals so selected by him has come to distinguish the goods of his manufacture from all others of the kind, I cannot see why he is not entitled to protection. So here, while the general public has the right to use this check-mark to form a gripping surface to hold the article to be gripped or to prevent the hand of the user of the tool from slipping thereon, and perhaps for other purposes, I do not see that this fact prevented the complainant from appropriating it as a trade-mark. All the world may use the check-mark except as a trade-mark. This would reduce the proposition here, on this branch of the case, to the question whether the defendant used the check-mark, in manufacturing horseshoe nails, as a gripping surface, or for the purpose of imitating the complainant's mark and manufacture so as to pass off his nails as those of the complainant company.

That question was argued before this court at great length and with great ability. The record contains a large amount of evidence on that subject. The defendant contends that, in manufacturing the nail, experience had proved that it was necessary to harden and toughen it next the head as well as to roll it into proper shape; that in passing the nail between the rollers at a certain stage of manufacture it was found that the nail was liable to jump or slip from its proper position, and that this jumping or slipping would produce a defective nail; that it was therefore necessary at this stage of manufacture to provide on the roller a gripping or holding surface which would prevent the nail from jumping or slipping between the rollers. The complainant produced in court a section of the machine which performs this operation of impressing what it contends is its trade-mark on the head of the nail. This section of machinery also showed to the court the manner in which the nail passes between the rollers. It would not be profitable to discuss the evidence bearing on this question pro and con, or to enter upon a description of the machinery. I have studied the evidence as well as the machine produced. The defendant contends that the machine produced does not fairly and fully show the operation of defendant's machine used for the manufacture of horseshoe nails. I have not placed great reliance on the machine exhibited, except as it illustrates the way in which nails must pass between the

rollers. From the evidence contained in the voluminous records of the parties I have arrived at the conclusion, and am satisfied that it was not necessary for the defendant to use the check-mark of the complainant as a gripping or holding surface in the manufacture of horse-shoe nails, or, rather, to use rollers having a gripping surface thereon which would produce the complainant's check-mark on the nail. The defendant has used rollers which, in gripping the nail at this stage of manufacture, imprint thereon the exact duplication of the complainant's trade-mark. It was unnecessary to do this, even if it was necessary to have a gripping surface on the roller to prevent the slipping or jumping of the nail as it passed between the rollers. Some other of the many forms of gripping surfaces could have been used. It is significant that a gripping surface was used which produces upon the nail an exact copy of complainant's trade-mark. The complainant had made its nail with this distinguishing mark thereon for many years before the defendant claims to have discovered that a gripping surface was necessary. The complainant had built up its trade in horseshoe nails on this particular kind of nail with this check-mark thereon, which had come to be well known among all dealers and users as the distinguishing mark of the complainant's product. I am satisfied from the evidence as a whole that the nail in passing between the rollers at this stage of manufacture neither jumps nor slips, and that the use of the gripping surface, other than the rollers themselves, is entirely unnecessary, and that the defendant adopted the gripping surface which produces on the nail the check-mark in question for the purpose of producing a nail which would so closely imitate or simulate complainant's nail that to the eye of the observer the one could not be distinguished from the other, and for the purpose of selling his product on the market as nails of complainant's manufacture. If it was necessary to have a gripping surface on the roller, it was not necessary to use the only one of the many which would produce on the nail the exact counterpart of complainant's distinguishing mark, which had come to be well known in the trade and among manufacturers and dealers in and users of horseshoe nails. I therefore must find that the production of this check-mark on defendant's nails is not a necessary incident of manufacture.

I do not think the complainant ever adopted or used a roller that would produce this check-mark as an incident of manufacture, for the purpose of gripping or holding the nail in position while passing through or between the rollers. The evidence establishes to my satisfaction that the original or primary design and purpose was to impress upon the nail itself, at the place designated and mentioned, a mark of peculiar form and design, which should distinguish a certain class or certain classes of nails manufactured by complainant from those of all other manufacturers.

Hesseltine's "The Law of Trade-Marks and Unfair Trade," says (page 6):

"A trade-mark is an arbitrary sign affixed by a proprietor to his goods with the intention of designating their origin by a use thereon: (1) An arbitrary sign is a word, a combination of words, letters, a name, a number, a figure or

symbol, not necessarily disclosing on its face the origin of the goods, affording by association a ready means of recognition of their origin."

In *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144, the court said, amongst other things:

"That to acquire the right to the exclusive use to a name, device, or symbol, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. That the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production."

These principles are sustained in numerous adjudicated cases. However, it is to be kept in mind that while the primary purpose of the adoption of the particular symbol, device, or mark must have been to indicate and identify the origin or ownership of the article to which it is attached, it is all-sufficient if the particular mark, or symbol, or device used by a manufacturer has come to point distinctively, either by itself or by association with the goods of that particular manufacturer to which attached, to the origin and manufacture of the article on which stamped, and the manufacturer of those particular goods has thereupon adopted it as his trade-mark, no other person having adopted or used it to designate his goods. If the manufacturer had originally two or more purposes or objects in adopting the particular mark, as, for instance, to indicate the quality and also the origin, and also to ornament the article, the idea being that with this particular mark the article would be more attractive when exposed for sale, and the goods of this manufacturer, bearing this particular mark, and by reason thereof, had come to be known as the goods or manufacture of that particular manufacturer, irrespective of grade or quality, and he thereupon adopted such mark, symbol, or device as his trade-mark to indicate origin solely, no other person or persons having adopted or used it, I do not see that such mark did not on such adoption become his valid trade-mark, or that the trade-mark is not valid as such. There is a difference between the original use of the mark, or symbol, or device, and its adoption as a trade-mark, and the primary purpose of its adoption as a trade-mark. Within the language of the cases, if the trade-mark points distinctively by itself, not being merely descriptive or indicative of quality, or by association to the origin, manufacture or ownership of the article on which stamped, and on which placed by the manufacturer, or it was adopted by him for the purpose of identifying the origin or ownership of such article, and it is a mark which may be lawfully so appropriated, then, in either event, it is a lawful trade-mark. "The primary object of a trade-mark is to indicate origin, and if the primary object be to in-

dicating quality, then the exclusive right to use cannot be acquired." *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997.

The check-mark in question is not in any sense descriptive of a horseshoe nail. It does not describe its qualities, ingredients, characteristics, or uses. A horseshoe nail would. So it was held that the picture or representation of a book was not a valid trade-mark. *Merriam v. Famous Shoe & Clothing Co. (C. C.)* 47 Fed. 411, 413, 414. In *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537, 546, 11 Sup. Ct. 396, 400, 34 L. Ed. 997, Mr. Chief Justice Fuller said:

"The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association."

This check-mark of the complainant is not distinctive in its original signification. It, of itself, does not point to the Capewell Company, or any company or corporation, or to any particular article of manufacture. By association with the horseshoe nails of the Capewell Horse Nail Company, this check-mark became distinctive in its signification, and points unerringly to the origin of the horseshoe nails to which it is applied. It came to mean, when imprinted on a horseshoe nail, or a package containing such nails, "made by Capewell Horse Nail Company." It meant no others, for it was not used by any other person or company who manufactured nails. Capewell's nails were of a high grade and known so to be, hence incidentally this mark indicated a first quality of nail. But this fact does not debar the complainant from protection. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 547, 548, 11 Sup. Ct. 396, 400, 34 L. Ed. 997. The court said:

"Nothing is better settled than that an exclusive right to the use of words, letters, or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while, if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality is not of itself sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Stratton* [C. C.] 12 Fed. 696), yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture, or ownership, but was placed upon the article to denote class, grade, style, or quality, it cannot be upheld as technically a trade-mark."

In this case, under the evidence, it is a question of fact whether or not the primary purpose of the adoption of this check-mark as a trade-mark was to indicate and identify the origin, the particular manufacturer of these nails, or to indicate quality, or to ornament the nails merely.

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, *supra*, the alleged trade-mark consisted of the letters "L. L." used on sheetings. There was evidence that these letters were adopted and used by complainant to indicate quality and weight, and that they were and had been used generally in that business and trade to indicate quality, form, and weight. The court so held the facts to be (pages 541, 545, of 138 U. S., page 400 of 11 Sup. Ct. [34 L. Ed. 997]), and decided, not that the letters "L. L." may not be the subject of a valid trade-mark,



but, first, that the complainant did not adopt them primarily to show the origin or ownership, and, second, that in that business those letters could not be appropriated by any one as a valid trade-mark, inasmuch as they indicated quality, form, and weight to all and by whomsoever used when applied to sheetings, and that for such purpose in that business all had the right to use them; that they could not be appropriated exclusively by any one; and that, as the mark, sign, or symbol was one which, from the nature of the fact it was used to signify, others might employ with equal truth, others in the same business had an equal right to use it for the same purpose.

I think the evidence ample and convincing that the complainant not only adopted this peculiar check-mark, covering as it does the under or beveled side or face of the head of the nail, as a distinguishing mark, but that it did it to indicate the origin and manufacture of the nail, and that this was its main and primary object. It is also shown by ample evidence that this nail with this mark became known to the public as the principal and leading nail made by the Capewell Horse Nail Company. Horseshoe nails bearing this mark on the head came to be generally and universally known as nails made by that company. Dealers and users called for them and demanded them, and received and used them, as the nail made by that company. Nails bearing this mark were associated in the public mind with those of complainant's manufacture. In my judgment it is not pertinent to inquire why the complainant did not call or advertise these nails, bearing this mark, "Check-Mark Nails," or "Check-Mark," or by some other name, or why it did not print these or similar words on the package containing them. If the complainant adopted this check-mark of this shape, the same shape and dimensions of the beveled face of the nail, as its trade-mark to indicate and identify the origin of the nail, and placed it upon all its nails of that grade and kind, and all its packages containing them, and placed them, bearing this mark, so adopted, on the market, and, because of this mark, these nails became associated in the public mind with the Capewell Horse Nail Company as the sole maker thereof, and the public relied on the mark as the distinguishing mark of the Capewell Horse Nail Company for its nails, or nails of its manufacture, so that when it called for nails of this company it identified their genuineness by this mark and relied thereon, it seems to me that it is entirely immaterial that the complainant did not impress on each nail or each package or carton the words "This check mark is our trade-mark," or advertise the fact that it had adopted the check-mark as its trade-mark. It is true that such a notice would have given notice to all who read it that the check-mark was claimed as a trade-mark, but I know of no law which requires a person to advertise his trade-mark, or to put a notice on it or on the goods on which it is found stating that the trade-mark imprinted or attached is a trade-mark. Of course, when it is denied that a person has adopted or claimed a certain mark as his trade-mark, an old written or printed notice that he had adopted and was claiming the mark as his trade-mark might be potent and convincing evidence that the claim had been in fact made. To my mind, evidence that a person did not do something which, how-

ever wise as a precautionary measure, the law did not require him to do, is not evidence that he did not do what he claims to have done and which the law required him to do, unless it appears that the act not done would probably and naturally precede, accompany, or follow the doing of the act in dispute. But here, at best, there is a mere absence of direct evidence on the subject the one way or the other, and complainant shows a destruction of all its old prints, etc.

The complainant now puts in evidence acts and one notice to the trade, thousands of which were sent out, showing that it did make and claim and present to the public this check-mark as the distinguishing mark of its nail, as the distinguishing mark of nails of its manufacture. That circular reads as follows:

"We show here a cut of the 'Capewell' nails. Nails which do not have this check on the head are not 'Capewell' nails. Some other nails have been made with an imitation of this check, but the imitation is so poor the check being rough and indistinct, that it is unlikely that such bogus nails will deceive any one."

In addition, it appears that complainant had and has over 100 salesmen who carry pocket cases for exhibiting the nails, each bearing the name "Capewell Horse Nail Co.," and each nail in this case has the check-mark thereon. This shows that the complainant company was exhibiting and selling these nails bearing the check-mark as "Capewell" nails. This was their distinguishing name, and it is immaterial, as stated, that this name did not in and of itself suggest the idea of a check-mark. It is all-sufficient that the check-mark read to all dealers and users and the public generally "Capewell" nails.

And I do not think it was necessary that complainant should use its trade-mark, to make it valid as such, on all horseshoe nails of every grade and variety manufactured and sold by it. The complainant makes and sells at least four grades or varieties of horseshoe nails. It applies the check-mark to its first and second grade and Black Prince nails only. This check-mark, therefore, indicates to the public not only origin, but first or second or lowest grade nails of that origin. The complainant has a mark known as "Alligator" for its third grade of nails, and another, known as "Black Prince," for its lowest grade nails. Speaking of merchandise or of manufactured articles generally, all horseshoe nails belong to a class known as "nails." Horseshoe nails are not heeling nails for ladies' and gentlemen's footwear, neither are they nails for fastening shingles on a building, known as "shingle nails," nor are they carpenter's nails for fastening boards on a building. Horseshoe nails are a class of nails within the class of manufactured articles known as "nails." If a manufacturer were making all kinds of nails, it is clear that he might have a trade-mark for each class of that class of manufactured articles, as, for instance, one trade-mark for his horseshoe nails, another for his shingle nails, and another for his common boarding nails. Can the complainant have different trade-marks for the different classes or grades of its horseshoe nails? I think it can.

Paul on Trade-Marks, § 61, pp. 105, 106, says:

"It is settled by competent authority that a manufacturer or dealer may appropriate different trade-marks for different grades of goods of the same

general kind, or different species of goods of the same genus. Each case is to be decided by considering the primary function of the mark adopted. If the primary function is to denote origin or ownership, and the mark is distinctive, it is a valid trade-mark. If the primary function is to indicate grade or quality, the mark is invalid for the purpose of a trade-mark."

In *American L. B. Co. v. Anthony*, 15 R. I. 338, 339, 5 Atl. 626, 627, 2 Am. St. Rep. 898, the court said:

"Within limits which are well defined, a combination of letters or figures, arranged for convenience or to attract attention, may serve the purpose of a trade-mark, as well as a device invented or arbitrarily selected. So a person may have different symbols for different grades of goods, which, in the same way, will indicate both quality and origin with respect to the goods so marked.

"A manufacturer may adopt such symbols, not simply to mark a style or quality, but his style and his quality as well. He is entitled to have his style and his quality protected from misrepresentation, and to have the benefit of any favorable reputation they may have gained."

In *Menendez v. Holt*, 128 U. S. 514, 520, 9 Sup. Ct. 143, 144, 32, L. Ed. 526, the court held:

"They used the words 'La Favorita' to designate flour selected by them, in the exercise of their best judgment, as equal to a certain standard. The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co. to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence. It did not, of course, in itself, indicate quality, for it was merely a fancy name and in a foreign language, but it evidenced, that the skill, knowledge, and judgment of Holt & Co. had been exercised in ascertaining that the particular flour so marked was possessed of a merit rendered definite by their examination and of a uniformity rendered certain by their selection. The case clearly does not fall within the rule announced in *Manufacturing Co. v. Trainer*, 101 U. S. 51, 55, 25 L. Ed. 993, that 'letters or figures which, by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation, but are open to use by any one, like the adjectives of the language'; or in *Raggett v. Findlater*, L. R. 17, Eq. 29, where an injunction to restrain the use upon a trade label of the term 'Nourishing Stout' was refused on the obvious ground that 'nourishing' was a mere English word denoting quality. And the fact that flour so marked acquired an extensive sale, because the public had discovered that it might be relied on as of a uniformly meritorious quality, demonstrates that the brand deserves protection rather than that it should be debarred therefrom, on the ground, as argued, of being indicative of quality only. *Burton v. Stratton* (C. C.) 12 Fed. 696; *Godillot v. Harris*, 81 N. Y. 263; *Ransome v. Graham*, 51 L. J. (N. S.) Ch. 897."

It is immaterial that the mark indicates grade as well as origin, and is also ornamental, if the primary purpose of adoption and use was to indicate origin. This is the doctrine of all the well-considered cases. And it is not necessary that the mark adopted shall have been an original conception or an original design. Its use as a trade-mark, however, must have been original with the one claiming it. *McLean v. Fleming*, 96 U. S. 245, 254, 24 L. Ed. 828, where it is said:

"Words or devices, or even a name in certain cases, may be adopted as trade-marks which are not the original invention of the party who appropriates the same to that use; and courts of equity will protect the proprietor against any fraudulent use or imitation of the device by other dealers or manufacturers. Property in the use of a trade-mark, however, bears very

little analogy to that which exists in copyrights or in patents for new inventions or discoveries, as they are not required to be new, and may not involve the least invention or skill in their discovery or application. Phrases, or even words in common use, may be adopted for the purpose, if, at the time of their adoption, they were not employed by another to designate the same or similar articles of production or sale. Stamps or trade-marks of the kind are employed to point out the origin, ownership, or place of manufacture or sale of the article to which it is affixed, or to give notice to the public who is the producer, or where it may be purchased. *Canal Company v. Clark*, 13 Wall. 311, 20 L. Ed. 581.

"Subject to the qualification before explained, a trade-mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity. *Upton, Trade-Marks*, 9; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 603; *Coddington, Dig.* 9."

I find in the record six different trade-marks registered by the complainant company, viz.: No. 67,010, registered January 14, 1908, consisting of parallel horizontal lines, seven in number on the beveled front face of the head of the nail. No. 54,637, registered June 26, 1906, consisting of the representation of an alligator displayed on the blades of the nails, and on the packages containing the nails and the boxes containing the packages. No. 50,450, registered March 20, 1906, consisting of the monogram "C. H. N. Co.," formed of a horseshoe and nails, stamped or printed upon the packages containing the goods and the boxes containing the packages. This was first registered March 1, 1904, as No. 43,190. No. 48,113, registered December 12, 1905, and consisting of the words "Black Prince" in large letters, printed or stamped on the packages containing the goods and the boxes containing the packages. This was first registered March 1, 1904, as No. 42,191. No. 51,221, registered April 10, 1906, and consisting of the word "Capewell." This was applied to the packages containing the goods and the boxes containing the packages. No. 43,814, registered December 6, 1904, consisting of the fac-simile signature "Capewell" in the handwriting of Geo. J. Capewell, the vice president and superintendent of the complainant corporation. Also the one in question here and before described. All are for horseshoe nails. The two for the surname "Capewell" are clearly invalid as trade-marks. Only three of these marks are applied to the nails themselves, viz., the parallel lines, the alligator, and the check-mark. No two of these marks are applied to the nail of the same grade of nails. While the check-mark is applied to the nail itself, and is also shown on the representation of nails forming the monogram mark above mentioned, the monogram trade-mark is applied to the packages containing these nails and to the boxes containing the packages, but not to the nails themselves. It results that the complainant, as to its first and second grade nails, uses to denote origin one trade-mark on the nail itself, which is not seen when sold in packages, and another on the packages containing the nails and the boxes containing the packages. It follows that the complainant has doubly guarded itself as to these nails. The monogram indicating origin says this package or box contains nails

manufactured by the Capewell Horse Nail Company and it is unnecessary to open the package. When the box and package therein contained are opened, the nails therein contained are found to bear the second trade-mark, indicating the same origin or manufacture. If packages bearing the one mark are destroyed or the nails are taken from the package and used or sold loosely, they bear the trade-mark imprinted on the nails themselves, and there is no chance for imposition on the user or the one on whose horse the nails are to be used. If complainant has the right to adopt these trade-marks to indicate the origin of the goods manufactured by it and to register them, I cannot see that it loses the right to use the one on the nail by using the other on the boxes and packages, or vice versa. I find nothing in the statute that indicates a manufacturer cannot adopt and register as many trade-marks as he pleases to indicate the goods of his make. The trend of the authorities is that he may. The argument in opposition to this view is that it would tend to confusion. I cannot see that such result would follow. If the trade-mark adopted and registered indicates origin or ownership, that fact ends the matter, and I do not see that confusion arises in the minds of dealers and users for the reason the manufacturer indicates the same origin or ownership by two marks or a dozen marks, provided they all indicate the same origin or ownership. Clearly a dozen notices in express words on the same package or article stating the same origin or ownership will not produce confusion or uncertainty if the language be clear, even if worded differently. As decided in *Albany Perforated-Paper Co. v. John Hoberg Co.* (C. C.) 102 Fed. 157, the use of some thirteen different names on packages to designate difference in quality and size of sheets of an article such as toilet paper put up in rolls indicates strongly and conclusively that such use of such names was adopted to indicate size and quality, and not origin or ownership, and, such being the facts, such names could not be claimed as trade-marks. The evidence as to the purpose of the use of the names was:

"This was done because, as the witness testified: 'It is impossible to account for the whims of the trade. The trade demands many things that are quite unaccountable. \* \* \*. Because the trade demands a good many different styles of packages and of wrappers. We use it for that purpose, and to designate the different styles, to distinguish them one from the other.' And this is done for the purpose: First, 'to make an attractive looking package—one that will command a ready sale; and the other purpose, as I have already stated, is to designate the different kinds of paper.'"

What was said on the subject of the manufacturer of a single article having the right to use and be protected in the use of more than one trade-mark for such article was entirely obiter, as the court found there was no trade-mark for the reasons first stated. I hold that a manufacturer of horseshoe nails which are of different grades and sizes and are put up and sold in packages and boxes, and also sold and used loosely, may adopt and use, and be protected in using, at least two trade-marks, the primary purpose of which is to indicate origin, for the same grade of such nails, one to be imprinted on the nail itself and the other on the packages and boxes containing such nails, and that this is so even if such manufacturer has other trade-

marks primarily adopted to indicate the same origin, but which incidentally indicate grade, and which he uses on other grades of horseshoe nails of his manufacture.

I find nothing to the contrary in *Candee Swan & Co. v. Deere & Co.*, 54 Ill. 439, 5 Am. Rep. 125. The fact that the complainant has registered the surname "Capewell" and puts that name on its boxes and packages does not debar it from using its valid trade-mark on the same boxes and packages and its other valid trade-mark on the nails contained therein. The check-mark is now found on the "Black Prince" grade of complainant's nails, imprinted on the nails themselves, and the words "Black Prince," with the figure of a man in armor on horseback, are found on the packages, or boxes, or both, containing them. As the check-mark is found on three grades of complainant's nails, I do not see how it can be claimed that its primary use is to indicate grade or quality instead of origin. "Capewell" may indicate first or second grade; "Alligator" may indicate medium grade; and "Black Prince" may indicate the lowest grade; but not so with the check-mark, and this is the mark now in question, for it indicates origin, and, incidentally, first, second, and low-grade nails of complainant's manufacture, but which of these grades is not determined by the check-mark, but by either the word "Capewell," or the words "Black Prince," or in some other way.

The defendant insists that this check-mark is so indefinite in size and shape that it is not valid as a trade-mark, and, again, that the complainant is endeavoring to appropriate as its trade-mark "the appearance of a horseshoe nail having check-marks on its head," and, also, the nail itself. I do not find merit in this contention. It is clear to my mind that the picture of a pig's foot on packages containing pickled pig's feet would be descriptive merely, and not a valid trade-mark for that article. So of a bronzed, or red, or black, or blue horseshoe nail as a trade-mark for horseshoe nails; it would be descriptive merely. *Putnam Nail Company v. Dulaney*, 140 Pa. 205, 212, 21 Atl. 391, 11 L. R. A. 524, 23 Am. St. Rep. 228. So in *Ex parte Underwood Typewriter Co.*, 131 O. G. 2419, where the proposed trade-mark was a mere representation of the article to which it was to be applied. This check-mark is well defined in its form and dimensions and in the figure within those dimensions. It is not a rhomboid, but it has four sides; the upper and lower sides being parallel but unequal in length, the upper being the longest. The right and left hand sides are of equal length but not parallel. Within these boundaries are the check-marks. This trade-mark is as well defined as any trade-mark can be. Its area is coextensive with that of the beveled face of the head of the nail. It neither appropriates the form nor the appearance of the nail or its head. It is, of course, true that this trade-mark, when cut or engraved or pasted on the head of the nail, gives to the nail a distinctive appearance, some might say an ornamental appearance, and hence the exclusive right to use this check-mark placed on the beveled face of the head of the nail as a trade-mark includes the exclusive right to make and vend a horseshoe nail of that particular appearance.

But as a trade-mark is designed to be placed on the goods, or on the package containing them, and may be placed on either the one or the other, I do not see that this fact invalidates complainant's trade-mark. Other manufacturers may adopt a trade-mark, and cut, impress, or engrave it on their horseshoe nails on the beveled face of the head, and thus give to their production a distinctive appearance, and so gain the exclusive right to make and vend nails of that particular appearance. In fact, if such were not the legitimate use and application of a trade-mark, in many cases it would fail of its purpose. Must the mark be applied to the back of the nail, or to some part of the article where it will not be seen, or must it be made so small that it will not give a distinctive appearance to the article? I know of no such requirement in the law.

The defendant also contends that as this alleged trade-mark, check-mark, consists of a design or ornamentation for a nail, and the complainant used the same in public for more than two years without applying for a design patent, it has abandoned such mark to the public, and cannot now register or claim it as a trade-mark. This check-mark was never adopted or used as a design for a horseshoe nail, or primarily for ornamentation. No design patent for the head of a horseshoe nail, however ornamental, could have been granted. *Rowe v. Blodgett*, 112 Fed. 61, 50 C. C. A. 120; *Bradley v. Eccles*, 126 Fed. 945, 949, 61 C. C. A. 669. However handsome and attractive this check-mark may have been and may be when imprinted on the nail, and however much it may have added or may add to the appearance of the nail when on the market, it was still capable of appropriation as a trade-mark. I know of no rule of law that requires a trade-mark to be nonattractive, ugly, or repulsive, or that prohibits the appropriation of a distinctive mark, otherwise proper for appropriation and use as such, as a trade-mark because beautiful and attractive.

The defendant also insists that this check-mark is not a valid trade-mark for the reason it is cut or stamped into or onto the nail itself, and therefore "consists in part of the very goods to which the mark is applied." Does it destroy the validity of a trade-mark, or prevent the adoption of a symbol, etc., as such, that it is applied by being cut or cast into or impressed upon the very material of the article, the origin of which it is designed it shall designate? Said the court in *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125:

"That it must be attached to the article manufactured, in such a way as to be reasonably durable and visible, is also conceded. It must have a practical existence, not resting in the thought of the owner, but stamped or impressed, or attached in some way, to the article itself."

"Hero" and "Heroine" stamped on glass jars was held proper and sufficient. *Rowley v. Houghton*, 2 Brewst. (Pa.) 303. See, also, *Robert v. Grandjean*, 28 Annales, 145; *Browne on Trade-Marks*, § 89.

Advertising a mark as a trade-mark, or publishing or claiming it as such, however extensively this is done, or even registering it, does not make it a trade-mark. That is accomplished by the adoption and use of it as such. This inheres in the very definition of a trade-mark, and has been repeatedly decided. *Browne on Trade-Marks*, § 306, p. 312, and sections 52, 53, and 54, pp. 58, 59:

"A trade-mark, therefore, consists of the use in trade of such a mark. placed upon goods manufactured by a particular person, and placed in market with such marks, for sale and trade. *Adams v. Heisel* (C. C.) 31 Fed. 279. \* \* \*

"Symbols or devices used by a manufacturer or merchant to distinguish the products, manufactures, or merchandise which he produces, manufactures, or sells, from that of others, are called and known by the name of 'trade-marks.' *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51-56, 25 L. Ed. 993."

In this case the complainant has very fully supplied the evidence lacking in *Capewell Horse Nail Company v. Putnam Nail Company* (C. C.) 140 Fed. 670, in every aspect of the case, and it is not necessary to go further into the questions there discussed.

It is established to my satisfaction that this well-defined check-mark was first appropriated and adopted by the complainant as a trade-mark and its trade-mark, and that it was so adopted and appropriated and thereafter used primarily for the purpose of identifying and distinguishing the goods—horse nails—of complainant's manufacture from those of all other makers, and not as an incident of manufacture or primarily for ornamentation; that it was the proper subject of such appropriation and adoption and use, and that the fact of such adoption and appropriation was extensively and sufficiently made known to the public by actual and continued use by complainant as such, same being affixed to its nails, and also by publications and otherwise; that by such use thereof on the said goods of complainant's manufacture such check-mark came to be generally known to the public as complainant's trade-mark, and its goods bearing such mark on the nail came to be publicly known and distinguished as those of complainant's make, and such mark became its property; that complainant never abandoned it, and that it was not the proper subject of a design patent; that after such adoption and long-continued use by complainant, and after such check-mark had come to be such well-known, distinguishing mark of the goods of complainant's manufacture, the defendant commenced making horseshoe nails bearing this check-mark on the beveled face of the head, and that the making of such check-mark on defendant's nails was neither a necessary incident of manufacture nor a necessary result in the course of manufacture, but, on the contrary, the defendant adopted and designed or changed its machinery for use in the making of its nails so that it would place such check-mark thereon for the purpose of simulating complainant's nails and producing confusion in the mind of dealers and users and selling its nails as those of complainant's make. The complainant had a common-law right and title to this check-mark as its trade-mark, and was entitled to have it registered as its trade-mark irrespective of the so-called 10 years' clause of the act of February 20, 1905, c. 592, § 5, 33 Stat. 724 (U. S. Comp. St. Supp. 1907, p. 1010). I cannot find that this check-mark had been used exclusively by the complainant for more than 10 years next preceding the passage of the act of February 20, 1905, as there is evidence that others used it during some part of that 10 years but after its adoption and use as a trade-mark by complainant.



The complainant is not estopped in any sense from claiming this as its trade-mark and asserting its rights in this action on the ground that the person who made oath to the declaration made a false oath in obtaining the registration. At the time the oath was made by Williams it was not understood that "exclusive" would be held to mean that a person claiming a trade-mark would be excluded from registration under the 10 years' clause, should it appear that some person had infringed; that is, had used the same mark in violation of the alleged rights of the other person claiming it and claiming registration. See *Worcester Brewing Co. v. Reunter & Co.*, 128 O. G. 1687; *Id.*, 133 O. G. 1190 (March 31, 1908).

I think and hold that under the facts of the case the statement that "such use has been exclusive" was surplusage. It does not affect the registration, nor does it affect complainant's right to maintain this action. The voluminous records and exhaustive briefs have been examined with care, and I am satisfied that defendant infringes the lawful trade-mark of the complainant.

There will be the usual decree accordingly.

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**DAILEY v. NEW YORK, N. H. & H. R. R. CO.**

(Circuit Court, S. D. New York. February 19, 1909.)

**1. MASTER AND SERVANT (§ 286\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—NEGLIGENCE OF MASTER.**

The question whether a railroad company was chargeable with negligence in failing to provide a reasonably safe place for employes to work, because of its making the doors of a roundhouse so narrow as to leave a space of only 11 inches between an engine passing in or out and the posts on either side, *held* one for the jury in an action by an employe to recover for a personal injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1022; Dec. Dig. § 286.\*]

**2. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.**

A master is not relieved from liability for an injury to a servant on the ground that it was caused by the negligent act of a fellow servant, where the master's negligence was a concurring cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 515; Dec. Dig. § 201.\*]

**3. NEGLIGENCE (§ 136\*)—ACTIONS—QUESTION FOR JURY.**

Negligence becomes a question of law for the court only when the facts are such that fair-minded men can draw from them but one inference upon the issue.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 293; Dec. Dig. § 136.\*]

**4. MASTER AND SERVANT (§ 101\*)—INJURY TO SERVANT—DUTY OF FORESIGHT.**

The rule that it is the duty of a master to exercise reasonable care to provide a reasonably safe place for servants to work applies to permanent structures as well as to movable ones and appliances, and as well to the location thereof as to their mode of construction, and, while he is not bound to provide against every possible danger, he is bound to fore-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

see and provide against all probable contingencies, even though they have not occurred in the past.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172; Dec. Dig. § 101.\*]

**5. MASTER AND SERVANT (§ 284\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.**

Plaintiff, who was a locomotive fireman in the employ of defendant railroad company, was assigned to work as a hostler at a roundhouse, and on the first night of such work was injured by being caught between the tender of an engine which was being taken into the house and the post at the side of the door, which was only 11 inches from the side of the tender. It was winter, the place was not well lighted, and when a door was opened the smoke and steam coming out further obstructed the view. It was plaintiff's duty to take engines from the turntable into the house, where they were usually run by their own steam; but plaintiff testified that there was not sufficient steam up in the one in question to move it, and that, while he was in the cab making more fire, the foreman caused another engine to be run against his and to kick it into the roundhouse with considerable force; that there was no bumper at the end of the track, and, as there was not enough steam to work the brake, he was compelled to get off the engine to block the wheels, and in doing so in the darkness was caught between the tender and the post. *Held*, that under the circumstances shown, whether defendant was negligent in making the doorways so narrow, and, if so, whether such negligence contributed, with that of the foreman, to cause the injury, and whether plaintiff assumed the risk or was guilty of contributory negligence, were all questions for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000, 1001, 1022, 1067, 1070, 1122; Dec. Dig. § 284.\*]

At Law. Motion to set aside verdict of jury and for a new trial on the grounds that there was no evidence of negligence sufficient to take the case to the jury; that plaintiff assumed the risks of the place, was guilty of contributory negligence, and that the accident and injury was caused by the negligence, if any negligence there was, of a fellow servant or co-employee.

Willet Hoysradt (Abram J. Rose, of counsel), for plaintiff.

Chas. M. Sheafe, Jr. (Nathaniel S. Corwin, of counsel), for defendant.

RAY, District Judge. The defendant is a Connecticut railroad corporation, owning and operating a line or lines of railroad in said state, and at East Hartford, Conn., has what is known in railroading as a "roundhouse," a building constructed on a circle, or the part of a circle, with an open space, or area, in the center of the circular space, having a turntable thereon used for turning engines so they may be forced or run in any desired direction. The roundhouse itself has what are called "stalls," that is, spaces for the placing therein or "stabling" of engines, one stall for each engine, when not in use, or while being cleaned, or while undergoing slight or ordinary repairs. On its outer side the building has solid walls with windows for the admission of light, and on the inner side, next the open space in the center, before mentioned, each stall has double doors, or a double door, hung by hin-

ges to posts, or stanchions, placed at the entrance of the stalls and on both sides thereof, and which doors swing from the center of the doorway or entrance and on such hinges, so that, when it is desired to take an engine in or out of its stall in the roundhouse, the doors of the stall may be swung open, leaving a clear space for the purpose. These posts or stanchions serve to support the roof of the roundhouse also. Tracks lead from outside this building to the turntable, and other tracks lead from the turntable to each stall. It is seen that when an engine is brought in from the outside it may be run directly onto the turntable. When that is turned, if it be desired to place the engine in a stall not exactly opposite the place of entrance, the engine is turned with it until the rails on the turntable on which the engine stands are brought in proper relation to those leading into the proper stall, whereupon, by putting on steam and properly manipulating the brakes, the engine may be slowly run into the stall and brought to a stop at the proper point. There is usually a man to operate the turntable, and the engines coming into the yard from a trip are usually taken in charge by an employé, called "the hostler," outside the roundhouse, and run then by their own steam in onto the turntable, and thence into their respective stalls. The hostler, or the one taking the engine from the turntable into the stall, when so engaged, usually, and almost invariably, occupies the cab on the engine. That, under all ordinary circumstances and on all ordinary occasions, is his place, as he cannot control, start, and stop the engine and regulate its speed, if under steam, unless he is there. It is obvious that, if the engine is in order, under sufficient steam to move, the air brakes, if air brakes are used, as was the case here, are in working order, and nothing out of the ordinary occurs and the hostler does his duty, the engine will be under perfect control, and may be started and stopped at will, and there will be no necessity or excuse for the hostler to leave the cab while stabling the engine. Hence, under such circumstances, so far as he is concerned, there is no danger, if the doorway or opening into the stall is of sufficient height and width to permit the ingress and egress of the engine.

It is equally obvious that, if the engine is out of repair so as to interfere with its control, or the brakes are inoperative or fail, or the engine is pushed or shoved from the turntable into the stall by some outside force or power not controlled by the hostler, and which does not continue to properly control its movements, and the engine or its braking apparatus is in such condition that the hostler cannot control it when in motion from the cab, there might and probably would be necessity or necessary occasion for the hostler to leave the cab of the engine and the engine itself while in motion. Ordinarily, then, there will be no danger to the hostler arising from the narrowness of the entrance to the stall, but should circumstances arise, such as I have mentioned, and should there be necessity for him to leave the cab in the discharge of his duty and descend to the ground while the engine is on its way into the roundhouse, he will be exposed to great danger of injury if the entrance is so narrow that there is not room for his body between the side of the engine, or tank, and the posts or stanchions to which the doors are hung. In such case he will be in imme-

diate danger of being caught and crushed between the moving engine and the post or stanchion on the side of the entrance.

The roundhouse of the defendant at East Hartford occupied all but about 125 feet of the periphery of the circle, and contained 25 stalls. The space inside the roundhouse was divided into sections, each section having five or six stalls, and the sections were divided or separated from each other by brick walls running to the roof. When the engine was in place in the stall, there was a space of four to six feet from these posts to the rear of the tender or tank of the engine, and there was a space of five or six feet between the engine in one stall and that in the adjacent stall—less than that as you approached the entrance from the front of the stall. Some engines are a little wider than others, but at this roundhouse the open space between the side of the engine or tank as it passed through the entrance into the roundhouse did not exceed 11 inches in width. It was evident to one familiar with the place that there was not room for the body of a man between the post and the side of the engine, or for a man to ride in standing on the side of the engine. When engines were taken in and left, at this season of the year, December, 1906, they usually had fire and steam on, which filled these sections and stalls with smoke and steam and obscured vision. When the doors were opened for the entrance of an engine, the smoke and steam would rush out in dense clouds and make it very difficult to see surrounding objects. There was no light in these stalls, unless it might be the lantern of a workman at the further end of the stall, or of a workman engaged on an engine in an adjoining stall. There was an arc light in the open circular space where the turntable was located. There was nothing to prevent an engine passing into the stall from going on into and through the walls of the side of the roundhouse if the brakes were not applied, or if they did not hold when there was no steam on. This, so far as material, was the construction of this roundhouse, and these the usual conditions at the place in question in winter weather.

The turntable itself was about 60 feet in diameter, and it was 30 to 40 feet from the edge thereof to the entrance to the stalls. It was a slightly descending grade from the turntable to these doorways.

The plaintiff, Oliver Dailey, 38 years of age at the time of the accident, had been in the employ of the defendant company as fireman for something like a year at a place called "Hopewell Junction," and before that he had worked as fireman on the Erie Road some five or six years. He was not familiar with the construction of this roundhouse at East Hartford, but he had seen roundhouses at other places, and knew defendant's roundhouse at or near Hopewell Junction, which was similar in construction and had openings to its stalls of about the same width as the one in question. He was not a hostler, but had occasionally taken an engine into or from its stall at other places, and had acted as hostler at Hopewell Junction at different times. He had not had occasion to notice the construction specially, and his attention was not called to the construction or width of the openings to the stalls at East Hartford, except as he might be expected to observe such openings in doing what he did do after being put to work there. The

plaintiff went to East Hartford on the 8th of December, and reported to Mr. Nichols, the engine dispatcher of the defendant company at that place, who directed him to hostler the engines that night. His duty was to take the engines found outside the roundhouse and supply them with coal and sand and water, and then put them in their appropriate stalls in the roundhouse. Previous to this night of December 8, 1906, he had never placed an engine in the East Hartford roundhouse, nor had he ridden into it on an engine. He had been in the roundhouse, but went in through the side entrance.

The plaintiff commenced work about 6 o'clock in the evening, after dark, and worked at this business through the night. The plaintiff was unable to state how many engines he took in during the night, but he must have taken in several, as he was constantly busy. At about 5 o'clock in the morning he took charge of a locomotive out in the yard, away from the roundhouse, near the coaling station, which had, as he says, substantially no fire and but little steam on—not enough to move it. It had been storming, but had turned cold, and the wind was blowing. The plaintiff thereupon reported to Mr. Moriarity, foreman of the roundhouse or of this particular work, and who had immediate charge of it, and Moriarity told the plaintiff to fix up the fire and he would come out and assist the plaintiff. The plaintiff got on the engine and commenced to fix the fire. Moriarity came out and with another engine shoved this one down to the sandhouse and water station, where it was supplied with water and sand and coal, and then Moriarity shoved it with his engine in onto the turntable. The plaintiff says he did not then have sufficient steam to move his engine from the turntable into its stall, and that he stated this fact to Moriarity, who thereupon, without warning to the plaintiff as to what he was going to do, backed another engine from the stall behind him and kicked the engine plaintiff was on "off the turntable quite fast into the engine house." Plaintiff says he felt the shock, saw the man with the engine at the other end of his engine, and that his, plaintiff's, engine went right on into the engine house, meaning the roundhouse, which is the same thing. The plaintiff says that the brakes on this engine were operated by air, in turn operated by steam, all controlled by a lever; that he had the lever on a backward motion on the engine; that there was no steam on the engine to operate the air pump, and for this reason he could not apply the brakes. He says he opened the throttle to give the air pump what steam there was, but there was not enough to operate the brakes or hold the engine. The plaintiff says that the speed of the engine he was on was such he saw it would pass on off the rails or tracks and into, if not through the side walls of the roundhouse; that there was no way of checking its progress or stopping it, except to jump off and block the wheels of the engine by placing something in front of them. He says that he started to get down on the engineer's side for the purpose of putting a block under the wheels; that the speed did not slacken, and that as he was getting down in the smoke and steam, which prevented him from seeing his surroundings, and which was coming from the doors of the roundhouse, he was caught between the side of the engine or tank of the tender and the post to which the door was hung by the side of the

entrance and crushed, rolled around between the post and side of the tank, and that he then fell to the floor of the roundhouse. He further says that he heard the crash of the engine into the side of the roundhouse when it ran off the ends of the tracks. The plaintiff says that in the darkness, smoke, and steam coming from the stall he could scarcely see anything, it so obscured his vision, and that his eyesight was good. The plaintiff says that he did not see this post or stanchion before he started to get off, or as he was getting off, and he did not have it in mind.

The plaintiff was assisted to his feet and to his boarding house, where he was confined to his bed under medical treatment for some time. He gave evidence tending to show that he suffered bruises, a broken arm, injury to his spinal column, and a rupture. He gave evidence as to his earnings and the permanency of his injuries. The defendant did not deny that the plaintiff was injured on the occasion mentioned substantially in the manner and by the means described. The defendant did not deny that the plaintiff was in its employ and in the line of his duty at the time, but did claim, and gave some evidence from Moriarity and others tending to show, that there was a hand brake on the engine which plaintiff could have applied; also that soon thereafter Moriarity got on the engine and found sufficient fire and steam with which to freely move it. The plaintiff says he saw no hand brake, and that it was usual to have the wheel of the hand brake off when the engine was being controlled or was supposed to be controlled by the air brakes. The defendant also contended that plaintiff was negligent in not properly handling the engine, it being supplied with fire, steam, and air brakes, all operative, and also that the plaintiff received his injuries through the negligence of Moriarity, a fellow servant, in kicking the engine and letting it go without control, knowing, as plaintiff said, that it was not supplied with steam sufficient to control its movements.

The plaintiff gave evidence tending to show that this roundhouse stood in a large yard of such extent that it could have been enlarged having the same number of stalls and in making the entrance to such stalls much wider; that the entrance to these stalls could have been made sufficiently broad by lessening the number; and that the construction was faulty and negligent in not constructing the roundhouse with a wider entrance to the stalls. It is self-evident, I think, and the defendant substantially conceded, that by lessening the number of stalls in this roundhouse the width of the openings thereto could have been sufficiently increased to permit the passage of the body of a man between the side of the engine and the posts to which the doors were hung; that by enlarging the roundhouse the same number of stalls could have been provided with similar but wider entrances. The negligence of the defendant, if any, consisted in not exercising reasonable care to provide a reasonably safe place for the plaintiff to work in performing the duties devolved upon him. Whether or not defendant was negligent in this regard depends, it seems to me, upon the question whether the defendant in the exercise of such care ought to have foreseen that this or similar accidents might occur, that this or similar emergencies or situations might arise, and in not pro-

viding for the safety of its employes on such occasions or happenings or in such emergencies by making the entrance to the stalls of its roundhouse sufficiently wide. The defendant gave evidence tending to show that this was the usual construction of such roundhouses on this and other roads; that the entrances to these stalls were as wide as or wider than those in roundhouses used for the same purpose on other roads. There was no evidence that a similar accident had happened at this roundhouse or at any roundhouse on defendant's road or on any other railroad. The defendant also claimed that as plaintiff was familiar with defendant's roundhouse at Hopewell Junction, where the entrances were no wider, and he had seen this roundhouse as well as others, he knew the construction of such roundhouses, and that he assumed the risks of such construction, such risks being as obvious and open to him as to the defendant company. The plaintiff contends that, even if Moriarity was a fellow servant and negligent, and his negligence was one of the proximate causes of plaintiff's injury, there was another proximate and concurring cause, to wit, the concurrent negligence of the defendant company in not foreseeing that this or similar accidents or occurrences might happen, and in not providing against them. The plaintiff says that he had the right to assume that the defendant had fully discharged its duty to him by exercising due care to provide a reasonably safe place, and that, even if the defendant had a negligently constructed roundhouse at Hopewell's station, he had the right to assume that the one at East Hartford was properly constructed and safe.

The court charged the jury that negligence of the defendant could not be inferred or found from the mere fact that an accident happened and injury resulted, and that the burden of proving negligence was on the plaintiff (*Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361); also, that Moriarity, who kicked or shoved the engine on which plaintiff was at work, was, at the time, engaged in such work and in performing such duties that he was a fellow servant or co-employe of plaintiff, and that plaintiff could not recover if Moriarity's negligent act, if it was negligent, was the sole cause of the injury; also, that even if Moriarity was negligent in kicking the engine the plaintiff could recover if they found the defendant was also negligent in not exercising reasonable care to provide a safe place for the plaintiff to work, and such negligence was a concurring cause in producing the accident and injury, and plaintiff was free from contributory negligence, and had not assumed the risks of the situation. It was left to the jury to determine and say on the evidence whether or not defendant was negligent in not apprehending or foreseeing that occasion might and probably would arise making it necessary for the person taking engines into these stalls to leave the cab and be on the side of the engine while it was in motion, or descend to the ground, and so be in danger of coming in contact with these posts, and in not providing against such danger of accidents and injury by providing a wider entrance to the stalls. On this subject the court charged:

"It is claimed that the defendant company was negligent in not foreseeing, not this particular contingency or situation, but similar contingencies, and

providing against them by making the opening wider. That is, it is claimed that this was not a safe place for the men who placed those engines to work, for the reason that the defendant company, in the exercise of reasonable care to provide a safe place, ought to have foreseen, and was negligent in not foreseeing, that some such contingency would arise where it would be necessary for the person in charge of the engine to get off or jump off and take care of the engine and take care of the property, or do something to properly place the engine. Now, gentlemen, there is the crux of this case: Was the defendant, the railroad company, negligent in not foreseeing that, not this particular contingency, but that a similar contingency, might arise, and in not providing against it by providing a wider entrance, so that in case the person in charge of the engine had occasion to leave it or get down from it, that he could ride on the side or be at the side of it, and not be injured by being pushed against that post?

"The defendant is not liable for accidents which a prudent man, in the exercise of ordinary care, could not ordinarily have foreseen. Could and should this defendant company, in the exercise of ordinary care, have foreseen that the persons or person in charge of its engines, in placing them in the stalls in the roundhouse, would have occasion to leave the cab and get down from or out on the side of the engine when in motion, and so come in contact with the posts or uprights at the entrance to such stalls? If it could, and should, and ought to have foreseen that, in the exercise of ordinary care, as I have defined, then it would be negligence of the company in not so providing a place for the workmen to be carried into or walk into where they would not be crushed in the manner referred to.

"In determining that question, you are to consider the situation, the nature and character of the duties to be performed—that is, by the person in charge of the engine—and the acts to be done in properly performing the duty of placing the engines in the roundhouse; the liability to happenings which would or might make it necessary for the person in charge of the engine to leave the cab and ride on the side of the engine, or to descend therefrom.

"The burden is on the plaintiff to establish negligence by a fair preponderance of evidence. You cannot find negligence from the mere fact that this accident happened. You must find that in the exercise of ordinary care, in the light of human experience, which you have a right to consider, and with knowledge of the duties required, the defendant ought to have foreseen that such or similar accidents would occur by the employé coming in contact with the posts or uprights, the employé being engaged in the discharge of the duties required of him.

"The defendant was not required to so construct its stalls as to make accidents impossible; it was not an insurer of its employés or of the safety of the place. The defendant is not liable for an accident and a consequent injury that could not be or would not be foreseen by an ordinarily prudent person exercising reasonable and ordinary care under all circumstances of the case, and in view of the duties to be performed and the result to be accomplished and the risks to be encountered. But, gentlemen, if, on the other hand, an ordinarily prudent person in the exercise of reasonable care, in the light of human experience and the circumstances and the duties required, ought to have foreseen that such occurrences would be liable to happen, and that employés might be injured, then you can say that it was negligence not to provide for the safety of the employé in that regard by making the entrance wider."

"The master cannot escape liability for injuries to a servant on the ground that the injury was caused by the acts of a fellow servant, if there was concurrent negligence on the part of the master." *Booth v. Boston, etc.*, 73 N. Y. 38, 29 Am. Rep. 97; *Anthony v. Leeret*, 105 N. Y. 591, 12 N. E. 561; *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575; *Hough v. Railway Co.*, 100 U. S. 213, 218, 25 L. Ed. 612.



"Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence; and if, from the facts admitted or conflicting testimony, such men may honestly draw different conclusions as to the negligence charged, the question is not one of law, but of fact to be settled by the jury, under proper instructions." *McDermott v. Severe*, 202 U. S. 600, 604, 26 Sup. Ct. 709, 710, 50 L. Ed. 1162; *Railroad Company v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Railroad Company v. Everett*, 152 U. S. 107, 14 Sup. Ct. 474, 38 L. Ed. 373.

It was the duty of the defendant to exercise reasonable care to provide a reasonably safe place in which the defendant was to work, and if it failed in this duty, and the defendant had not assumed the risks of the situation, or been warned of the dangers, if unusual, not obvious, or unknown to him, and was injured in consequence of such negligence, then the defendant was liable. *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; *Texas & Pacific Railway Co. v. Swearingen*, 196 U. S. 51, 55, 57, 61, 62, 25 Sup. Ct. 164, 49 L. Ed. 382; *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. Ed. 994; *Union Pacific Railway Co. v. O'Brien*, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 766; *Benthin v. N. Y. C. & H. R. R. Co.*, 24 App. Div. 303, 48 N. Y. Supp. 503. This rule applies to permanent structures of the company as much as to movable ones, and appliances, and as well to the location thereof as mode of construction. See cases cited. There are scores of cases holding the same.

In *Choctaw, etc., v. McDade*, *supra*, the Supreme Court of the United States held:

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use the same degree of care to provide properly constructed roadbed, structures, and track to be used in the operation of the road.

"The servant has a right to assume that the master has used due diligence in providing suitable appliances for the operation of his business, and does not assume the risk of the employer's negligence in making such provision."

At page 67 of 191 U. S., page 25 of 24 Sup. Ct. (48 L. Ed. 96), the court said:

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use ordinary care to provide properly constructed roadbed, structures, and track to be used in the operation of the road. *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766."

In *Union Pacific R. Co. v. O'Brien*, *supra*, the same court said, page 457 of 161 U. S., page 620 of 16 Sup. Ct. (40 L. Ed. 766):

"The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and, if from a defective construction thereof an injury happen to one of its servants, the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is

bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations. *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Texas & Pacific Railway v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Gardner v. Michigan Central Railroad*, 150 U. S. 349, 359, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Union Pacific Railway v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; *Chicago & Northwestern Railroad v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Toledo & Peoria Railway v. Conroy*, 68 Ill. 560; *Stoher v. Iron Mountain Railway Co.*, 91 Mo. 509, 4 S. W. 389; *Paulmier v. Erie Railroad*, 34 N. J. Law, 151; *Snow v. Housatonic Railroad Co.*, 8 Allen (Mass.) 441, 85 Am. Dec. 720; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Smith v. New York & Harlem Railroad Co.*, 19 N. Y. 127, 75 Am. Dec. 305; *Patterson v. Connellsville Railroad Co.*, 76 Pa. 389, 18 Am. Rep. 412.

"It is the duty of the company in employing persons to run over its road to exercise reasonable care and diligence to make and maintain it fit and safe for use, and, where a defect is the result of faulty construction which the employer knew or must be charged with knowing, it is liable to the employé, if the latter use due care on his part, for injuries resulting therefrom."

In *Northern Pacific Railroad v. Peterson*, *supra*, at page 353 of 162 U. S., page 845 of 16 Sup. Ct. (40 L. Ed. 994), the court said:

"He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employées, and, if the employé suffer damage on account thereof, the master is liable."

In *Texas & Pacific R. Co. v. Swearingen*, *supra*, the court, at pages 61 and 62 of 196 U. S., page 167 of 25 Sup. Ct. (49 L. Ed. 382), said:

"This is apparent when it is borne in mind that the plaintiff testified, in substance, that prior to the accident he had not closely inspected the scale box or taken measurements of the distance from the box to the north rail of track No. 2, and that he did not do more than cursorily observe the structure from a distance, and that he was unaware of the nearness of the scale box to the north rail of track No. 2.

"Prima facie, the location of scales where the tracks were only the standard distance apart, and where a space of less than two feet was left for the movements of a switchman between the side of a freight car and the scale box, incumbered, as he would be in the nighttime, with a lantern employed for the purpose of signaling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchmen in its employ. And so far from the proof making it certain that the necessity of the situation required the erection of the structure between tracks Nos. 1 and 2 as existing, there was proof that the railway company owned unoccupied ground, intended for other tracks, to the south of track No. 4, justifying the inference that the distance between tracks Nos. 1 and 2 might have been increased, and the employment of the scales thus rendered less hazardous to switchmen, or that the scales might have been removed to a safer location.

"It was, therefore, properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and,

if not, whether the plaintiff had notice thereof. The Court of Appeals was of opinion, and rightly, we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and, as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation. *Choctaw, O. & G. R. R. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96."

It appeared from the evidence that defendant might easily have placed the posts wider apart—made the entrances wider. It was shown that when engines came in from off the road or from work they were stabled in this building, and so placed both night and day; that sometimes they were more or less disabled, as everybody knows. It appeared that the hostler in the line of his duty was required to go in and out of these stalls with an engine many times each day and night, and that, if anything occurred making it necessary for the hostler to get down from the engine after leaving the turntable and while it was on its way into the stall, he was liable to come in contact with the post or stanchion. True, his place, ordinarily, was in the cab, but it is readily seen that occasion may arise for the hostler to leave the cab and get down from the engine while it is in motion and on its way into the stall. This will be the case with any engine being placed in its stall if out of repair, so the brakes, whether operated by hand or by steam, will not work after the engine is put in motion. In such case, as the engine cannot be stopped by steam, or air, or by hand, but can be by blocking, it would be the duty of the hostler to block it and prevent it running off the tracks into the side of the building, and necessary for him to leave the engine to perform that duty, or to save himself from injury by being carried into and perhaps through the walls of the roundhouse, where the cab would be smashed and injury done to whoever occupied it. In such case it might be necessary for the hostler to put his head out, even if he did not leave the cab. Should not the defendant company have foreseen and provided against such happenings? I can see no difference in principle between this case and those where structures are placed so near the tracks that there is not room for the engineer and trainmen having duties to perform, in emergencies, on the outside of the engine or cars, or by putting their heads outside, to safely pass such structures when the train is in motion. True, the liability to accidents and consequent injury is not as frequent in the former case as in the latter, but they are just as sure to happen and may be as readily apprehended and foreseen in the one case as in the other. The darkness, the smoke, and steam in these sections and stalls, the absence of bumpers to prevent the engines from running off the tracks and into the walls of the building, the failure of steam to work the air pumps, the liability of the air pumps and brakes to get out of order and fail to work, the necessity for pushing a disabled engine from

the turntable into its stall, the necessity for the hostler to leave the cab and alight from the engine in such cases, etc., were all known quantities in railroading. They were not possible occurrences and contingencies merely, but probable, though rare, happenings and conditions.

In 26 Cyc. 1130, 1131, 1132, it is said:

"A railway company is bound to exercise reasonable care and diligence to prevent obstructions or erections on, over, or near its tracks which are a source of danger to its servants, and will be held liable for injuries occasioned by its neglect of duty. \* \* \*

"If a railway company knowingly maintains or permits a bridge over its track so low that brakeman cannot perform their duties on the top of the cars with reasonable safety, it is liable to a brakeman who, having no knowledge of the dangerous character of the bridge, is struck by it and injured while in the performance of his duty."

Here the defendant company is chargeable with notice that this was an unsafe place for hostlers to work, provided, in the exercise of reasonable care, it ought to have known or foreseen that in the discharge of their duties they might or probably would have occasion to ride into the stalls on the side of the engines, or to alight therefrom while on their way from the turntable into the stalls.

It can hardly be contended that the defendant was guilty of want of reasonable care in not foreseeing and providing against "improbable" occurrences. The defendant was bound, however, to foresee and provide against all probable contingencies. *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 332, 339; *Latorre v. Central Stamping Co.*, 9 App. Div. 145, 150, 41 N. Y. Supp. 99; 26 Cyc. 1144, 1145. In *Sheehan v. N. Y. C. & H. R. R. Co.*, supra, the court said:

"The law does not exact absolute certainty, but, when life is at stake, it demands that care shall be taken to provide so far as is possible against all contingencies."

In *Latorre v. Central Stamping Co.*, supra, the court, per Cullen, now Chief Judge of the Court of Appeals, said:

"The fact that no previous accident of this character had happened does not relieve the master from liability, provided the accident was such that the probability of its occurrence might reasonably have been foreseen. We think this accident of such a character. The danger of igniting the turpentine from inserting the heated metal was one that should have been anticipated by a person having the technical knowledge on the subject that the master must have possessed."

In 26 Cyc. 1144-1146, it is said:

"While there is a presumption that a master, having knowledge of defects in the place for work, or in the machinery or appliances, has knowledge of the consequences which may result therefrom, and will be held liable for injuries to a servant resulting from known or probable dangers, yet he is not liable for the result of hidden or improbable dangers, of which he did not have, and, by the exercise of reasonable care, could not obtain, knowledge. But facts which do not necessarily operate to charge a servant with notice of the danger arising from the defective condition of machinery may operate to charge the master with such notice, since the obligation upon each arising from the mere knowledge of the defective condition is not alike. \* \* \*

"To render a master liable for an injury to a servant, caused by a defect in the place of work, or in the machinery or appliances, it is not necessary that the master should have had actual knowledge of the defect, but it is

sufficient to show that he could have discovered it by the exercise of reasonable, proper, and ordinary care and diligence in performing the duties of master."

I am of the opinion there was sufficient evidence in this case to take the question to the jury whether defendant was negligent in not foreseeing, if it did not foresee, the danger to its employes engaged in taking engines into and out of these stalls, under the conditions that existed there, and in not providing against such danger by making the entrances to the stalls wider, or by giving warning of the danger to be encountered. Of express notice or warning of the danger there was no pretense. On the trial the defendant relied on the facts that the plaintiff had been in this roundhouse; had safely taken engines into these stalls during the night, and must have become familiar with the situation; and had worked as hostler, off and on, at Hopewell Junction, where the entrances were no wider than at East Hartford. All this was for the jury to consider, but was not conclusive of the questions at issue. In *Benthin v. N. Y. C. & H. R. R. Co.*, 24 App. Div. 303, 48 N. Y. Supp. 503, frequently cited and approved, the railroad company had erected a telegraph pole on its own lands 49 inches from the track, measuring on the ground, but because of its leaning over towards the tracks such pole was only 4 inches from the side of the passing locomotive upon which the deceased, a fireman, stood at a point at the height of his head. There was unoccupied land upon which the pole might have been set 12 or 13 feet away from the track. The fireman had previously passed this pole on many occasions, and his proper place on the engine under the rules of the defendant company was on the left-hand side of the engine. When struck by the pole the fireman was on the right-hand side of the engine, where he had gone for the purpose of looking out to ascertain whether a journal on a car was smoking. While in this position the fireman was killed by his head coming in contact with such pole. No accident of this nature had happened at this place, or at any place on the road, so far as the proof showed. The court held that the defendant company had not performed its duty to exercise due care to furnish a reasonably safe place for its employes to perform their duties, that the deceased did not assume the risks and that he was not guilty of contributory negligence as matter of law. The court said:

"It is urged that the intestate had passed this pole on many previous occasions. This is undoubtedly true. But whether he was negligent in not knowing how near to the track it stood, and bearing in mind the location of the pole and the train at the time he looked, was a question of fact for the jury. \* \* \* Whether the night of the accident was so foggy and dark that objects could not be distinctly seen for any considerable distance was a disputed fact."

In *Wallace v. C. V. R. R. Co.*, 138 N. Y. 302, 33 N. E. 1069, it was held that:

"A brakeman on top of a moving train, as matter of law, is not chargeable with negligence simply because he does not constantly bear in mind the precise location where his train and where every bridge over the track is."

In that case the plaintiff, a brakeman, while standing on top of a freight car on a moving train, was struck by a low bridge and injured.

At the time he was watching the train to see that it did not break. The court said:

"At the time of the accident he was upon a very long train, intent upon the discharge of his duty, with his face toward the rear of the train, in a position to most effectually discharge his duty, and thus his back was toward the bridge. He was not at the time aware that he was approaching a place of danger, and had no warning of the bridge. Indeed, the bridge was not in his mind, and the trial judge nonsuited him because he did not at the time have the bridge in his mind and thus guard himself against the danger of injury.

"We do not think that one thus situated can, as matter of law, be charged with negligence because he did not take notice of the fact that he was approaching the bridge, and thus know that he was in a place of danger. He was in a place where there was danger that the train might break in two, and he was intent upon the discharge of his duty. It cannot be said that a brakeman is, as matter of law, careless because he does not bear constantly in mind the precise location where the train is and where every bridge is."

In *Kane v. Northern Central Railway*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339, it was held that whether an employé is guilty of contributory negligence, in a case where he knew of the defect in the car in the use of which he was injured, was for the jury, and that in determining the question of negligence "regard must always be had to the circumstances of the case and the exigencies of his position." The court said:

"But in determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed to all the circumstances of the particular occasion. In the case before us, the jury may not unreasonably have inferred from the evidence that, while the plaintiff was passing along the tops of the cars for the purpose of reaching his post, he was so blinded or confused by the darkness, snow, and rain, or so affected by the severe cold, that he failed to observe, in time to protect himself, that the car from which he attempted to let himself down was the identical one which, during the previous part of the night, he had discovered to be without its full complement of steps."

In *Young v. Syracuse, B. & N. Y. R. R. Co.*, 45 App. Div. 296, 61 N. Y. Supp. 202, a switch had been misplaced. The switch was located some 15 or 20 feet south of a water tank and near the track. By reason of its location, the red light showing the switch to be misplaced was not visible to the engineer until his train was within 60 feet of the switch, and too near it to avoid a collision. There was evidence that the switch might have been located at another point so it would have showed the red light for a much greater distance without impairing its usefulness. The engineer had been in the employ of the company for a number of years and had frequently passed this place, and it was a rule of the company that engineers were to approach switches with great care and have their trains under such control as to avoid accidents in case a switch was misplaced. The engineer was killed. Held, it was error to dismiss the complaint; that it was for the jury to say whether defendant was guilty of negligence in locating the switch where it did, and, if so, whether this negligence was an efficient proximate cause of the accident, and whether the engineer assumed the risk, and whether the engineer was guilty of

negligence in failing to have in mind the location of the switch and its character under all the circumstances of the case.

In *Brown v. N. Y. C. & H. R. R. Co.*, 42 App. Div. 548, 59 N. Y. Supp. 672, a mail crane was so placed that its bow extended within seven inches of a passing locomotive. It was shown that it could have been placed at a greater and safe distance from the tracks without interfering with its successful operation. The plaintiff's intestate, a fireman, on a passing locomotive, engaged in the performance of his duty and not unfamiliar with the place, was struck by the crane and killed. Held, that the question of defendant's negligence in locating and maintaining the crane, as well as that of the negligence of plaintiff's intestate, were for the jury. The court also held that the fireman engaged in the discharge of his duty might easily have forgotten the location or failed to have observed it, while engaged in the performance of his duties and distracted thereby, without being charged with such negligence as would defeat a recovery.

To the same effect is the case of *Fitzgerald v. N. Y. C. & H. R. R. Co.*, 37 App. Div. 127, 55 N. Y. Supp. 1124, also *True v. Niagara Gorge Railroad Co.*, 70 App. Div. 383, 75 N. Y. Supp. 216. In this last-cited case the plaintiff was a conductor on defendant's road engaged in collecting fares, and while so doing was standing upon the running board of the car. He was swept therefrom by another car of defendant passing in the opposite direction, and injured. The tracks could have been placed further apart. The plaintiff had been on this route for 30 days, making 15 trips daily. Held, that he was entitled to recover; that the question of defendant's negligence in placing its tracks so close together at the point where the accident occurred, and the questions of plaintiff's negligence and assumption of the risk, were for the jury.

*Choctaw, O., etc., R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, was the case of a dangerous structure so near to the tracks and passing cars of a particular kind that it was dangerous to employés on the cars. It could have been placed further away. The court said:

"Be this as it may, the testimony makes it clear that in the proper construction of this appliance there is no necessity of bringing it so near to the car as to endanger brakemen working thereon. Whether hung at an angle or not, it can be so constructed as to leave such space between it and the top of the car as to make it entirely safe for brakemen in passing. \* \* \* Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employé should be subjected to danger wholly unnecessary to the proper operation of the business of the employer. *Kelleher, Adm'r v. Milwaukee & Northern R. R. Co.*, 80 Wis. 584, 50 N. W. 942; *Georgia & Pacific Railway Co. v. Davis*, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; 1 *Shearman & Redfield on Negligence* (5th Ed.) § 201, and cases cited. \* \* \*

"It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with the judgments in the courts below that its maintenance under the circumstances was negligence upon the part of the railroad company. The court, having left to the jury to find the fact as to whether McDade was killed by the obstruction, did not err in giving instruction that the negligent manner in which the waterspout was maintained was, of itself, a conviction of negligence."

In *Texas & Pacific Railway Co. v. Swearingen*, 196 U. S. 51, 57, 25 Sup. Ct. 164, 49 L. Ed. 382, from which I have already quoted, a scale box, 6 feet high, 5 feet wide, and 18 inches deep, a permanent structure of the standard size and location, had been erected and was maintained at a distance of 19½ inches from track No. 2 in the yard. There were other tracks, but they could have been placed further apart, and the scale box at a greater distance from the track in question. The scale box was erected several years before the accident in question, and there was no evidence of prior accidents at this place. The plaintiff testified:

"I knew we had to pass the scale box at the time I was hurt, so as to get to the switch beyond. I was not thinking about it, and I did not see it when we passed it in going after these cars. \* \* \* There was nothing to hide the scale box from my view; it was perfectly open and apparent."

The accident happened after dark, but there was a light on the engine on which the plaintiff was riding. The plaintiff also testified:

"I was never warned about the danger of getting knocked off the cars by the scale box, and at the time I was hurt I was attending to my work and thinking about my duties and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it."

He had worked there for some considerable time. There, as here, it was contended that the defendant company was not negligent in its construction, but the court held, as we have seen by the quotations from the case, made earlier in this opinion, that, as there was evidence that the tracks could have been placed further apart and the scale box further from track No. 2, the question of negligent construction and location was properly for the jury. The court also held that the questions of assumption of the risk and negligence of the plaintiff were for the jury. That case is controlling here, and much stronger for the defendant company in every aspect, except that there employes, at times, were expected to ride on the side of the moving engine or cars, while here the hostler was not expected to be on the side of the engine or tank while going into the roundhouse, except in emergencies making that course necessary or proper. In the light of the evidence and experience in railroading and in moving engines and cars, it was for the jury to say whether or not the defendant company reasonably might and should have apprehended the necessity of leaving the cab. Of course, the case would have been stronger for the plaintiff had he been able to show prior occurrences of this kind at such places. But, as said by Chief Judge Cullen, while the happening of prior accidents at a given place is strong evidence that a defendant knew or had reason to apprehend the dangers of the situation, still the absence of proof that an accident has happened there is not conclusive proof of the safety of the place or of the absence of negligence in constructing and providing it. I take it that, where a given place proves to be dangerous, the absence of a prior accident and injury at that place does not exonerate the master from liability for the first one that does occur. It becomes a question whether the master in the exercise of reasonable care and forethought ought to have known the danger. So, in determining whether or not this roundhouse was



a dangerous place for the plaintiff to work, the defendant company could not rely on the fact, if it be a fact, that no accident had happened there before, but was bound to consider whether or not contingencies were liable to arise making it necessary or proper for the hostler to leave the cab and be on the outside or alight from the engine while on its way into the stall. If, in the exercise of reasonable care, defendant might have foreseen such necessity, then the place was to the defendant obviously a dangerous one for the hostler to work in.

In *Abel v. D. & H. C. Co.*, 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773, the defendant was held guilty of negligence in not foreseeing that cars might be backed against others standing on a side track and undergoing repairs, and thereby endangering the lives of workmen engaged underneath same, and in failing to make and promulgate a rule for the protection of such workmen.

In *McCoy v. N. Y. C. & H. R. R. Co.*, 185 N. Y. 276, 77 N. E. 1174, the court held and applied the same doctrine for the protection of the hoer whose duty it is to remove the ashes from the ashpan of the locomotive by holding defendant liable for not promulgating a rule that the person in charge of the engine should not move it until he actually saw that the hoer was in a place of safety. This decision was based on the proposition that it was the duty of the defendant company to foresee that the engine might be moved and injury result.

In *Berrigan v. N. Y., L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57, the Court of Appeals laid down the rule that a railroad company is only bound, in making and promulgating rules, "to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising ordinary care."

In *Mendizabal v. N. Y. C. & H. R. R. Co.*, 89 App. Div. 386, 388, 85 N. Y. Supp. 896, 897, the court said:

"Experience shows that animals may stray upon a railroad track, and that if they do there is danger that a train may come in collision with them and be wrecked. Adequate measures, reasonable in their nature, must be taken to guard against such danger."

Without going into the numerous cases, it seems to me sufficient that it is common knowledge in railroading that engines and their brakes get out of order; that they sometimes fail to work or hold; that the fires in engines get low or go out, so that steam fails, and that in such cases the air pumps and brakes will not work; that engines put in motion by some exterior force need to be under control, and that it is dangerous to engine, engine house, and hostler to have them run into their stalls if not under full control, and that in such a contingency it would be both necessary and proper for the hostler to leave the cab and engine and use every effort to stay its progress. It seems to me that this, or a similar occurrence, was one which in the exercise of reasonable care might have been foreseen, and one which ought to have been foreseen or apprehended. The defendant knew of the smoke and steam and narrow entrances to these stalls, and that it would be extremely dangerous for the hostler to be on the outside of the cab, or to descend from the engine while on its way in. The dangerous character of railroad business demands especial care and caution on

the part of the railroad company in the construction of its tracks, etc., and it is bound to a degree of care proportionable to the dangers to be encountered. *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 664, 21 Sup. Ct. 275, 45 L. Ed. 361.

I am satisfied that the evidence was such as to justify the jury in finding that the defendant was negligent; that plaintiff was not negligent; that plaintiff had not assumed the risk of the place in which he was required to work; and that, while the negligence of Moriarity in setting the engine in motion was one cause of the accident and injury, the actual, efficient, proximate, and concurring cause was the negligence of the defendant company.

The motion to set aside the verdict and for a new trial is therefore denied.

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In re GEBBIE & CO.

(District Court, E. D. Pennsylvania. February 18, 1909.)

No. 2,779.

**BANKRUPTCY (§ 143\*) — PROPERTY PASSING TO TRUSTEE — PROPERTY SUBJECT TO PROCESS—ATTEMPTED PLEDGE BY BANKRUPT.**

Bankrupt, a corporation engaged in publishing and selling books, some two years before the bankruptcy entered into a contract with claimant, a creditor, by which it purported to transfer to claimant certain books contained in a room on its premises, and to lease such room to claimant. It provided, however, that the president of the bankrupt should be sole agent for claimant, with authority to sell any of such books in his discretion, and he retained the key to the room; also, that on payment of the recited debt the books unsold should be retransferred to the bankrupt, and that in the meantime they should not be removed by claimant except on certain defaults, when it had the right at its option to sell the same and credit the proceeds to the bankrupt. It had not exercised such option at the time of the bankruptcy, and the books were taken possession of by the trustee. *Held*, that there was no such change of possession as to constitute a sale or pledge valid as against execution creditors of the bankrupt under the law of Pennsylvania, and that the property, being subject to levy, passed to the trustee under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.\*]

In Bankruptcy. On certificate of referee.

C. W. Van Artsdalen, for Mercantile Guaranty Co.  
Samuel W. Cooper, for trustee.

J. B. McPHERSON, District Judge. This is a dispute between the Mercantile Guaranty Company and the bankrupt's trustee concerning their respective rights to certain books, which at one time were undoubtedly the bankrupt's property, but are now claimed by the guaranty company under an agreement made in January, 1905, more than two years before the creditors' petition was filed. Asserting this claim, the guaranty company attempted to offer the books for sale several weeks after the adjudication, but was met by the trustee's application for a restraining order, and thereupon agreed that the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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whole matter should be submitted to the referee for his determination. He has found that the title, ownership, and right to the possession of the property is in the trustee, and at the request of the guaranty company has certified the controversy to the court. There was little conflict of testimony, and the facts that are necessary to explain the situation of the parties and to throw light on the agreement in question appear in the following report of the learned referee (Theodore M. Etting, Esq.):

"Gebbie & Co. is a Pennsylvania corporation. Its business was that of publishing and selling books. George Gebbie was and continued to be its president up to the time of bankruptcy. At and before the execution of the contracts under which the Mercantile Guaranty Company claimed, and until a short time previous to the bankruptcy, the business of the corporation was carried on at premises 714 Spruce street in the city of Philadelphia; the premises in question being leased from the mother of George Gebbie. Gebbie & Co. was adjudged a bankrupt April 12, 1907, upon a petition filed April 11, 1907. The trustee in bankruptcy found the property in dispute, with other stock of the bankrupts, on the above premises, and took possession of them in the course of the administration of the estate. The Mercantile Guaranty Company some time afterwards, acting under a power of sale contained in an agreement which will be referred to hereafter, and which was executed between Gebbie & Co. and the Mercantile Company on the 14th of January, 1905, advertised the property in dispute, which consists of certain books and engravings contained in a room in 714 Spruce street, the premises above referred to, for sale at auction for account of whom it may concern, and thereupon the trustee in bankruptcy made application for an order restraining the guaranty company from making the sale or from interfering with his title or possession. The essential averments in the trustee's petition are that the books and engravings are in his possession, that they were never delivered to the claimant by the bankrupt or passed into its possession, that they formed part of the bankrupt estate, and that he is entitled to sell them. The claimant in its answer denies that the property is part of the bankrupt estate, or that it ever came into the possession of the trustee, or that he has any title thereto. It is averred that, at the time of the commencement of the bankruptcy proceedings, neither the room nor the building were occupied by the bankrupt. The room, it is averred, had been leased to the Mercantile Guaranty Company by Gebbie & Co. since January 14, 1905, and it since then had been in the exclusive possession of that company. The remainder of the building, it is averred, at the time of the commencement of the bankruptcy proceedings, was in the possession of the Gebbie Book Company. The title to the books is claimed under a sale, made contemporaneously with the execution of the lease above referred to, and exclusive possession thereafter. The sale was stayed pending the determination of the question, and testimony was taken on the petition and answer. At the close of the testimony, and in order to avoid circuity of action, counsel for trustee and claimant entered of record the agreement first above referred to.

"The Mercantile Guaranty Company is a New York corporation having its principal office in the city of New York. It had no office for the transaction of business in Philadelphia, or at any other place within this commonwealth. On the 14th of January, 1905, an agreement was made between Gebbie & Co. and the Mercantile Guaranty Company, by the terms of which certain books and engravings contained in a schedule annexed to the said agreement, and which comprised the property in dispute, and which were then in the room adjoining the first floor office of Gebbie & Co., 714 Spruce street, were sold by Gebbie & Co. to the Mercantile Guaranty Company, and a lease for said room, bearing even date with the execution of said agreement, was given by Gebbie & Co. to the Mercantile Guaranty Company. Both the agreement and lease bear the signature of Gebbie & Co., by George Gebbie, president. At the time of the execution of the above agreement and lease Gebbie & Co. was indebted to the guaranty company in the sum of \$11,252.25, which indebtedness had been incurred in November, 1904, and as collateral security for the payment of this

indebtedness, the guaranty company then held certain book contracts or leases, which Gebbie & Co. had guaranteed but which were in default. The guaranty company also held in its hands certain other book contracts or leases known as collection accounts. The above collateral not being considered sufficient by the guaranty company, a demand for additional collateral was made, and the agreement executed January 14, 1905, grew out of this demand. The books and engravings referred to in the agreement were then in a room back of the general office of Gebbie & Co., access to which was had by a door opening from the hallway. The room was quite dark. It was impossible for any person visiting the premises of Gebbie & Co. to see the interior of this room or its contents from the rest of the premises. The door leading to the room was kept locked. George Gebbie and two other persons connected with Gebbie & Co. had access to the room by keys. These keys, it appeared, opened another room as well, and were in the possession of all of the persons referred to before the execution of the agreement, and they remained in their possession thereafter. The books referred to in the agreement were in the room prior to the execution of the agreement. They were not specifically selected and set aside at the time of the agreement, but there had been a stock-taking a few weeks previous, and there can be no doubt under the evidence that they were in the room when the agreement was made, that they remained there continuously thereafter, and that they were at all times kept separate and apart from the other stock of Gebbie & Co. The total retail price of the books and engravings above referred to, as set out in the schedule contained in the agreement, is \$97,740.50. By the terms of the agreement, the books and engravings in question were granted, bargained, and sold unto the guaranty company, subject, however, to the following conditions: That during the continuance of the agreement the guaranty company should not remove the books from the room or offer them for sale except through George Gebbie; that George Gebbie should have the exclusive right to sell them as agent for the guaranty company, with the power of appointing agents under him, and he was authorized to sell them at any fair price which to him seemed most advisable. In consideration for the transfer of the above property, the guaranty company agreed to give Gebbie six months from the 1st day of January, 1905, in which to pay its indebtedness of \$11,252.25, and further agreed as to the amounts and conditions of payment, which in substance were that the guaranty company was to give Gebbie & Co. credit for all amounts collected or received by it from the book contracts or leases which it then held as collateral, and that, unless that sum made a payment in excess of the balance due, Gebbie & Co. was to pay the guaranty company \$500 monthly. The cash or notes received from the sale of the books was to be kept in a separate account; monthly statements rendered showing the number and names of the books sold, and the amount received was to be remitted and credit was to be given to Gebbie & Co. for the money thus received on account of this indebtedness. It was further agreed between the parties that if on or before the 1st day of July, 1905, the indebtedness of Gebbie & Co. was not paid, that the guaranty company could then demand the full balance due upon tendering to Gebbie & Co. a good and sufficient bill of sale for the books then unsold, and, in the event of the failure of Gebbie & Co. to pay the balance due within five days, the guaranty company was authorized to sell the books then unsold to the highest responsible bidder, at either public or private sale. The proceeds of sale, less reasonable expenses, were to be applied to the account of the indebtedness, and the balance, if any, after payment, was to be paid to Gebbie & Co.; or the guaranty company could at its option, under the terms of the agreement, in the event of the debt not being paid on or before July 1, 1905, allow the agreement to continue from month to month upon the conditions hereinbefore referred to, having the right within the first ten days of any month to demand the balance due, and upon tender of a bill of sale to proceed in the event of nonpayment to sell at either public or private sale the books and engravings then unsold as above provided, the proceeds of said sale to be applied to the account of said indebtedness, and the balance, if any, after payment, to be paid to Gebbie & Co.

"From the terms of this agreement, it is clear that, whilst the title to the books was transferred to the guaranty company, its ownership therein was

shorn of every right ordinarily incident thereto. The guaranty company could not remove the property from the room; it could not offer it for sale; it could not make a sale directly. The only person who could sell was George Gebbie, the then president of Gebbie & Co., or agents appointed by him. There was no obligation on the part of Gebbie to sell any of the books, inasmuch as it was quite possible that the debt could have been discharged on or before July 1st, or at a later period, from other sources of payment. If he elected to sell, it was at such prices as seemed to him most advisable. Such of the property as had not been sold was upon payment of the debt to be resold to Gebbie & Co. The total indebtedness of Gebbie & Co. at the date of the agreement was about \$11,000, and the total retail price of the books as set out in the agreement was \$97,740. The real consideration for the agreement was the extension of time granted to Gebbie & Co. in which to pay the above-mentioned indebtedness. Between the date of the agreement and the commencement of the bankruptcy proceedings, comparatively few books were sold. Several visits to the premises were made by the president of the guaranty company, and dissatisfaction was expressed at the slowness with which the debt was being liquidated or the books sold; but beyond satisfying himself that the books had not been removed or otherwise disposed of, nothing appears to have been done with respect to them, other than as heretofore stated, until shortly before or shortly after the commencement of the bankruptcy proceedings. At this time demand was made for payment of the debt, a bill of sale was tendered, and an endeavor made to sell the books under the power contained in the agreement. Contemporaneously with the execution of the agreement of the 14th of January, 1905, Gebbie & Co. made a lease to the Mercantile Guaranty Company for six months from the 1st of January, 1905, of its first floor office in premises 714 Spruce street, this being the room in which the property above referred to was kept. By the terms of the lease, the rent, which was fixed at six dollars a month, was made payable in advance, but by the terms of the agreement the guaranty company was to be released from its liability upon payment of its debt and upon tendering a bill of sale. It appears from the evidence that the guaranty company paid no rent. In February, 1907, Gebbie & Co. became embarrassed, and in consequence its business was sold to the Gebbie Book Company. Gebbie & Co. ceased to do business after February of 1907, or to pay rent for the premises. As certain property taken over by the Gebbie Book Company, but not as yet paid for, remained on the premises, the building appears to have been occupied by both companies, but Gebbie & Co. assumed no liability for rent, and paid no rent after February, 1907. No change was made in the use of the room in which the property in dispute was stored.

"The contention of the claimant is that there was sufficient transfer of title and delivery on January 14, 1905, to vest title in the guaranty company, but in any event that, inasmuch as no part of the building was in the possession of or under the control of the bankrupt at the time of bankruptcy, or for several months prior thereto, if there had not been a sufficient delivery on January 14, 1905, any defect was remedied at the time when the Gebbie Book Company succeeded Gebbie & Co. and the latter withdrew.

"Counsel for the trustee relies upon the case of *Security Warehousing Co. v. Hand* (recently decided) 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117. This case is in certain respects, I think, on all fours with the case at bar. In *Stephens v. Gifford*, 137 Pa. 219, 20 Atl. 542, 21 Am. St. Rep. 868, the Pennsylvania rule with respect to transfer of personal property is reviewed and considered. There can be no doubt that, in determining the sufficiency of the transfer of title, the law of the state must govern. The rule laid down in *Stephens v. Gifford* is that transfer of property of the nature of that now under consideration is ordinarily effected by transferring the thing itself to the possession of the purchaser, but that parties may within certain limits by their own contracts modify this rule; but that if such terms and conditions are prejudicial to others or are calculated to mislead the public, they will be held to be void as to those who would otherwise be injuriously affected by them. If a purchaser pays the price without taking possession of the goods, he takes the risk of the integrity and solvency of the seller. A purchaser must, for the protection of the public, take such possession as is usual and rea-

sonable in view of all the circumstances of his purchase. If he neglects this obvious duty, then, as between himself and creditors, he must bear the loss resulting from his own act. The facts in the case under consideration were substantially as follows: The purchaser of a team of horses arranged with the seller for the use of the stable in which the horses then were until he should be ready to move them. He also arranged with the keeper to continue in care of them. The keeper carried the key to the stable in which the horses were kept. By virtue of these arrangements, the contention was that the purchaser became the lessee of the stable, the employer of the keeper, and a purchaser in actual possession of the property. The sale was declared fraudulent on the ground that there had been no change in the visible possession of the horses.

"In *Security Warehousing Co. v. Hand*, there was no change of possession in fact, and the only possession in form was, as in the present case, by virtue of a lease; and there, as here, there was no change made in the actual possession of the property, or no change made in its visible possession. There, as here, the only agents on the scene were the agents of the pawnor. It was held that there had been no change in possession, that the method adopted was a mere device or subterfuge.

"In order to give any validity to the agreement now under consideration, it must necessarily be regarded as either a pledge or a sale. In either event delivery is a necessary incident. It is a mere trifling with words to call George Gebbie the agent of the guaranty company, or at all events, if an agent at all, his agency was restricted to the power of sale. The agreement precluded the guaranty company from removing the property from the room. The clear intent of the agreement was that the actual possession and custody of the books should not be changed, and that they should remain after the agreement where they were before its execution, and that Gebbie & Co., through George Gebbie, its president, should have the same right to fix the price and to sell as before. The actual possession was unchanged. The property could have been levied on and sold under judicial process against Gebbie & Co. at the time of the adjudication in bankruptcy.

"A delivery, to be effectual in Pennsylvania, must be made either at the time of the sale or within a reasonable time thereafter. It is immaterial whether Gebbie & Co. or the Gebbie Book Company was in possession in February, 1907. In *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779, the requirement of possession as laid down by Mr. Justice Bradley, is: 'A pledge may be in the temporary possession of the pledgor as special bailee, without defeating the legal possession of the pledgee; but where it has never been out of the pledgor's actual possession, and has always been subject to his disposal by way of collection, sale, substitution, or exchange, no pledge or privilege exists as against third persons.' It cannot, I think, be maintained in the case at bar that there was any real change in the actual possession of the property. Whilst it is generally true that the trustee in bankruptcy stands in the shoes of the bankrupt, and that he holds the property assigned subject to the same equities that the debtor held it, there are many transactions which would be binding on the debtor which would not be binding on the trustee. Indeed, it may be laid down as a general rule that a trustee in bankruptcy may properly oppose any preference or privilege which the law itself, unaided by a bona fide purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference, even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim. Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold as well against the trustee as against the debtor, because the trustee only takes such title as the debtor had at the time of insolvency. As against third persons, neither a sale nor a pledge can be maintained without possession. Want of possession is fatal, though the parties may have acted in good faith. *Casey v. Cavaroc*, cited supra. The trustee in bankruptcy, in section 70a (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), is vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the peti-

tion, might have been levied upon and sold by judicial process against him, and, by subdivision "e" of the same section, the trustee in bankruptcy may avoid any transaction by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. By reason of these special provisions, the trustee in bankruptcy can question the sufficiency of the alleged transfer. *Security Warehousing Co. v. Hand*.

"For the reasons above stated, the conclusion at which I have arrived is that it is a trifling with words to call the transaction between Gebbie & Co. and the guaranty company a transfer of possession from the former to the latter. There was really no delivery, and no such change of possession as the law requires. The alleged change was, as is said in *Security Warehousing Co. v. Hand*, a mere pretense a sham. The trustee is entitled to possession of the property, and the title and ownership is in him."

In the foregoing report the referee has summarized the agreement of January, 1905, but I think the correctness of his construction will be even more manifest if the agreement be set out in full:

"Whereas the said Gebbie is indebted to the said Guaranty Co. in the sum of \$11,252.25, as of the date of November 30, 1904 (as appears by an account hereunto annexed marked Exhibit A), being balance due by reason of the purchase of certain book contracts, or leases, which said contracts have been purchased by and assigned to the said Guaranty Co. as collateral security (a list of which is hereunto annexed marked Exhibit B and known as 'Guaranty Account').

"And whereas the said Guaranty Co. had certain other book contracts or leases of the said Gebbie in its hands for collection, which are known as 'Collection Accounts.'

"And whereas the said Gebbie is the owner of certain books, a list of which is hereunto annexed, marked 'Exhibit C' and is also the owner of the sheets for a set of books known as 'The Complete Writings of Theodore Roosevelt.'

"And whereas many payments on the said book contracts or leases, purchased by and assigned to the said Guaranty Co., are overdue, and in default, which have been guaranteed by said Gebbie, and the said Guaranty Co. has demanded additional collateral security from the said Gebbie for the moneys due thereon.

"Now this agreement witnesseth:

"First: That the said Gebbie, for and in consideration of the sum of one dollar, to it in hand paid by the said Guaranty Co. and the hereinafter mentioned covenants and agreements by the said Guaranty Co., does hereby grant, bargain, sell, release, and confirm unto the said Guaranty Co. all the books set forth in the schedule hereunto annexed marked 'Exhibit C,' now remaining and being in the room adjoining the first floor office of the said Gebbie at 714 Spruce St. in the city of Philadelphia and state of Pennsylvania, for which said room a lease, bearing even date herewith, has been given by the said Gebbie to the said Guaranty Co. and is hereunto annexed, identified by the signatures and seals of the parties hereto.

"Second: That for and in consideration of the premises, and the hereinafter mentioned further covenants and agreements of the said Gebbie, the said Guaranty Co., does hereby covenant and agree to give the said Gebbie six months from the 1st day of January, 1905, in which to pay it the said sum of \$11,252.25 now due and owing to it by the said Gebbie. And it further covenants and agrees that the said sum shall be paid in the amounts and upon the conditions following, to-wit:

"(a) The said Guaranty Co. is to give the said Gebbie credit upon the said indebtedness of \$11,252.25 for all amounts collected or received by it from the said accounts heretofore purchased by it known as 'Guaranty Account,' a list of which is hereunto annexed marked 'Exhibit B' aforesaid.

"(b) The said Gebbie is to pay to the said Guaranty Co. the sum of \$500 each month during the continuance of the agreement (unless that sum would make a payment in excess of the balance due, in which event the amount to be paid shall be only that necessary to balance the account or is reduced as is

hereafter provided). The said monthly payments of \$500 to be made at the times as hereinafter provided.

"(c) It is further agreed between the parties hereto that any payments on account of the collection accounts, less commission, shall be credited on account of the said required monthly payment of \$500 and for the purpose of this agreement, collection accounts shall be all accounts whatsoever in the hands of the said Guaranty Co. other than those heretofore purchased, all of which are set forth in 'Exhibit B' and known as 'Guaranty Accounts.'

"(d) The said Gebbie further agrees to endeavor to sell the sheets for the books known as 'The Complete Writings of Theodore Roosevelt' and that in the event of selling the same during the continuance of this agreement, that it will inform in writing the Guaranty Co. and give the terms of sale and hereby agrees to pay to the said Guaranty Co. upon receipt thereof, fifty per centum of the cash received from time to time from said sale or sales during the continuance of this agreement and said payment shall be credited to the said Gebbie on account of the said indebtedness of \$11,252.25 (provided, however, that the amount to be paid is not in excess of the balance due on said indebtedness, in which event, only the amount necessary to balance the said account shall be paid).

"(e) The said Guaranty Co. shall send the said Gebbie a statement between the first and tenth days of each month during the continuance of this agreement showing what moneys it has collected on account of the said accounts known as 'Collection Accounts'; and the said Gebbie shall pay to the said Guaranty Co. the difference between the amount collected from said 'Collection Accounts' and the sum of \$500 (the monthly payment provided for in 'Clause B') at any time before the end of the month in which said statement is received, (provided, however, that said payment does not make a payment in excess of the balance due; in which event the amount to be paid shall be only that necessary to balance the account) and it is further provided, that the said Guaranty Co. shall send the said Gebbie a complete statement of the full account between the parties hereto, between the first and tenth days of each month during the continuance of this agreement.

"Third: It is further understood and agreed between the parties hereto that George Gebbie shall have the exclusive right to sell, and is hereby authorized as the agent of the said Guaranty Co. with power of appointing agents under him, to sell at a fair value at all times during the continuance of this agreement, any or all of the books set forth in 'Exhibit C' now remaining in the room adjoining the first floor office at 714 Spruce Street in the city of Philadelphia, aforesaid. The cash or notes received from said sale or sales shall be kept by the said George Gebbie in a separate account, of which monthly statements, showing the number and names of the books sold, the purchaser or purchasers, and the amount received for the same, together with a check for the cash received, or the notes received, or both from said sale or sales, shall be sent to the said Guaranty Co. between the first and the tenth days of each month during the continuance of this agreement. And the said Guaranty Co. agrees to give credit to the said Gebbie for the cash or notes so received on account of its said indebtedness.

"It is further understood and agreed between the parties hereto that the said Gebbie may sell the said books at any fair price, which to him may seem most advisable.

"And it is further understood and agreed between the parties hereto that the said Guaranty Co. shall not remove the said books from the said room adjoining the first floor office of the said Gebbie at 714 Spruce Street in the city of Philadelphia aforesaid, during the continuance of this agreement, and shall not offer these books for sale, except through the said George Gebbie, or his agents, as above provided, during the continuance of this agreement.

"Fourth: It is further understood and agreed between the parties hereto that upon the payment of the full sum of \$11,252.25 to said Guaranty Co. as hereinbefore provided, the said Guaranty Co. agrees to give to the said Gebbie a good and sufficient bill of sale for the books set forth in 'Exhibit C' which have not been sold (as hereinbefore provided); and the said Gebbie, upon receiving the said bill of sale, hereby covenants and agrees to release the said Guaranty Co. from any and all liability on the lease for the said room



adjoining the first floor office of Gebbie at 714 Spruce Street in the City of Philadelphia aforesaid.

"Fifth: It is further understood and agreed between the parties hereto that if the said indebtedness is paid before the full amounts on the said accounts known as 'Guaranty Account' are paid, that the said Guaranty Co. will assign the said accounts, with the balance due thereon to the said Gebbie, or will hold the same for collection as the said Gebbie may direct.

"Sixth: It is further understood and agreed between the parties hereto that of the said indebtedness of \$11,252.25 is not paid in full by the said Gebbie on or before the 1st day of July, 1905, that the said Guaranty Co. may demand the full balance then due, upon giving the said Gebbie a statement of the full accounts and tendering to it a good and sufficient bill of sale for the said books set forth in 'Exhibit C' (then remaining unsold) and then in the event of the failure of the said Gebbie to pay the balance due within five days, the said Guaranty Co. may proceed to sell the said books set forth in 'Exhibit C' (then remaining unsold) to the highest responsible bidder at either public or private sale and the proceeds of said sale, less the reasonable expenses thereof, shall be applied to the account of the said indebtedness and the balance, if any, after the payment of the said indebtedness, shall be paid to the said Gebbie by the said Guaranty Co., and the said Guaranty Co. shall within twenty days after the said sale, send a statement to the said Gebbie showing the condition of the accounts between the parties hereto; or at the option of the said Guaranty Co. it may allow this agreement to continue from month to month upon the conditions hereinbefore set forth having the right, within the first ten days of any month, to demand the balance then due and of proceeding to the sale of the said books set forth in 'Exhibit C' (then remaining unsold) same as is above provided.

"Seventh: It is further understood and agreed between the parties hereto that the terms of the agreement dated the 16th day of November, 1903, entered into between the predecessor of the said Gebbie, Gebbie and Company, a corporation of the state of New Jersey and The Merchants Guaranty Trust Co., are not modified or changed by this agreement, but nothing in the said agreement shall require the said Gebbie to pay more than \$11,252.25 on account of the dealings of the parties hereto or their respective predecessors."

In my opinion, it cannot be properly inferred from this agreement that a sale was intended by the parties, or even an ordinary pledge as collateral security. No doubt an interest of some kind in the books described was intended to be given to the guaranty company, and perhaps such interest more nearly resembles a pledge than a sale; but if the agreement is read as a whole, its controlling object seems to be the grant to the guaranty company of a right in the proceeds of the books, while Gebbie & Co.'s right of property and of possession, and their right to sell at their own discretion, are left practically undisturbed. Even in form, the agreement (taken as a whole) is not a bill of sale. It is more like a chattel mortgage to secure the payment of \$11,252.25, for it would certainly cease to be effective after the debt was paid; but, as a chattel mortgage of this description is not sanctioned by the law of Pennsylvania, the result seems to be that the transaction must be treated as an attempt to pledge, but without the surrender of possession, and with an express provision that the pledgee shall not sell. The option given by article 6 to sell under certain conditions was not exercised until after the bankruptcy. The adjudication was entered on April 12, 1907, and the guaranty company made no attempt to offer the property for sale until about May 25th; and, of course, it was then too late to interfere with whatever rights the trustee had acquired under the bankruptcy law.

It does not seem to me that a prolonged discussion of the foregoing facts is necessary. The general rule with regard to one of the requisites of a pledge is as follows (22 Amer. & Eng. Ency. of Law [2d Ed.] 853, and cases in notes):

"To constitute a valid pledge, there must be an actual or symbolical delivery of possession of the thing pledged; and to preserve the pledge, as will be seen hereinafter, the pledgee must retain possession of the property. Ordinarily, the physical possession of the property is delivered to and retained by the pledgee."

Or, to use the language of the note to *Lucketts v. Townsend*, 49 Am. Dec. 731:

"It is of the very essence of the contract that there should be a delivery or transfer of custody of the pledge to the pledgee, coupled with a continuous retention of possession by him. \* \* \* What will amount to a sufficient delivery is often a nice question of law and fact. The general criterion is that the delivery should be as complete as the nature of the article bailed admits of. This does not require that the delivery should in all cases be manual. It may be either constructive or symbolic, if the pledgee is clothed with all the usual muniments of title and indicia of ownership. \* \* \*"

To this general rule there are exceptions, which need not now be noticed. That there was neither actual nor symbolical delivery of possession, in the present case, seems to me beyond controversy. It is scarcely pretended that there was actual delivery—the facts are decisively against it—and the only ground upon which constructive or symbolical delivery can be urged is the fact that a lease for six months of the room in which the books were stored was executed to the guaranty company at the same time with the agreement. But this lease was a mere sham; the lessee had not even unrestricted access to the leased premises; the rent was neither demanded nor paid, nor intended to be paid; and the whole affair was simply a juggle on paper that cannot be treated seriously. It is perfectly clear that the bankrupt's possession of the books and of the premises where they were stored was never disturbed for a moment, and that all the indicia of ownership continued unchanged after January, 1905, until the petition in bankruptcy was filed. In such a situation the Pennsylvania law is well settled. Whether an agreement that seeks to transfer the title to personal property is to be construed as a formal sale or a formal pledge, it is in either case ineffective against execution creditors unless there is a visible change of possession. This is the general rule, and, so far as a formal pledge is concerned, it has been in force in this state since the decision in *Welsh v. Bekey* (1829) 1 Pen. & W. (Pa.) 57. And a similar rule prevails as to a formal sale without change of possession. *Stephens v. Gifford*, 137 Pa. 219, 20 Atl. 542, 21 Am. St. Rep. 868. It follows that, under the law of Pennsylvania, the books in question continued to be the property of the bankrupts, and that this property prior to the filing of the petition might have been levied upon and sold under judicial process against them. Therefore by section 70, cl. "a," the trustee was vested with a title thereto which is good against the guaranty company, whichever of its characters—formal vendee or formal pledgee—may be the more appropriate.

Collins' Appeal, 107 Pa. 591, 52 Am. Dec. 479, is not in conflict with this conclusion. The ground of that decision will appear by the following quotation from the syllabus:

"In general, however, it is essential that the instrument creating the pledge should make or provide for an unconditional assignment of the subject of the pledge to the pledgee; otherwise some further act of assignment by the pledgor is necessary.

"But a recognized exception to this rule is where, by the agreement of the parties, the possession of the subject of the pledge is to remain with the pledgor. In such case the pledgor and all persons claiming under him, except bona fide purchasers for value without notice of the pledge, are bound by the agreement.

"The principle of such exception has been applied to the pledge of specific chattels; a fortiori, it applies in the case of the pledge of an intangible interest, incapable of delivery or manual occupancy, or in the case of an expectancy to come into existence after the contract of pledge is made, and where the personal effort of the pledgor is necessary, both to its subsequent existence and its actual maintenance."

Accordingly, it was held in that case that the pledgee of an interest in a limited partnership, which was only in contemplation when the contract was made, could enforce the contract against a general creditor of the pledgor; but it is to be observed that the right of an execution creditor who had acquired a lien against the property was not involved, and also that the effect of the bankruptcy act could not be considered, as the case was decided 15 years before the act was passed.

As it seems to me, the superiority of the trustee's title is clear. In some cases he merely stands in the bankrupt's shoes, but his position here is different, because the bankruptcy act expressly gives him a better title, and therefore the doctrine of York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, does not apply. This is apparent from the decision of the Supreme Court in Security Warehousing Co. v. Hand, 206 U. S. 415, 422, 27 Sup. Ct. 720, 51 L. Ed. 1117. The facts of that case closely resemble the facts now under consideration, as will appear by the following quotation from Mr. Justice Peckham's statement on page 416 of 206 U. S., page 720 of 27 Sup. Ct. (51 L. Ed. 1117):

"From these findings it appeared that the Security Warehousing Company was a corporation of the state of New York, duly licensed to do business in the state of Wisconsin, and that it was engaged in the business of 'field warehousing,' so called; that it owned no warehouse of its own, and occupied no public warehouse at any place. The warehousing company leased certain premises from the (bankrupt) knitting company in Racine in the state of Wisconsin, and also certain premises at a place called 'Stevens Point' in the same state. These two places were occupied by the knitting company with their goods to be sold, and the goods were placed on the premises really occupied by the knitting company, although in form leased by it to the warehousing company, and the so-called warehouse receipts were given to the knitting company by the warehousing company, acknowledging the receipt of the property at such places. There was no change of the possession in fact, and scarcely any in form. These receipts were in turn pledged by the knitting company to various banks, and moneys obtained upon the security of such receipts from them."

Upon these facts the title of the trustee was upheld, not only against the warehousing company, but also against persons who had taken

the warehouse receipts in good faith and in due course of business as security for loans. The ground on which the trustee's title was declared to be good against the warehousing company is thus stated in the opinion, pages 425 and 426 of 206 U. S., page 724 of 27 Sup. Ct. (51 L. Ed. 1117):

"By section 70a the trustee in bankruptcy is vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which prior to the filing of the petition might have been levied upon and sold by judicial process against him; and by subdivision 'e' of the same section the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud, or otherwise as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same.

"The title to this property was in the knitting company. There had been no valid pledge of it because the possession had been at all times in the knitting company, and it could have been levied upon and sold under judicial process against the knitting company at the time of the adjudication in bankruptcy. The security company had, of course, full knowledge that the knitting company, in fact at least, shared in the possession of the property. It was itself an actor, or it acquiesced in the arrangement under which it had, at most, but a partial possession, and even that was subject to the control of the knitting company."

These paragraphs are, I think, peculiarly applicable to the present situation, and render further comment unnecessary.

The decision of the referee is affirmed.

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### KENT v. HONSINGER et al.

(Circuit Court, N. D. New York. January 11, 1909.)

#### 1. COURTS (§ 344\*)—FEDERAL COURTS—JURISDICTION—LOCAL SUIT—SERVICE ON ABSENT DEFENDANTS.

A Circuit Court of the United States, in a suit to enforce a lien, can acquire jurisdiction over a defendant, not found in the district, only by following the provisions of section 8 of Act March 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), and making an order directing such defendant to appear and plead by a day certain, designated, and causing such order to be served either personally or by publication. Mere service of a subpoena, although by order of the court, on the president of a corporation defendant in another state, is ineffective to give jurisdiction, and a decree entered on such attempted service is void.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 344.\*]

#### 2. CORPORATIONS (§ 629\*)—DISSOLUTION—SUIT BY STOCKHOLDER FOR DISTRIBUTION—FOLLOWING ASSETS INTO FOREIGN JURISDICTION.

The sole property of an Iowa corporation having its place of business in that state was sold under a decree foreclosing a mortgage, leaving a surplus, however, after paying the mortgage debt. Defendants, residents of New York, who were owners of a majority of the stock, held a stockholders' meeting, of which the minority stockholders were not notified, elected themselves directors and officers, and removed the books and money of the corporation, which was its only remaining asset, to New York, refusing to make any distribution at demand of the other stockholders. In a suit brought by them in a state court of Iowa, a decree was entered

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\*For other cases, see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dissolving the corporation in accordance with the laws of the state, and appointing a receiver to take and distribute its assets; but defendants paid no attention to his demand therefor. By the articles of incorporation of the corporation, the holders of preferred stock were given a first lien on its property and assets. *Held*, that a holder of such stock could maintain an original suit in equity on behalf of himself and the others similarly situated in the federal court in the district of defendants' residence in New York to enforce such lien against the assets of the corporation unlawfully brought there by defendants.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2472; Dec. Dig. § 629.\*]

**3. COURTS (§ 328\*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.**

In a suit by a stockholder on behalf of himself and other stockholders to secure the distribution of a fund belonging to a dissolved corporation, the entire fund is the amount in controversy for the purpose of determining the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. § 328.\*]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

**4. CORPORATIONS (§ 312\*)—LIABILITY OF OFFICERS—MISAPPROPRIATION OF FUNDS.**

The treasurer of a corporation who unlawfully carried its funds into another state and there kept them is not relieved from liability by turning the same over to a successor elected at a stockholders' meeting held in the latter state which was illegal and void under the laws of the state of incorporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1380; Dec. Dig. § 312.\*]

In Equity. Bill of complaint for the appointment of a receiver and other relief:

Grant & Wager and Powell & Powell, for complainant.  
S. L. Wheeler, for defendants.

RAY, District Judge. The bill of complaint herein was filed March 5, 1906. The bill on its face purports to be an "ancillary bill for the appointment of a receiver and other relief." Proofs have been taken and a final hearing had.

The bill is filed by Leroy A. Kent, a resident and a citizen of the state of Vermont, also a shareholder in the Vermont Building Company, an Iowa corporation, at all the times mentioned in the bill of complaint, in behalf of himself and all other shareholders similarly situated, against the defendants individually, and also as officers and trustees of said building company, all residents and citizens of the state of New York, upon the following state of facts:

(1) The Vermont Building Company was duly incorporated under and pursuant to the laws of the state of Iowa in September, 1893, having its principal place of business at Sioux City, Western division of the Northern district of said state. It had an authorized capital stock of \$95,000, divided into 950 shares of the par value of \$100 each, of which 350 shares were issued and denominated "preferred stock," and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

600 shares were issued and denominated "common stock," and all thereof was issued and outstanding prior to December 1, 1904, and is still outstanding. The complainant is the owner of 10 shares of such preferred stock. By the articles of incorporation the holders of preferred stock have a first lien on all the property of the company subject to the mortgage. The said company was organized for the sole purpose of acquiring, erecting, taking over, and maintaining certain premises—real estate—in said Sioux City known as the "Masonic Block," used for offices, stores, etc.

(2) Willis T. Honsinger, misnamed "William" in the bill, for the two years prior to the commencement of this action owned 600 shares of the common stock, except 1 or 2 shares transferred to qualify others for directors in the corporation, and 204 shares of the preferred stock of said company, and by reason of such ownership had absolute control of the corporation, the election of its officers, etc., and exercised such control, and the minority stockholders were denied representation on the board of directors.

(3) February 1, 1894, a mortgage of \$25,000 was placed on such block, the proceeds being used to pay the construction indebtedness of the company, and such mortgage became and was a lien on such property, which was the only property of said company.

(4) In May, 1903, default was made in the payment of such mortgage, and it was foreclosed, and, pursuant to a judgment of foreclosure and sale entered in September, 1903, the said property was sold October 26, 1903. On such foreclosure sale there was a surplus, after paying the mortgage debt and interest and all costs and expenses of sale, amounting to \$9,799.43, which was duly paid over to W. F. Lohr, the secretary and treasurer of said Vermont Building Company. There were also accumulated rentals raising the amount in the hands of said secretary and treasurer to \$13,117.50, forming the only assets and property of the said company at the time of the commencement of this action.

(5) The complainant owns 10 shares of the preferred stock, and the other minority stockholders 136 shares thereof.

(6) In September, 1904, a stockholders' meeting was held in Iowa at which defendants, Willis T. Honsinger, Henrietta E. Honsinger, his wife, and S. L. Wheeler were elected sole members of the board of directors of said company, such board being composed of three directors only, and all of such directors so elected were then residents and citizens of the state of New York, of which state they are still residents and citizens. The minority stockholders were not represented at such meeting, and had no part therein, not having been notified thereof.

(7) Immediately on their election as such directors, said Honsingers and said Wheeler held a directors' meeting, and elected said Willis T. Honsinger president of the company, Henrietta E. Honsinger vice president, and S. L. Wheeler secretary and treasurer.

(8) Thereupon the said defendants obtained possession of such funds belonging to said company, and amounting to \$13,117.50, from the secretary and treasurer, Lohr, and obtained possession of all the stock books, minute books, books of account and record, and all other

books and papers of said company, and brought said money, books, papers, etc., with them to the state of New York, thus withdrawing and removing the same from the state of Iowa.

(9) Since September, 1904, said company has not had any officer or director or agent residing in or having an office in said state of Iowa, and there has not been any meeting of directors or stockholders in said state, or office of such company therein.

(10) October 27, 1903, and after the money had been paid over to Mr. Lohr, then the secretary and treasurer of said company, an agreement was made and entered into between said Lohr, as secretary and treasurer, and Eric A. Burgess, duly representing seven or eight of the minority stockholders holding preferred stock to the amount of \$14,600, as follows: Burgess, who then contemplated and was about to commence a proceeding to wind up the corporation and place its affairs and property in the hands of a receiver for distribution to creditors, stockholders, etc., agreed not to institute or prosecute such a suit, and both agreed that matters should be left as they were until the year allowed for redemption under the Iowa statute should expire. Lohr, in consideration thereof, agreed that he would deposit the money in an Iowa bank in Sioux City, bearing interest, and retain the funds in said state until October 26, 1904, and would notify Hubbard and Burgess, representing the minority stockholders, of any stockholders' meeting or of any contemplated change in the board of directors or in the management of said company. Relying on this agreement, no proceedings to wind up the corporation or procure the appointment of a receiver, etc., therefor were instituted. Lohr at that time refused Burgess permission to examine the books of the company.

(11) It was also agreed and understood between Burgess and Lohr that a dividend of the said money would be made to the stockholders of the company and its affairs closed up.

(12) Demands were duly made by the said minority stockholders on the officers of the company for a dividend and a distribution of its funds according to law, but no attention was paid thereto.

(13) From the evidence in the case it fully appears that the election of Willis T. Honsinger as president, Henrietta E. Honsinger as vice president and of S. L. Wheeler as secretary and treasurer of said company in September, 1904, was in violation of such agreement, and intended to be; was a scheme to obtain the possession of the funds and property and books and papers of the said company, and remove them from the state of Iowa and from the jurisdiction of the courts of that state, and prevent the proper distribution of the funds to the stockholders entitled thereto under such laws.

(14) Since removing such property to the state of New York, the said defendants have taken no proceedings to wind up the affairs of such company or to properly distribute its remaining property to the parties and stockholders entitled thereto.

(15) The defendants have ignored the rights and interests of such stockholders, and have ignored their demands duly made for a proper and legal disposition of such funds under the laws of the state of Iowa.

(16) On the 9th day of December, 1904, Leroy A. Kent, then own-

ing 10 shares of the preferred stock of said company, filed a bill in equity in the Circuit Court of the United States in and for the Western division of the Northern district of the state of Iowa, of which district said corporation was a resident, and in which district its said real estate was situated, and where it did business in said state so long as business was done there, for the liquidation and winding up of the affairs of said Vermont Building Company, the payment of its debts, if any, and the distribution of its surplus assets to the stockholders thereof according to law and the articles of incorporation. In said suit the said Vermont Building Company, said Willis T. Honsinger, Henrietta E. Honsinger, and S. L. Wheeler were defendants.

(17) The said company at that time had no place of business in said district or state, and no director or officer thereof resided in or was in said state or district, and its property, books, and papers had been so removed to the state of New York by the defendants, where they were held by them as aforesaid.

(18) In such suit, on the filing of such bill, a writ of subpoena in chancery was duly issued by the clerk of said court under the seal thereof, and annexed thereto was the following order and notice, also under the seal of said court and duly signed by the clerk, viz.:

"Memorandum. The within named defendants are notified that unless they enter their appearance in the clerk's office of said court at Sioux City aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly.

"[Seal.]

A. J. Van Duzee,

"Clerk U. S. C. C., Northern District of Iowa,

"By J. H. Bolton, Deputy."

This subpoena and notice or order was delivered to the United States marshal of said district for service December 9, 1904, and such marshal made due return, duly signed, that the defendants could not be found in said district.

(19) Thereupon, and on the 13th day of December, 1904, on motion duly made and on a full showing of all the facts, H. T. Reed, Judge of the United States Circuit Court in said district, duly made and entered an order duly appointing F. L. Eaton, of Sioux City, Iowa, receiver of all the property and assets of said defendant, and authorized and directed him as such to ask for, demand and receive and take possession of all the property, books, and papers of said Vermont Building Company. The said order fixed the bond of such receiver, who duly qualified, gave and filed the bond required, which was duly approved, and entered on the discharge of his duties as such receiver, and duly and repeatedly demanded the property, books, and papers of said company from said president Willis T. Honsinger and said secretary and treasurer, S. L. Wheeler. These demands were ignored by said defendants, and were not and have not been complied with in whole or in part.

(20) December 13, 1904, the complainant duly applied to said judge for an order for the personal service of such writ of subpoena, or for service of same by publication on all such defendants. All the facts were set forth in the application. On the same day the said H. T.



Reed, Circuit Judge, made an order reciting the essential facts, and ordered and directed as follows:

"It is, therefore, ordered that the process of subpoena be served upon said defendant Vermont Building Company by the sheriff of Clinton county, state of New York, and in said state, by reading said subpoena to William T. Honsinger, president of said company, and by delivering to him a true copy of said subpoena. Return of said service to be made upon oath by said sheriff upon a duly certified copy of such subpoena, issued under the seal of this court.

"H. T. Reed, Judge."

(21) Thereupon said F. W. Lohr applied for leave to intervene and move to dismiss for want of jurisdiction, etc. This motion was granted, and the motion made and denied.

(22) On the 13th day of December, 1904, the following order and process, duly signed by the clerk of said court and under its seal, was issued, viz.:

"United States of America, Northern District of Iowa, Western Division—ss.:

"The President of the United States, to Vermont Building Company:

"We command you that you appear before the Judge of the Circuit Court of the United States, for the Northern district of Iowa, at Sioux City on the first Monday of February, 1905, it being the 6th day of February, A. D. 1905, to answer to the bill of complaint of Leroy A. Kent, filed in the office of the clerk of said court on the 9th day of December, 1904, and then and there to receive and abide such judgment and decree as shall then and thereafter be made, upon pain of such judgment being pronounced as against you by default.

"By an order of the Judge of the Circuit Court of the United States, in and for the Northern district of Iowa, made and entered on December 13, 1904, it was ordered by said court that the process of subpoena herein be served upon said defendant, Vermont Building Company, by the sheriff of Clinton county, in the state of New York, and in said state, by reading said subpoena to William T. Honsinger, the president of said Vermont Building Company, and by delivering to him a true copy of said subpoena, return of said service to be made upon oath by said sheriff, upon a duly certified copy of said subpoena issued under the seal of said court, a certified copy of said order being hereto attached.

"To the Sheriff of the County of Clinton in the State of New York: Returnable to the February rule day, it being Monday the 6th day of February, A. D. 1905.

"Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the U. S., at Sioux City, this the 13th day of December, A. D. 1904, and of the Independence, the 128th year.

"[Seal.]

A. J. Van Duzee,

"Clerk U. S. C. C., Northern District of Iowa,

"By J. H. Bolton, Deputy.

"Memorandum: The within-named defendant, Vermont Building Company, is hereby notified that unless it enters its appearance in the clerk's office of said court at Sioux City, Iowa, aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against it, as confessed, and a decree entered thereon accordingly.

"[Seal.]

A. J. Van Duzee,

"Clerk U. S. C. C., Northern District of Iowa,

"By J. H. Bolton, Deputy."

(23) The same was served as follows:

"State of New York, County of Clinton—ss.:

"I, A. T. Downing, being first duly sworn on oath state: That I am the duly qualified and acting sheriff of the county of Clinton, in the state of New York; that the within subpoena came into my hands on the 22nd day of De-

ember, A. D. 1904, for service; that on Dec. 22, 1904, I served the same on the Vermont Building Company at Plattsburgh, in the county of Clinton, and state of New York, by reading said subpoena to William T. Honsinger, the president of said company, and by then and there delivering to the said William T. Honsinger, as such president, a true copy of said subpoena.

"All done in the county of Clinton, and state of New York, on the day and year last above mentioned. A. T. Downing."

(24) The defendants and each of them made default in appearing, and on proof thereof and in due and regular course the case proceeded to a final hearing, and on the said hearing, and on the proofs and evidence duly given, the said court made a decree dissolving the said corporation, and appointing such F. L. Eaton permanent receiver, and fully authorizing and empowering him as such to ask for, demand, and receive and take into his possession all of the money, property and assets, books, and papers, of said company, etc., but dismissing the action as to the Honsingers and said Wheeler, they not having been served. This decree was duly entered, and has not been vacated or set aside, nor has any party or person in interest taken any steps to open or vacate the default or to set aside the said decree.

(25) The said receiver duly qualified as permanent receiver, and duly demanded of the defendants here the possession of such money, books, papers, etc., but the defendants have paid no attention thereto.

(26) Thereupon this suit in equity was commenced for the relief demanded in the bill of complaint. The complainant asks that the defendants be enjoined from disposing of such property, books, papers, etc.; that they be compelled to make discovery thereof; and that an ancillary receiver be appointed here to the end that such property be returned to the state of Iowa and properly and legally disposed of under the laws of that state and the decrees of its courts.

(27) The defendants insist that this suit cannot be maintained as ancillary to the suit in the Circuit Court of the United States, Western division, Northern district of Iowa, on the ground that the decree of that court and its order and decree appointing a receiver are void, as that court never obtained jurisdiction of the parties or any of them or of the subject-matter. They claim there was no valid service of the writ of subpoena, and (2) that, as the property was out of the state, there was no jurisdiction obtained of the subject-matter.

The defendants also claim that this suit cannot be maintained in this court as the amount in controversy is less than \$2,000. Before going into the laws of the state of Iowa it is perhaps well to consider whether or not the decree of the Circuit Court of the United States entered in Iowa has any force or validity. Is it a nullity, void? Service of the subpoena according to law was of course necessary to give the court jurisdiction. Congress has made no general provision as to the service of process, but, except in special cases where substituted service or service by publication is authorized, the service must be made in the district in which issued. 1 Rose, Code, §§ 853 and 971a. In common-law actions commenced in the federal courts, the local state practice as to mode and sufficiency of service controls. Rev. St. U. S. § 914 (U. S. Comp. St. 1901, p. 684); 1 Rose, Code, § 853a, and see cases there cited. But in equity actions the rule is different. Here

the bill is filed, and thereupon a subpoena issues. 1 Rose, Code, § 967. It must be served within the district where issued, except in certain cases where substituted service is permitted. 1 Rose, Code, § 971a. See Equity Rules, 11 to 16. Service of the subpoena in equity cases may be made by publication, or by personal service without the district in which issued, in the following cases and in the following manner, viz.:

"When in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district, and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state."

See Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513).

That the equity action in the United States Circuit Court of the Western division of the Northern district of Iowa was one to enforce a legal or equitable claim on specific personal property cannot be doubted. The articles of incorporation of the Vermont Building Company, in evidence, expressly declare:

"It is hereby provided and determined that three hundred fifty shares (350) of one hundred dollars (\$100) each shall be denominated 'Preferred Stock' and six hundred shares of one hundred dollars (\$100) each shall be denominated 'Common Stock.' The holders of said preferred and common shares of capital stock shall have the rights and privileges usually pertaining to holders of such stock and such other rights and privileges as are further set forth and guaranteed by these articles of incorporation. \* \* \*

"The holders of said preferred shares shall be entitled to receive out of any moneys belonging to said corporation semiannual dividends at the rate of six per cent. per annum on the amount of each share, from the net profits of the business conducted, in priority and preference to the payment of dividends to the holders of preferred or common stock.

"It is further provided that the holders of said preferred shares of stock shall be entitled to a first lien to the amount of their respective shares upon all the real and personal property of this corporation subject only to the lien of a first mortgage not exceeding thirty thousand dollars (\$30,000) as herein-after provided."

The mortgage had been paid, and the purpose of the action was to secure a winding-up of the corporation and an enforcement of this lien on the property by securing a distribution thereof to the holders of the preferred stock and consequently the holders of this lien. The difficulty with complainant's case is that he did not follow the statute in securing authority to serve the subpoena without the state of Iowa. In order to serve the corporation, it was necessary to serve on some one personally or by publication. I do not think the corporation was a nonresident of the state of Iowa, or that the corporation itself was in fact absent from the state. The fact that the officers thereof were absent from the state, residents of the state of New York, or that they had taken the property, books, and papers wrongfully to New York, did not deprive the courts in Iowa of jurisdiction of the subject-matter. The corporation was still a resident of the state of Iowa. It was not, however, found therein, and it did not voluntarily appear. It came within the category of absent defendants. It was competent in such case for the court to make an order directing such absent defendant or defendants to appear, etc., by a day certain, to be designated, and there might have been a service by publication or personal service of the order as directed by the court. But the court neither made such an order nor required publication. All the court did was to direct a personal service of the subpoena on the president of the company in the state of New York by the sheriff of Clinton county. This order was not served, and the order made did not require either the president or the corporation to appear, plead, answer, or demur by a day certain. The subpoena was not an order of the court, neither was it a substitute therefor. I think the decree entered by the Circuit Court of the United States in that suit in the Northern district of Iowa was a nullity.

There are many cases bearing on the question of the sufficiency of such service, but I find no case indicating that the service made was sufficient. See 1 Rose, Code, § 856, subsec. "c"; *Greeley v. Lowe*, 155 U. S. 58, 71-75, 15 Sup. Ct. 24, 39 L. Ed. 69; *Goodman v. Niblack*, 102 U. S. 556, 563, 26 L. Ed. 229. See, also, *Bracken v. Union Pac. Ry. Co.*, 56 Fed. 447, 5 C. C. A. 548; *U. S. v. American Lumber Co.* (C. C.) 80 Fed. 309.

But does this dispose of this case adversely to the complainant? He, in behalf of himself and all others similarly situated, a citizen and resident of the state of Vermont, brings this suit against the defendants, all residents and citizens of the state of New York, to reach and procure, in some lawful mode and by lawful means, the preservation and subsequent proper application and distribution of the funds and property of the Vermont Building Company, an Iowa corporation. It appears, and proof has been permitted, that since the commencement of this suit in equity a suit has been brought in the district court of the state of Iowa to dissolve the corporation and wind up its affairs. That suit has gone to a final decree, and in that suit, bill filed October 3, 1907, wherein Leroy A. Kent was plaintiff and Vermont Building Company, Willis T. Honsinger, Henrietta E. Honsinger, and S. L. Wheeler were defendants, service of process was duly made on all the defendants under and pursuant to the laws of the state of Iowa,

and the decree entered November 9, 1907, so finds and recites. The statutes of Iowa on the subject and proofs of such service are in evidence. This suit in equity is not based upon that decree, but the judgment roll and record were admitted in evidence to show the present status of the company and of its property. That decree of the state court dissolves the corporation, appoints F. L. Eaton of Sioux City, Iowa, receiver, and directs and authorizes him as such to ask for, demand, and receive all the property, books, papers, etc., of the company, and directs the defendants and all officers of the company to surrender and deliver same to the said receiver, who has duly qualified as such, and also forbids the defendants to interfere with same in any manner except to surrender same to the receiver. To the commands of this decree of the state court of the state of Iowa the defendants pay no attention whatever, ignoring same and all demands thereunder.

The evidence establishes that the defendants wrongfully and unlawfully removed all the property of such corporation, including its books and papers, from the state of Iowa to the state of New York, where, so far as appears, they now hold same. During the pendency of this action they have so held all such property, and at the time of the final hearing they had not surrendered same to the receiver or returned same to the state of Iowa. In bringing the property, books, and papers to the state of New York, and in not maintaining an office in Iowa, etc., the defendants acted in violation and defiance of the laws of that state. This court has jurisdiction of the property, which is in fact in this state, and of the defendants. It ought to be able to hold, protect, and preserve the property and transmit it to the Iowa court for distribution under the laws of that state. It is immaterial whether the defendants are solvent or insolvent. Conversion or misappropriation by a responsible party is no less obnoxious to the law and to a court of equity than conversion and misappropriation by an insolvent person. These preferred shareholders have a lien on this specific property, and they may protect and preserve the lien, and, to do so, the property itself. It is not necessary to relegate them to a common-law action for damages, and it is no defense in such a case as this to say that the complainant and those in whose behalf he sues may have a remedy at law for damages. The stockholders are entitled to their liens and to this property. An appeal to equity is proper where equitable rights are involved, of which the court takes equitable cognizance. Such is this case. The question whether this is an original bill or purely ancillary is determined by the bill itself, and not the name given it by the pleader. *Raphael v. Trask*, 194 U. S. 277, 24 Sup. Ct. 647, 48 L. Ed. 973; *Dunn v. Clarke*, 8 Pet. 1, 8 L. Ed. 845.

This bill, while it sets out the decree in the suit in Iowa, is essentially an original one, and, as it states a cause of action in equity aside from allegations as to that decree, the suit may be maintained. But that suit in Iowa has never been dismissed or discontinued, and the receiver appointed therein by the order of the court has not been discharged, nor has the order appointing him been vacated or set aside. We have, then, a suit pending with bill filed in the proper Circuit Court of the United States in the state of Iowa, in the district of the residence of the corporation, with a receiver duly appointed and

qualified and seeking possession of the property in question. The complainant here does not seek possession of this property himself. All he demands is that it be taken and transmitted to the proper court in Iowa, there to be dealt with according to law.

The laws of Iowa provide that if the corporation transacts business in the state the articles shall fix the principal place of business, which shall be in the state, in charge of an agent of the corporation, at which place it shall keep its stock and transfer books and "hold its meetings," and that in January of each year it shall file with the Secretary of State a list of its officers, and any change in the location of its place of business made by a vote of the stockholders. Also, if the corporation does not do business in the state, then it is to designate in writing a person on whom service of process, etc., may be made, and file same, etc.; also, that courts of equity may dissolve and close up the business of a corporation and appoint a receiver. The defendant Wheeler testifies that in 1905, and in the following year, meetings of the stockholders and directors were held in the state of New York, and that in 1905 the defendant Henrietta Honsinger was elected secretary and treasurer at one of these meetings, and that he then paid over the said money to her. I regard such meetings held in the state of New York in defiance of the articles of incorporation and of the laws of Iowa as illegal and invalid. Wheeler cannot, in my judgment, exonerate himself from liability by or through such a transaction. In view of all the facts this transaction should be regarded as a misappropriation of and an attempt to dissipate the funds in defiance of the rights of the holders of preferred stock.

As to the amount in controversy, it clearly exceeds \$2,000, exclusive of interest and costs. Clearly all of the funds represented by 146 shares of the preferred stock, or about \$5,500, is in controversy here. And in my judgment the entire fund is in controversy within the meaning of the statute. Assume that the corporation has been dissolved by the Iowa courts, its affairs are not wound up, but are in process of being wound up, and the money or property should be returned to that jurisdiction, and may be, I think, held for that purpose. I doubt the power of the Circuit Court of the United States in the Northern district of Iowa to make a decree dissolving the corporation. It has no such jurisdiction unless specifically conferred by some statute of that state. *Conklin v. United States Shipbuilding Co.* (C. C.) 140 Fed. 219, and cases cited. If so, then this decree of the Circuit Court of the United States referred to was and is void irrespective of service. But that fact does not defeat this action. *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Acken, as Director, etc., v. Coughlin et al.*, 103 App. Div. 1, 92 N. Y. Supp. 700; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Nash v. Hall*, 11 Misc. Rep. 468, 32 N. Y. Supp. 701; *Watkins v. Watkins*, etc., 17 Misc. Rep. 227, 40 N. Y. Supp. 1042.

Here the defendant Willis T. Honsinger and his wife (as Wheeler testifies) are in possession of all the books and papers and property—such property being in money—of the corporation in the state of New York, where they reside, and of which state they are citizens. The corporation is practically dissolved; it has ceased to do business; it

was organized for a special purpose, and that purpose has been accomplished. The Honsingers have violated the laws of Iowa by removing the books, etc., to New York, by failing to maintain an office or place of business in Iowa, and in other respects, and they absolutely disregard and ignore the rights of the preferred stockholders. It is a case where a stockholder suing for himself and all others similarly situated may maintain an action to protect and preserve such property, etc., without a demand on the officers, the Honsingers, who are the wrongdoers, to bring suit. Equity does not require the doing of a vain thing. See cases cited, *Carpenter v. N. Y. and N. H. R. R. Co.*, 5 Abb. Prac. 277; *Sage v. Culver*, 147 N. Y. 241, 246, 41 N. E. 513. As said by the court in *Sage v. Culver*, supra:

"When the corporation is exclusively under the control of the trustees and officers whose acts and management are questioned, a demand that the corporation bring the action would be idle and fruitless, and in such cases equity permits the stockholder to bring the action in his own name."

*Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456.

As to the defendants here, Willis T. Honsinger was served, and he is the president of the company. The defendant intended was actually served. There may be an order amending the record accordingly, and a finding to that effect.

While this court cannot appoint a general receiver of the corporation, it can appoint a receiver of this fund, with power to hold, protect, and preserve it for future disposition; payment to such person or persons as the Iowa court shall designate; and it can enjoin and restrain the defendants from disposing of it; and it can compel the defendants to render an account of it and pay it over to such receiver.

There will be a decree accordingly. The court will name a special master and receiver when the decree is entered.

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#### GAINES v. CHEW et al.

(Circuit Court, E. D. Missouri, E. D. February 13, 1909.)

No. 5,361.

#### 1. MINES AND MINERALS (§ 53\*)—OPTION TO PURCHASE MINE—CONSTRUCTION OF CONTRACT.

Time is of the essence of any option to purchase property, and more especially does the rule apply where the property is of a speculative value, such as an undeveloped mine.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 148; Dec. Dig. § 53.\*]

#### 2. MINES AND MINERALS (§ 23\*)—RIGHTS OF PARTIES JOINTLY INTERESTED IN PROPERTY—STATUTE.

The provisions of Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), respecting the rights of co-owners of mining claims where some of such owners have done all the assessment work thereon, have no application to mining property situated in a foreign country.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 23.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## 3. TRUSTS (§ 102\*)—RESULTING TRUST—CREATION—FIDUCIARY RELATION BETWEEN PARTIES.

Complainant, who with another held an option for the purchase of a mining concession in Mexico, entered into a written contract with defendant by which the latter agreed that if the option could be extended to give time for the sinking of a shaft on the property he would furnish the necessary money therefor; that if they purchased he should have 75 per cent. interest, and complainant and his associate 25 per cent., and that "the financing of the property will then have to be made jointly by all the parties interested." Complainant secured an agreement to extend the option, but on condition that an advance payment of \$5,000 should be made. Complainant did not advise defendant of such condition, and the latter sent an agent to exploit the property. On subsequently learning of the condition he decided to accept the extension, and called on complainant for his share of the advance payment, which complainant refused to pay, and thereupon defendant notified him that he should allow the option to expire, which he did, but obtained a new one to himself, under which he purchased the property. *Held*, that the contract created no such fiduciary relation between the parties as prevented defendant from treating it as at an end as he did, and that his own purchase raised no resulting trust in favor of complainant.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 102.\*]

In Equity.

Kineally & Kineally, for complainant.

Holmes, Blair & Koerner, for defendants.

TRIEBER, District Judge. The amended bill charges that certain parties being the owners of a mining concession granted by the government of Mexico, known as the Hidalgo Mine, entered, in Mexico, into an agreement with one Clayton, whereby they agreed that he could buy for himself or sell their concession within three months from July 20, 1905, for the sum of \$60,000, Mexican silver, to be paid \$20,000 upon the execution of the conveyance, and the balance in one and two years in equal installments; that Clayton was to receive 25 per cent. of the purchase money for his services. It was also provided that, in case of a failure to make the purchase and the payments at the time specified, the option and all payments made were to be forfeited. That thereafter Clayton employed complainant to sell said concession to some person who could provide the capital necessary to operate the mines thereon, and for his services, in case of a successful sale, he was to receive one-half of the profits and commissions which Clayton was to have under the option, which would be a one-eighth interest in the concession. That on September 6, 1905, complainant and defendant Chew entered into a written agreement, which is as follows:

"St. Louis, September 6, 1905.

"William P. Gaines, Austin, Texas.

"Dear Sir: Referring to your mining proposition in old Mexico now under option for \$60,000.00, Mexican, to Mr. Clayton of Minaca, Mexico, will say if the option is extended for sixty days from October 20, 1905, for the first payment of \$20,000.00, Mexican, and permission is given to sink a shaft and otherwise exploit the property, I will agree to advance \$600.00 to sink the shaft fifty feet deep as per Mr. Clayton's letter, which work is to be under my own supervision, or that of my representative. After said work is done,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



and before the expiration of the option to purchase, I will, at my option to, surrender the option or proceed if I desire. In the event I wish to go ahead with the deal, then I am to have seventy-five per cent. of the property, and Major Gaines and his associates, including Mr. Clayton, twenty-five per cent. The financing of the property will then have to be made jointly by all the parties interested. The option held by Mr. Clayton must be put in the hands of my representative before the expenditure of any monies. In the event I take over the mines the preliminary expenditures advanced shall be paid out of the first funds in the treasury.

[Signed] Phil. Chew.

"Accepted: William P. Gaines.

"Approved, for myself and associates, September 9, 1905: E. B. Hancock."

That after the execution and delivery of the above agreement, but on the same day, there was a parol agreement entered into between the same parties, whereby it was agreed that in case the defendant Chew concluded to purchase the mine under the option, a corporation should be organized, and when organized there should be conveyed to it not only the three-fourths interest of defendant Chew, but also the one-fourth interest of Clayton and plaintiff, and one-fourth of the capital stock of the corporation issued to plaintiff, one-half thereof for his own use and the other one-half for Clayton; that these shares should be placed in the hands of Chew as trustee for them, and that Chew should have the power to use said shares for the purpose of borrowing money thereon or to vote bonds to be issued by the corporation and used for the purpose of paying the purchase money and the expenses of developing and working the mine; and, in consideration of complainant agreeing to this, Chew would advance all the funds necessary to carry out the terms of the option, the same to be repaid to Chew out of the profits of the mine, Chew retaining plaintiff's and Clayton's stock as security for the advance. That neither plaintiff nor Clayton were to be required to advance any money, but all of it was to be advanced by Chew as aforesaid. That thereupon Rains and Chew entered into a conspiracy with Clayton to deprive plaintiff of his rights. In pursuance of said conspiracy, said defendants on October 16, 1905, four days before the option expired, entered into a contract with Clayton to obtain a new option from the owners for their benefit solely, and to exclude plaintiff from all rights thereunder; that a new option was obtained whereby the holder, the defendant Chew, was required to pay only \$5,000, Mexican, instead of \$20,000, Mexican, during the first week in November, 1905, and the other \$15,000 was to be paid in January, 1906, and the remainder in two equal annual payments thereafter. It was further agreed by them that Clayton was to receive a one-eighth interest, but plaintiff was to get nothing, the defendants claiming that he had forfeited all his rights by reason of his failure to contribute his share of the \$5,000, Mexican, payable in November, 1905, for which they had called on him on October 13, 1905.

The bill further charges that on November 3, 1905, Chew made the \$5,000 payment under the last option, and thereupon the owners conveyed the concession to him, although it was not to be delivered to him until the deferred payments had all been made. That immediately thereafter he assigned all his rights to the defendant Rains, and he, in accordance with the plans agreed upon between them and

Clayton, transferred the same to the Virginia C Mine, Milling & Smelting Company of Mexico, a corporation organized by Chew in the republic of Mexico with \$10,000 capital, with himself, Rains and Clayton, and two other persons as incorporators, Chew owning, in fact, all the stock. That afterwards all the stock of this corporation was transferred to the Virginia C Mine, Milling & Smelting Company of Arizona, the corporators in that company being the same as those of the Mexican corporation, the capital of the Arizona corporation being \$1,250,000, all of which stock was owned by Chew, although standing in the name of the other incorporators, the same being held in trust for him. That as soon as plaintiff ascertained these facts he called on Chew for his one-eighth interest in the corporation, which was refused, although, equitably, he was entitled thereto under the agreements aforesaid, Chew denying that he was in any manner bound by his agreements as set forth in the bill. That Rains was at all times cognizant of all the facts, including the agreements, written and verbal, between plaintiff and Chew, and that Rains holds the corporate shares in his name, but only in trust for Chew, who is the real owner of all except the one-eighth interest held in trust for Clayton. Clayton, it is charged, is a resident of Mexico, and for that reason cannot be made a party to the bill.

It is further charged that the stock of the corporation is not on the market, and cannot be purchased at any fixed value; that the mine is capable of yielding over \$10,000,000 worth of gold and copper under proper management, but there is no fixed value for it; and that Clayton and Rains are both insolvent.

The prayer of the bill is that plaintiff be decreed to be the owner of one-eighth of the stock of the Arizona Company; that Chew be adjudged a trustee of plaintiff therefor, and of one-eighth of all net profits realized out of the mine; that an accounting be had, and if it is found that there is anything due to defendants by reason of advances and expenditures he is ready to pay, and to that end deposited in court \$387.50, being the one-eighth part of the money advanced by Chew before the concession was conveyed to him.

The answer to this amended bill admits some of the allegations, and denies others. It denies specifically that Clayton employed plaintiff as charged, or that there was such an agreement between them as charged in the amended bill. It denies that there was any oral contract as alleged between plaintiff and Chew, or any other agreement than that set out in the written offer of Chew and accepted by Gaines, or that the same was ever modified or even proposed by Chew, but, on the contrary, alleges that the written proposition was the only agreement ever entered into between them. It admits that Chew employed Rains to examine the property, expending \$600 in its exploitation, but denies that he reported the mine to be very rich, although he recommended it as a good investment. That thereupon Chew decided to avail himself of the option, and on October 13, 1905, notified plaintiff thereof, and asked for \$625, American money, the equivalent of \$1,250, Mexican silver, being one-fourth of the cash payment to be made on or before October 20, 1905, to prevent a forfeiture, bu

plaintiff refused to pay the same or any part thereof. That Chew, when advised of plaintiff's refusal to furnish his share of the money, advised him that he would drop the deal and not buy under the existing option, but they deny that Rains ever advised Chew to get rid of complainant and get the assistance of Clayton to secure complainant's interest, and deny all charges of conspiracy with Clayton; but they admit that after Chew had advised complainant of the repudiation of the contract owing to plaintiff's refusal to pay his part of the purchase money due on October 20, 1905, they negotiated with the owners of the concession for a new option if the other was permitted to become forfeited. They deny that they ever claimed that plaintiff's failure to pay his share caused a forfeiture of his interest in the option, but claim that his refusal to pay said share in conformity with the terms of the contract between Chew and plaintiff released Chew from it, and he so advised plaintiff. They admit that after such notice to plaintiff they secured a new option to themselves subject to plaintiff's rights as long as the first option existed, and in November, 1905 paid \$5,000, Mexican, thereon. That this purchase was not made under the option in which plaintiff had an interest, but on a second option negotiated by Clayton for Chew, and in which latter option Gaines had no interest whatever. That in January, 1906, Chew paid the owners of the concession \$15,000, Mexican money, and agreed to pay them \$20,000 in Mexican money in January, 1907, and a like amount in January, 1908, in conformity with the terms of the option held by Chew, but not under that in which plaintiff was interested. That thereupon the owners, at Chew's request, and in conformity with the terms of the second option, conveyed the mining property to the Virginia C Mine, Milling & Smelting Company of Mexico, to which corporation Chew also caused to be conveyed other mining properties and water rights owned by him, but acquired from other persons and not covered by either option, but which were of greater value than the concession covered by the options. They admit the organization of the Arizona corporation as charged, and the transfer of all the shares of the Mexican corporation to it; but they deny that the moneys advanced by Chew have ever been repaid to him by either corporation, and that there are now large sums of money due him for moneys advanced. They admit that 60,000 shares of the Arizona corporation have been sold, but charge that all the money realized therefrom, and other large sums of money advanced by Chew in addition thereto, have been used partly in paying the purchase money for the concession, and partly in examining and operating the mines, and, while some valuable ore has been mined, none has been sold. They deny that Rains had any knowledge whatever of plaintiff's dealings with Chew, or that anything was done by either to wrong or defraud plaintiff or any other person. They deny that they were aided in their transactions by Clayton, or that Clayton had any knowledge of the agreement between plaintiff and Chew.

A general replication was filed to this answer, and a great deal of testimony was taken. The testimony is very voluminous, and although counsel have abstracted it in a somewhat condensed form (plaintiff's

abstract covers 164 typewritten pages, and defendant's 58 pages), the court had to refer to the testimony in order to determine the issues of facts.

A most important fact is whether there was an oral agreement between the parties, after the execution of the written agreement, materially modifying it as alleged in the bill. Whether oral testimony is admissible to establish this modification and new agreement, and, if so, whether the evidence necessary to establish it must be clear, unequivocal, and convincing, or whether a mere preponderance is sufficient, are questions which the court deems it unnecessary to determine in this case. But the following authorities may be consulted on those questions: Section 2496, Wigmore on Evidence; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Bohm v. Bohm, 9 Colo. 111, 10 Pac. 790, as to what evidence is necessary to establish it; and Whitney v. Hay, 181 U. S. 77, 89, 21 Sup. Ct. 537, 45 L. Ed. 758, and the leading English case, Reach v. Kennegate, 1 Ves. 125, decided by Lord Hardwick—as to whether oral evidence is admissible for the purpose of establishing a constructive trust.

A careful examination of the evidence fails to satisfy me that there is a preponderance of the evidence in favor of the plaintiff. The evidence clearly shows that Chew is a practical business man of large experience, and very careful in all his business transactions. The agreement prepared by him and accepted by the plaintiff shows that he did not intend to go into this transaction blindly, but that he wished to make a careful examination of the property before investing any money. In order to enable him to do so, the time of the life of the option being short, he made it a condition precedent, before he was to make any examination and expend any money for that purpose, that the option should be extended for 60 days from October 20, 1905, for the first payment. The most favorable view that can be taken is that the evidence is so evenly balanced that it is impossible to say that there is a preponderance in favor of either party.

In determining the other questions at issue in this cause, it is important to note that the mining concession, the subject of the negotiations between the parties, was not a contract of purchase and sale, but merely an option by which the owners of the concession obligated themselves to sell it to Clayton or his assigns upon certain terms, without any corresponding assumption on the part of Clayton to make the purchase. Besides, the option specifically provides that:

"If the buyer omits to make any one of the payments which are referred to at the end of the second clause of the contract, at the expiration of each time of payment, this contract will become nullified and without any value, the grantee losing the payments already made."

It is well settled that time is the essence of any option, and more especially does it apply where the property is of a speculative value, such as an undeveloped mine. Taylor v. Longworth, 14 Pet. 172, 10 L. Ed. 405; Richardson v. Hardwick, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; Kelsey v. Crowther, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. Ed. 1017; Woods v. McGraw, 127 Fed. 914, 63 C. C. A.

556; Kentucky Distilleries & Warehouse Co. v. Warwick Co., 109 Fed. 280, 48 C. C. A. 363; Mason v. Payne, 47 Mo. 517.

Counsel for plaintiff cite a number of decisions arising under section 2324, Rev. St. (U. S. Comp. St. 1901, p. 1426), and also cases in which the parties were partners engaged in the development of mines, but they clearly do not apply to this case, as the parties never were co-owners of any mine or mining property, nor was this a mineral entry under the laws of the United States. It was simply an option to purchase something in a foreign country which happened to be a mine. Nor do the cases cited by learned counsel for plaintiff to sustain the contention that forfeitures are not favored and will not be enforced in equity apply, for this was not, strictly speaking, a contract, but a naked option which contained a stipulation of forfeiture as hereinbefore set out.

Was Chew, by reason of the written agreement existing between him and plaintiff, occupying such a fiduciary relation towards plaintiff, that the purchase by him, after the refusal of plaintiff to furnish his proportionate share of the purchase money when due, would make the later purchase a fraud upon plaintiff's rights, and for this reason he should be charged as a trustee of a constructive trust for plaintiff's benefit? Unless plaintiff complied with the terms of that written agreement and furnished his proportionate share of the money for the first payment under the option, there could be no express trust. If any trust can be established, it must be a constructive trust, but such a trust can arise only when a person clothed in some fiduciary character, by fraud or otherwise, gains some advantage to himself. As stated by Judge Sanborn in *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176:

"The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and use by one of the parties to it of the knowledge or the interest he acquires through it (the fiduciary relation) to prevent the other from accomplishing the purpose of the relation."

Constructive trusts differ from other trusts in that they are not within the intention and contemplation of the parties at the time the contract is made from which they are construed by the court, but they are thrust upon the party contrary to his intention and against his consent. *Perry on Trusts*, § 166.

As the court finds that the verbal agreement charged in the bill has not been proved, was there anything in the written agreement to establish such a fiduciary relationship as prohibited the defendant from making the purchase after the forfeiture of the option caused by the refusal of plaintiff to contribute his share of the purchase money as required by the agreement? In connection with this matter, it is important to call attention to some of the testimony.

When the contract between plaintiff and defendant, Chew, was entered into, Chew insisted, as a condition precedent, upon an extension of the option in order to give him an opportunity to have an investigation made of the property. The plaintiff wired to Clayton asking for such an extension, and received in reply a telegram from Clayton, "Extension granted upon conditions," referring to a letter he had writ-

ten explaining the conditions. This letter, it seems, had been sent to Austin, Tex., the home of the plaintiff, who was then in St. Louis negotiating with Chew. He thereupon telegraphed to Hancock, who also had an interest in this option, to open that letter and wire him at St. Louis what it contained. Hancock wired back that the conditions referred to were that an extension for the first payment would be granted, provided work was commenced at once, but, in truth and in fact, one of the conditions stated in the letter was that a payment of \$5,000 was to be made at once, and the other \$15,000 in January.

It is but proper to say that while in St. Louis plaintiff apparently acted in good faith, and showed all telegrams which he sent to and received from his associates to the defendant Chew, but after his return to Austin, when he saw the letter of Clayton, which stated the conditions upon which the extension was granted, namely, "upon the payment of \$5,000.00, Mexican, on October 20, 1905, an extension of ninety days will be granted, and said \$5,000.00 to be deducted from first payment of twenty thousand dollars to be paid January 20, 1906," he concealed that fact from the defendant. On September 9th, after his return to Austin, and after seeing the letter and having Hancock approve the agreement, he wired and wrote to Chew in relation to the agreement, but failed to mention the conditions of the extension. On September 12th he wrote again to Mr. Chew, saying:

"Mr. Hancock says that Mr. Clayton thinks the owners of the mine might want you to put up a small amount of money after examination of the mine if it should prove satisfactory; but he also says he is satisfied Mr. Rains could avoid this if he goes down prepared to begin development work in the event the mine is satisfactory on inspection,"

—never mentioning the conditions contained in Clayton's letter. It is thus shown that after he returned to Austin, and before he was called upon to pay his proportion of the \$5,000 due October 20th, he had seen the letter from Clayton and knew that one of the conditions mentioned in Clayton's telegram to him while in St. Louis was that payment of \$5,000 was to be made on the day the first installment was due, and that the option was only extended as to the payment of the other \$15,000 under the agreement. On September 23d Chew wrote to Gaines complaining of these facts, and saying:

"I am free to say, and so stated to you repeatedly, that if it was necessary to pay money on this mine before I could exploit it, I would not touch it, and would, therefore, not have been out the money expended by Mr. Rains so far."

Not only was there no obligation on the part of Chew to advance the money for him, but the contract specifically provided that the financing of the property would have to be made jointly by all the parties interested. There was no obligation on the part of Chew to advance the money for him, and plaintiff knew that the failure to pay the money according to the terms of the option as modified would forfeit it. After having been called on by Chew on October 13th, his refusal to pay, he having at that time full knowledge of the terms, as shown by the letter of Mr. Clayton to him, worked a forfeiture of the option.

The vendors thereupon had a right to sell to any other persons, and there is no principle of equity jurisprudence which would prevent Chew, after that forfeiture, from entering into a new agreement with the vendors. This last agreement was, in fact, outside of the terms of the agreement between plaintiff and Chew, and comes within the rule laid down in *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169. The result might have been different if Chew had failed to call upon plaintiff for his proportion of the money, or in any way misled him to his detriment, or prevented him from carrying out his part of the agreement. But there is no such proof in this case. Chew called on plaintiff for his share of the money in ample time to enable him to furnish it. He refused to do so with full knowledge of the fact that unless the \$5,000 was paid on October 20th all rights under the option would be forfeited. He permitted the forfeiture to take place, and thereafter had no further interest in the purchase of the mine, nor was there anything which made Chew occupy a fiduciary relation towards him. Had the purchase been made by a stranger, although he had knowledge of all the agreements between Gaines and Chew, he could have made no claim for an interest. He had been advised that Chew would not advance his share of the money, and upon his failure to furnish it the agreement was treated as at an end. Nothing was done by Chew to prevent him from carrying out the agreement, and, when he refused to do so, Chew had the same rights as a stranger would have had.

From a careful consideration of all the testimony in this case, it is impossible to escape the conclusion that plaintiff had no intention of ever paying his share of the money necessary to purchase the mine and to exploit it; that he intended to make Chew advance all the money, and, if the mine should prove successful, claim his share in it, and, should it prove unsuccessful, let Chew bear the entire loss. Mr. Von Phul, his partner in the transaction, in a letter to him dated October 13, 1905, after Chew had called on them for their proportion of the \$5,000, said:

"I had worked myself up to believing, thinking, that I had a big fortune to fall back on in my old age. All gone up in smoke."

Mining claims are not only subject to great and sudden fluctuations in value, but it is impossible to tell, even after careful examination by experts, whether they will prove valuable or not. What may appear to be a vein of great value may turn out to be a pocket, and it is for this reason that courts of equity will refuse to grant relief in such cases, if the suit is not brought within a comparatively short period after the deprivation of his rights became known to him. In view of the concealment of the terms upon which the option was to be extended, Chew was justified in losing confidence in the integrity of the plaintiff, and he had a right to stand upon the strict letter of his agreement with plaintiff.

In the opinion of the court, there is no equity in plaintiff's claim, and the bill will be dismissed accordingly.

## FARRELL et al. v. UNITED STATES.

(District Court, E. D. Arkansas, W. D. February 20, 1909.)

## 1. INTERNAL REVENUE (§ 8\*)—LEGACY TAXES—CONSTRUCTION OF STATUTE—"IMPOSED."

A legacy tax under War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), was not "imposed" within the meaning of the saving clause of the repealing act of April 12, 1902, c. 500, § 7, 32 Stat. 97 (U. S. Comp. St. Supp. 1907, p. 649), until its assessment, and there remained no power to make a valid assessment after July 1, 1902, when the repealing act took effect.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3440.]

## 2. INTERNAL REVENUE (§ 8\*)—LEGACY TAXES—INTERESTS SUBJECT TO TAX.

The interest of an heir in personal property left by an intestate is wholly contingent until the estate becomes distributable under the laws of the state by the expiration of the time for the proving and payment of claims, and where such time did not expire until after July 1, 1902, the share of an heir was not subject to legacy tax provided for by War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), it being provided by Act June 27, 1902, c. 1160, § 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1907, p. 652), that no such tax should thereafter be assessed or imposed on any contingent beneficial interest which should not become absolutely vested in possession or enjoyment prior to said July 1, 1902.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 11; Dec. Dig. § 8.\*]

## At Law.

The plaintiffs, heirs of Elizabeth Farrell, deceased, seek to recover from the United States the sum of \$901.86, money alleged to have been unlawfully collected by the collector of internal revenue as a legacy tax from the administrator of their mother's estate. The allegations of the complaint are that the plaintiffs are residents of this district, and that their mother died in the city of Little Rock, where she resided at the time, on June 3, 1901, intestate, leaving an estate consisting of personal property, and the plaintiffs as her sole heirs at law; that on February 11, 1903, the said estate was assessed, under Act Cong. June 13, 1898 (chapter 448, § 1, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286]), a tax of the amount claimed as the distributive shares going to plaintiffs as her heirs; that on the 24th of February, 1903, the tax was paid to the collector upon his demand, by the administrator of the estate, out of the funds of said estate, which payment reduced by an amount equal to one-third of said tax each of the said three equal distributive shares accruing and thereafter descending under the laws of the state of Arkansas to plaintiffs; that the distribution of said estate did not take place until September 29, 1903, and that until that time no distributive shares of the value of \$10,000 or more took effect in the possession or enjoyment of them; that the distributive shares were, at the time the tax was assessed, contingent beneficial interests which did not pass to, or vest in the possession or enjoyment of, said distributees until said September 29, 1903, on which day it was determined that there would be any shares of \$10,000 or more accruing to plaintiffs; that under the provisions of the act of Congress approved June 27, 1902 (Act June 27, 1902, c. 1160, § 1, 32 Stat. 406 [U. S. Comp. St. Supp. 1907, p. 652]), plaintiffs are entitled to recover the amount of said tax; that on December 27, 1907, plaintiffs filed in due form, in accordance with the rules and regulations prescribed by the Secretary of the Treasury under the act of June 27, 1902, their claim of refunding of said tax, which claim was rejected

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



by the commissioner of internal revenue. Wherefore, they pray judgment for said sum of money.

The answer denies all the allegations, and in addition thereto pleads the statute of limitations of two years under section 3227, U. S. Rev. St. (U. S. Comp. St. 1901, p. 2089). The action is brought under the Tucker act approved March 3, 1887, c. 359, § 1, 24 Stat. 505 (U. S. Comp. St. 1901, p. 753), and, in conformity with section 7 of that act the court makes the following specific findings of facts:

That the plaintiffs R. E. Farrell, Omer Farrell, and Oscar Davis, administrator of the estate of Elizabeth Farrell, deceased, reside in this division and district, and the plaintiff William E. Farrell resides in the state of Louisiana, and that the plaintiffs Farrell are the real parties in interest in this suit; that Elizabeth Farrell died intestate in the city of Little Rock, county of Pulaski, state of Arkansas, of which place she was then a resident and citizen, on June 3, 1901, leaving an estate consisting of personal property, and that the plaintiffs R. E. Farrell, William E. Farrell, and Omer Farrell were her sons and sole heirs at law; that Oscar Davis was duly appointed as administrator of the estate of the deceased by the probate court of Pulaski county, state of Arkansas, on July 23, 1901; that on the 11th day of February, 1903, the estate of Elizabeth Farrell, deceased, was assessed under the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war revenue expenditures and for other purposes," an internal revenue tax in the sum of \$901.86; that that assessment was upon personal property belonging to said estate, and was based upon the total amount of the said personal property, which exceeded in value \$10,000; that the tax, having been demanded by the collector of internal revenue for the district of Arkansas, was, on the 24th day of February, 1903, paid to the said collector by the administrator aforesaid out of the funds of said estate; that said payment was made without protest, and reduced by an amount equal to one-third of the amount paid each of the three equal distributive shares accruing to the plaintiffs as sole heirs at law of the deceased; that the estate was in the hands of the administrator and in process of administration on September 29, 1903, upon which date distribution to said heirs was had, and that until said day said distributees and heirs were not in actual physical possession or enjoyment of their respective shares or any part thereof; that on December 27, 1907, the plaintiffs filed an application with the collector of internal revenue for a refund of the said tax in due form and in accordance with the rules and regulations of the Secretary of the Treasury in that behalf made under the act of June 27, 1902, but which claim was rejected by the commissioner of internal revenue, to whom it had been transmitted on February 12, 1908. This suit was instituted September 22, 1908.

John Bruce Cox, for plaintiffs.

William G. Whipple, U. S. Dist. Atty.

TRIEBER, District Judge (after stating the facts as above). Section 29 of the act of June 13, 1898, c. 448, 30 Stat. 448 (U. S. Comp. St. 1901, p. 2307), entitled "An act to provide ways and means to meet war expenditures and for other purposes," as amended by the act of March 2, 1901, c. 806, § 10, 31 Stat. 946 (U. S. Comp. St. 1901, p. 2307), provided for the collection of a tax on legacies or distributive shares arising from personal property passed either by will or the intestate laws of any state or territory, or any personal property or interest therein transferred by deed, grant, bargain, sale, or gift, made and intended to take effect in possession or enjoyment after the death of grantor, etc. Section 30 of this act provides that:

"The tax or duty aforesaid shall be due and payable in one year after the death of the testator, and shall be a lien and charge upon the property of

every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator or trustee having in charge or trust any legacy or distributive share as aforesaid shall give notice thereof in writing to the collector or deputy collector of the district where the deviser, grantor or bargainor last resided within thirty days after he shall have taken charge of such trust," etc.

By section 7 of the act of April 12, 1902, c. 500, 32 Stat. 97 (U. S. Comp. St. Supp. 1907, p. 649), section 29 of the act of July 13, 1898, was repealed, the repeal to take effect July 1, 1902. Section 3 of the act of June 27, 1902, c. 1160, 32 Stat. 406 (U. S. Comp. St. Supp. 1907, p. 652), provides:

"That in all cases where an executor, administrator or trustee shall have paid, or shall thereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June 13, 1898, and amendments thereof, the Secretary of the Treasury be and he is hereby authorized and directed to refund out of any money in the treasury, not otherwise appropriated, upon proper application being made to the commissioner of internal revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent and beneficial interests which shall not have become vested prior to July 1, 1902, and no tax shall hereafter be assessed or imposed under said act approved June 13, 1898, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902."

As the act applies only to "contingent beneficial interests which shall not have become vested prior to July 1, 1902," it is important to determine whether the distributive shares of these plaintiffs, as sole heirs of their mother, who died intestate in the state of Arkansas, where she resided at the time, on June 3, 1901, and letters of administration were issued to Mr. Davis on July 23, 1901, were contingent interests which did not become vested prior to July 1, 1902. Under the laws of the state of Arkansas, the title to all the personalty of a deceased person vests in the executor if there is a will, and the administrator if he died intestate, and they are the only persons who are authorized to collect debts and maintain actions for the recovery of the assets of the estate. *Hill's Adm'rs v. Mitchell*, 5 Ark. 608; *Lemon's Heirs v. Rector*, 15 Ark. 436; *Pryor v. Ryburn*, 16 Ark. 671; *Anthony v. Peay*, 18 Ark. 24; *Pope v. Boyd*, 22 Ark. 535; *Jacks v. Adair*, 31 Ark. 616, 625; *Whelan v. Edwards*, 31 Ark. 723; *Purcell v. Carter*, 45 Ark. 299; *George v. Elms*, 46 Ark. 260. Payment to the heir of a debt due to the deceased is no satisfaction, and will not legally discharge him from liability to the administrator when legally appointed. *McCustian v. Ramey*, 33 Ark. 141. Creditors of an estate of a deceased person have two years from the granting of letters of administration to present their claims for allowance (section 110, Kirby's Dig. Ark.), and no executor or administrator shall be compelled to pay legacies or distributive shares until two years after the date of his letters, unless ordered by the court so to do; and not then, until bond with good and sufficient security be given by the legatee or distributee to refund his proportion of any debt which may afterwards be established against the estate, and the costs attending the record thereof (section 160, Kirby's Dig. Ark.).

The intestate died June 3, 1901, and the administrator of the estate was appointed July 23, 1901. The two years within which creditors could exhibit their claims expired on July 23, 1903.

In *Refeld v. Bellette*, 14 Ark. 148, it was held that under these statutes the estate of a testator passes, upon his death, into the hands of his executor, in the first place to pay debts, and the right of a legatee to his legacy is suspended until the assent of the executor or the lapse of time for the settlement of his estate, as the devisee takes the legacy subject to the payment of the debts. To this effect is *Crow v. Powers*, 19 Ark. 424, 438, where it was held that a slave emancipated by will cannot obtain his freedom until two years within which debts could be proved against the estate have expired and the debts paid. The court there said:

"Supposing, then, that the plaintiff derived his title to freedom from the will alone, and entertaining the views just expressed in reference to the necessity of having the executor's assent to the legacy of freedom before the slave emancipated can assert his right thereto in a court of law, and the plaintiff, in the case before us, having failed to prove such assent, or that two years after defendant's administration of the estate of Crow, under the will, had expired at the time this suit was brought, we are constrained to hold that the first instruction given in the court below, at the instance of the defendant, was rightly given."

The instruction thus approved was:

"That if the jury believe, from the evidence, that plaintiff was a slave of Eli Crow in his lifetime, that he was emancipated by the will of said Eli Crow, that said Eli is dead, and said will has been probated, and said defendant is administrator of said Eli, with the will annexed, and that two years had not elapsed since the date of said letters before this suit was commenced, they must find for the defendant."

Therefore, until the estate is ready for distribution, which cannot be done under the laws of this state until the expiration of two years from the date the letters of administration were granted and the presentation and allowance of claims barred by the statute of non-claims, there can be properly no assessment of the tax, as it is impossible to determine how much, if anything, will go to the heirs. In the case at bar the assessment of the tax now sued for was made on February 11, 1903, over seven months after the repeal of the act had taken effect.

In *United States v. Marion Trust Co.*, 143 Fed. 301, 74 C. C. A. 439, the identical question was before the United States Circuit Court of Appeals for the Seventh Circuit, and it was there held that an assessment is a prerequisite to the existence of the tax, and until the estate is ready to pass without diminution to the heir no assessment can take place. It was further held that, after the repeal of the act providing for the tax, no valid assessment could be made, and without a valid assessment the tax cannot be collected.

The contention of the illegality of the collection of the tax must also be sustained on another ground. As has been shown, section 3 of the act of June 27, 1902, c. 1160, 32 Stat. 406 (U. S. Comp. St. Supp. 1907, p. 652), provides:

"And no tax shall thereafter be assessed or imposed under said act approved June 13, 1898, upon or in respect of any contingent beneficial interest which

shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902."

From what has been stated hereinbefore, it is clear that, until the time within which claims against the estate of a deceased person may be presented has expired, the interests of the heirs or devisees are purely contingent, and they are neither entitled to the possession nor enjoyment of any part of the estate, and, in fact, may never receive anything from the estate, for the debts proved against it within the time allowed by statute may consume all the personalty of the estate. It may, and has frequently happened, that a person dies leaving an estate which inventories hundreds of thousands of dollars in personalty, and yet upon final settlement after the payment of the debts and assignment of dower, when there is a widow, may leave nothing for distribution among the heirs or devisees, and may even prove insufficient to pay all the debts in full. Would, in such a case, the tax accrue on the supposed value of the estate upon the contingency that upon final settlement the heirs may receive the estate as inventoried, less the debts probated at the time of the assessment of the tax, although there is another year within which debts may be probated?

After July 1, 1902, under the act of June 27, 1902, no tax was to be assessed or imposed upon or in respect of any contingent beneficial interest which shall not have become absolutely vested in possession or enjoyment prior thereto. On that date none of the distributive shares had vested in the plaintiffs, in possession or enjoyment, nor were they entitled thereto. They could maintain no action therefor against the administrator under the laws of the state then in force. Since then the statute of non-claims has been reduced to one year. Act Ark. May 28, 1907 (Laws 1907, p. 1170, No. 438).

In *Vanderbilt v. Eidman*, 196 U. S. 480, 25 S. Ct. 331, 49 L. Ed. 563, where this provision of the statute was before the court, it was held, after a careful review of the provisions of section 29 of the act of 1898:

"In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached; and such is the construction which has been affixed to some state statutes, the text of which lent themselves more strongly to the construction that it was the intention to subject to immediate taxation merely technical interests, without regard to a present right to possess or enjoy."

It was further said in that case, in discussing the effect of the refunding act:

"In view of the provision for refunding, we see no escape from the conclusion that this statute was in a sense declaratory of what we hold was the true construction of the act of 1898, and which, as we have seen, had prevailed prior to the amendment of March 2, 1901, and which was only departed from by the administrative officers under a misconception of the import of that amendatory act."

To the same effect are *Herold v. Shanley*, 146 Fed. 20, 76 C. C. A. 478; *Disston v. McClain*, 147 Fed. 114, 77 C. C. A. 340; *Lynch v. Union Trust Co. (C. C. A.)* 164 Fed. 161.

The interest of any heir in the personalty of the deceased, until the ascertainment of the amount which he is to receive, can at most be said to be a "mere technically vested interest," and such an interest the Supreme Court in *Vanderbilt v. Eidman*, *supra*, said is not subject to the tax under the war revenue act.

From the foregoing authorities the law may be stated to be that, to subject the estate to this tax, the estate must be absolutely vested in the heir, or at least his right to receive it must be absolute, or, if not entitled to the possession, entitled to its enjoyment, and if the latter, then the tax is on the value of the estate he is permitted to enjoy under the devise. That is the result of the decision of the United States Circuit Court of Appeals for the Eighth Circuit in *Westhus v. Union Trust Co.*, 164 Fed. 795. In the case at bar the heirs neither had the possession nor enjoyment, nor were they, under the laws of the state of Arkansas, entitled to either until the two years within which claims could be established against the estate had expired, and this did not occur until some time after the repeal of the tax had taken effect.

This leaves for determination the plea of the two years' statute of limitations. On behalf of the government it is contended that this action is controlled by sections 3226, 3227, and 3228, Rev. St. (U. S. Comp. St. 1901, pp. 2088, 2089), while on the part of the plaintiffs the contention is that as the act of June 27, 1902, is a refunding act, and no provision for the recovery of the tax is made in case of a wrongful refusal by the Secretary of Treasury, the only remedy is by action under the act of March 3, 1887, c. 359, § 1, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), known as the "Tucker Act," and that by the provisions of section 2 of that act the limitation is six years.

Internal revenue taxes voluntarily paid cannot be recovered by suit unless the provisions of sections 3226, 3227, and 3228 have been complied with. *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561; *James v. Hicks*, 110 U. S. 272, 4 Sup. Ct. 628, 28 L. Ed. 144; *Kings County Savings Institution v. Blair*, 116 U. S. 200, 6 Sup. Ct. 353, 29 L. Ed. 65; *Chesebrough v. United States*, 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432; *Christie Street Commission Co. v. United States*, 136 Fed. 326, 69 C. C. A. 464. Nor does the fact that the suit is instituted against the United States under the Tucker act, instead of under section 3227, Rev. St., change this rule. In *Christie Street Commission Company v. United States*, Judge Sanborn, who delivered the opinion of the court in that case, said:

"If Congress had affirmatively declared by this law that all actions allowed under it might be commenced at any time within six years after the respective causes accrue, there might be some chance for an argument that there was an inconsistency between the limitation of this act and that of section 3227 which would work a repeal of the latter. But there is certainly no repugnancy between a general law to the effect that no action upon any of several classes of cases shall be brought after six years from the accrual of the cause of action and a statute that no action upon any of a specific class of these cases shall be sustained unless it is commenced within two years of the time when the cause of action arose; and there is no inconsistency between the two limi-

tations. The act of 1887 neither repealed nor modified the provisions of section 3227."

In *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 26 Sup. Ct. 133, 50 L. Ed. 281, the same rule was laid down that a general act does not repeal by replication an earlier special act; and in *United States v. Greathouse*, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130, the same rule was applied to the Tucker act.

But is this an action for the recovery of an internal revenue tax alleged to have been erroneously or illegally assessed or collected within the meaning of section 3227, Rev. St.? As has been stated heretofore, under the laws of the state of Arkansas, the distributive shares of the plaintiffs, as heirs of their mother, who died intestate on June 3, 1901, and letters of administration were issued on July 23, 1901, were contingent, and did not become vested prior to July 1, 1902. The act of 1902, in so far as it applies to payments made without protest prior to its passage, was clearly only a free gift of Congress, for having been paid voluntarily, without protest, the claim for refund was moral only and not legal, and for this reason no action could have been maintained for a refund without the aid of that act. This was the ground assigned by Judge Lowell in *Thacher v. United States* (C. C.) 149 Fed. 902, who further held that the cause of action is not based upon the illegality of the tax, but only seeks to enforce the free bounty of the government given by that act. He then proceeds:

"If section 3228 be applicable here by analogy, yet the two years therein mentioned must run, if to run at all, not from the payment of tax, which was ineffective to create the claim here in suit, but from the passage of the act providing the bounty which the petitioners seek to obtain."

This is the general rule applying to statutes of limitations affecting rights springing into existence by virtue of the new act. *Lewis v. Lewis*, 7 How. 776, 12 L. Ed. 909; *Sohn v. Watterson*, 17 Wall. 596, 21 L. Ed. 737; *In re Wehrli* (D. C.) 157 Fed. 938. This is a reasonable construction, and when applied to payments made prior to the passage of the act gives the parties ample time to present their claims to the commissioner of internal revenue, and upon his rejection to institute suit therefor. As to payments made after the enactment of the statute and after the repeal of the act went into effect, there is certainly no reason why the provisions of these sections (3226, 3227, and 3228) should not apply. The collection of the tax in 1903 was clearly illegal and without authority of law. As every one is presumed to know the law, the plaintiffs are presumed to have known it, and their duty was to make protest at the time, and in any event to institute the action to recover the money paid within two years from the time of payment. This is the effect of the decision of the United States Circuit Court of Appeals for this circuit in *Christie Street Commission Company v. United States*, supra, where Judge Sanborn, in a very elaborate opinion, the reasoning of which is unsailable, reached the conclusion that:

"This class of actions, the class founded under a law of Congress, was not enlarged by the act of 1887, but it remained bound by the same limitations and conditioned by the same words after as before the passage of that act.

\* \* \* It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the statutory limitations of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued."

Were this an action to recover money paid prior to the passage of the act, it may be possible that the contention of counsel for plaintiffs could be sustained, but this tax was assessed and payment thereof made long after the enactment of the statute and the repeal of the tax had taken effect. The act covers not only payments made before its enactment, but also payments made thereafter. The object of inserting the latter clause was, no doubt, prompted by the fact that as the act was introduced several months before its final passage, and the repeal was not to take effect until July 1st, Congress intended to provide for the refunding of any such collections made, if wrongful, although made after the enactment of the statute of June 27, 1902, but prior to July 1st. As has been hereinbefore stated, an assessment of this tax, and consequently its collection after July 1, 1902, was without any authority of law, and for this reason was clearly illegally assessed and collected. It was for the recovery of such collections that sections 3226, 3227, and 3228 were enacted. The act of June 27, 1902, was not necessary in order to enable the plaintiffs to maintain this action, as by section 7 of the act of April 12, 1902, the statute under which the collection was made had been repealed to take effect July 1, 1902. These conclusions make it unnecessary to determine whether, under the provisions of section 29 of the war revenue act, contingent interests of heirs of one who died intestate were subject to the tax at all, or whether the tax was limited to personalty or an interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor.

From what has been said it follows, as of course, that as this action was not brought within two years of the payment made by the administrator of the estate, the action is barred by limitation, and judgment will be entered for the defendant.

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TURNER v. SEEP et al.

(Circuit Court, E. D. Oklahoma. February 10, 1909.)

No. 233.

1. INDIANS (§ 16\*)—APPROVAL OF LEASES—POWERS AND DUTIES OF ASSISTANT SECRETARY OF THE INTERIOR—DELEGATION.

Under Rev. St. § 439 (U. S. Comp. St. 1901, p. 249), which provides that "the Assistant Secretary of the Interior shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary or may be required by law," the Secretary may delegate to the Assistant Secretary authority to approve leases of Indian lands and assignments

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereof, and, so long as such authority remains unrevoked, the approval of the Assistant Secretary is equivalent to that of the Secretary.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.\*]

2. INDIANS (§ 16\*)—LANDS—ASSIGNMENT OF OIL LEASE.

Where an oil and gas lease executed by an Indian in the Indian Territory on a form prescribed by the Interior Department expressly provided that no sublease or assignment of any interest therein could be made without the written consent of the lessor and the Secretary of the Interior, and any attempted assignment or transfer without such consent should be void, a subsequent regulation of the department which contained no requirement of the lessor's consent in such cases could not validate an assignment of such lease made without the lessor's consent.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.\*]

3. MINES AND MINERALS (§ 74\*)—OIL LEASE—VOID ASSIGNMENT—RIGHTS OF LESSOR—DAMAGES.

In a suit in equity to recover land from trespassers who had drilled oil wells thereon and for an accounting for the oil taken, where it appeared that defendants had gone into possession under a void assignment of a lease executed by complainant and had expended large sums in good faith in the mistaken belief that they had a lawful right to enter, they will not be required to account for the full value of the oil taken after it was produced, but only for its value in the ground as measured by the royalty complainant was to receive under the lease.

Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 202; Dec. Dig. § 74.\*]

M. C. Reville, K. S. Murchison, and A. A. Davidson, for complainant.

Zevely, Givens & Smith and Eugene M. Mackey, for respondents.

CAMPBELL, District Judge. Susan Turner, the plaintiff herein, is a full-blooded Cherokee Indian, and at the time of the executing of the lease hereinafter mentioned was a minor. On November 16, 1905, J. T. Parks, who, prior to that date, had been regularly appointed the plaintiff's legal guardian, executed to the Midland Oil Company, one of the defendants, an oil and gas mining lease covering the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , of section 25, Tp. 25 north, range 16 east, in the Cherokee Nation, in the Indian Territory, which land was a portion of the allotment of the plaintiff. The lease was executed upon the form prescribed at the time by the Secretary of the Interior, and was made for a term extending to December 4, 1908. In the execution of this lease the guardian acted under an order of the United States Court for the Northern District of the Indian Territory, sitting at Tahlequah, which court had at that time jurisdiction of such guardianship matters under the laws then in force. Thereafter, on December 9, 1905, the lease was filed with the United States Indian agent at Muskogee, to be forwarded to the Secretary of the Interior for his approval. In addition to filing the lease with the United States Indian agent, it was necessary, under the rules and regulations of the Secretary of the Interior then in force, that the lessee in such cases also file an application to accompany the lease, upon a form prepared and pre-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.



scribed by the Secretary of the Interior, setting forth certain information required by the department. The application to accompany this lease was not filed by the lessee, the Midland Oil Company, until September 5, 1906. One of the provisions of the lease was as follows:

"And it is mutually understood and agreed that no sub-lease assignment, or transfer of this lease or of any interest therein or thereunder can be directly or indirectly made without the written consent thereto of the lessor and the Secretary of the Interior first obtained, and that any such assignment or transfer made or attempted without such consent shall be void."

On the 29th day of April, 1907, the Midland Oil Company executed to William J. Seep, of Coffeyville, Kan., and Theodore N. Barnsdall, of Pittsburg, Pa., a written instrument purporting to be an assignment of this lease to Barnsdall and Seep. And on the same date, the said Barnsdall and Seep executed a written instrument styled an "acceptance" of such assignment. At the time of the execution of these instruments, the lease had not been approved by the Secretary of the Interior, nor had the plaintiff or her guardian consented either verbally or in writing to the assignment; but on June 18th, following, both the lease and assignment were approved by the Assistant Secretary of the Interior, as appears from an indorsement thereon reading as follows:

"Department of the Interior, Washington, D. C., June 18th, 1907. Lease and assignment approved as recommended. Jesse E. Wilson, Asst. Secretary of the Interior."

The Midland Oil Company never took possession of this property under its lease. The evidence shows, however, that early in the year 1906, within a few months after the date of the execution of the lease, W. J. Seep, appearing to act for Barnsdall and himself, went upon this property, which consisted of about 50 acres of land, and proceeded to sink oil wells thereon until it had developed 12 producing wells. Pumps were put in, and the oil was drawn and delivered to the Prairie Oil & Gas Company, a corporation engaged in the business of buying and piping oil from that field. Early in January, 1907, the guardian having been advised that developments were being made upon the land, visited the property and found Seep in possession, and oil wells sunk on the land and all equipment set for drawing oil from the land—tanks erected, pipes laid, and engine and engine house, and a man in charge of the land. Upon inquiry at the office of the Prairie Oil & Gas Company, he learned that they were taking the oil from the land, and that it was being credited to Barnsdall and Seep.

On March 7th, following, he filed this action, styled a "complaint in equity," in the United States Court for the Northern District of the Indian Territory, sitting at Tahlequah, setting up the minority of the plaintiff, his guardianship, the execution of the lease, and the fact that it had never been approved by the Secretary of the Interior; that Barnsdall and Seep were unlawfully in possession of the land, and withholding the same from the plaintiff, destroying the timber thereon, and withdrawing the oil therefrom, to the irreparable injury of the plaintiff; and praying that a receiver be appointed pending the action, that the defendants be restrained from interfering with the

plaintiff's possession and peaceful enjoyment of the premises and from removing the oil therefrom, and that the defendants be required to account to the plaintiff for the timber cut from the land and the oil and gas or other mineral taken and extracted therefrom, and that plaintiff have judgment therefor, and that she be adjudged and decreed the exclusive possession of her said allotment. A receiver was appointed by the court, pending the litigation, and the receivership still continues. To this complaint the Prairie Oil & Gas Company filed its separate answer, disclaiming any interest in the property, and denying that it was in any way in collusion with the other defendants in the premises, and praying that the complaint be dismissed in so far as it was concerned. Subsequently, this action was dismissed as to that company.

On November 5, 1907, the defendants, Seep and Barnsdall and the Midland Oil Company, also filed their separate answers, admitting the execution of the lease to the Midland Oil Company, and alleging its approval by the Secretary of the Interior on the 18th day of June, 1907, setting up also the execution and approval of the assignment from the Midland Oil Company to Barnsdall and Seep, and denying the allegations of the complaint with reference to the conversion of oil and timber by them from the land, and praying that the receiver be discharged and that the complaint be dismissed as against them. By replication thereafter filed, the plaintiff denied the approval of the lease by the Secretary of the Interior, and also denied the assignment of the same. It is contended by the plaintiff that the Assistant Secretary of the Interior had no authority to approve the lease, and that the sole authority to do so is vested personally in the Secretary of the Interior himself. By the Revised Statutes of the United States, it is provided:

"Sec. 438. There shall be in the Department of the Interior an Assistant Secretary of the Interior, who shall be appointed by the President by and with the advice and consent of the Senate, and shall be entitled to a salary of six thousand dollars a year, to be paid monthly." U. S. Comp. St. 1901, p. 248.

"Sec. 439. The Assistant Secretary of the Interior shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary or may be required by law." U. S. Comp. St. 1901, p. 249.

Section 439, above quoted, was construed by Attorney General A. H. Garland, in an opinion rendered by him on July 30, 1886, 18 Op. Atty. Gen. 432, in connection with section 3683 (U. S. Comp. St. 1901, p. 2456), which reads as follows:

"No part of the contingent funds appropriated by any department, bureau, or office shall be applied to the purchase of any articles, except such as the head of the department shall deem necessary and proper to carry on the business of the department, bureau, or office, and shall by written order direct to be procured."

The question arose as to whether or not the Assistant Secretary of the Interior, acting under direction of the Secretary of the Interior, might be considered "the head of the department," as the term is used in section 3683. In the course of the opinion, Mr. Garland says:

"This section 439, in other words, empowers the Secretary to make the assistant, as it were, his deputy in all things. It follows, then, that the Secretary of the Interior can lawfully devolve the authority vested in him by section 3683, Rev. St., upon Asst. Secretary of the Interior. This is entirely consistent with my opinion of the 16th inst., to which you refer, which is in effect that the duty mentioned in section 3683 can only be exercised by the head of the department, and cannot be transferred to an inferior office. So long as the powers delegated to an Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the former is co-ordinate and concurrent with that of the latter."

In a later opinion, dated March 31, 1888, found in 19 Op. Atty. Gen. 133, Mr. Garland holds that under section 439 the consideration and determination of appeals to the Secretary of the Interior from the action of the Commissioner of the General Land Office may be made by the Assistant Secretary of the Interior, if the Secretary shall by regulation devolve the performance of such duty upon him.

The written statement of Jesse E. Wilson, Assistant Secretary of the Interior, was admitted in evidence by stipulation of the parties, to be given the same effect as a deposition, in which he states that on June 18, 1907, he approved the lease and assignment thereof, herein referred to, as Assistant Secretary of the Interior, and in which statement he also says:

"I further state that I was on said 18th day of June, 1907, and am now, Asst. Secretary of the Interior, and that on the said date last mentioned the approving of said lease and said transfer were duties devolving upon me as Asst. Secretary of the Interior by reason of the fact that said duties were duly prescribed by the Secretary of the Interior and devolved upon me as Asst. Secretary of the Interior by reason of the fact that said acts had been by the Secretary of the Interior duly prescribed, and I was directed and required by him to act in the premises. [Signed] Jesse E. Wilson, Asst. Secretary of the Interior."

It is my opinion that section 439 empowers the Secretary to delegate to the Assistant Secretary the authority to approve leases and assignments of leases, and that, so long as the powers so delegated to the Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the Assistant Secretary is co-ordinate and concurrent with that of the Secretary. I am therefore of the opinion that the approval of the lease and assignment in controversy by the Assistant Secretary of the Interior, under the circumstances of this case, was equivalent to approval by the Secretary himself.

The approval of the lease and the assignment would relate back to the date of execution of the respective instruments, and would make them valid instruments from the dates of their execution, if all the other requirements necessary to their validity have been observed (*Pickering v. Lomax*, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716), unless it appears that the parties, by their own acts in the meantime, have abandoned or invalidated them.

As stated before, the Midland Oil Company never had possession of the property under the lease, and are not now claiming possession. Seep and Barnsdall are, however, in possession of the property and claim, under the alleged assignment from the Midland

Oil Company. We have seen that the lease provided that it should not be assigned without the written consent of the lessor, and that any attempt to assign without his consent should be void. We have further seen that the assignment relied upon was made without the consent, either verbal or written, of the lessor, and, so far as the record shows, without his knowledge or any attempt to secure his consent. In fact, it was not made until some time after this action was commenced. On January 11, 1907, just seven days prior to the date of the approval of the alleged assignment by the Assistant Secretary, the following regulation relative to assignments was promulgated.

"Assignments.

"40. No lease or any interest therein, by working or drilling contract or otherwise, or the use thereof, directly or indirectly, shall be sublet, assigned, or transferred without the consent of the Secretary of the Interior; and if at any time the Secretary of the Interior is satisfied that the provisions of any lease, or that any of the regulations heretofore or that may be hereafter prescribed have been violated, he reserves authority, after ten days' notice to the parties, to cancel and annul such lease without resorting to the courts and without further proceedings, and the lessor shall be entitled to immediate possession of the land."

It will be noted that the regulation is silent as to any requirement that the lessor shall also consent to the assignment, and it is pointed out that in subsequent forms of leases, prepared in the Interior Department, the requirement that the consent of the lessor to an assignment shall also be procured is left out. It is therefore argued that notwithstanding the provision in the lease in controversy that no assignment should be made without the lessor's consent, still it was a matter which the Secretary could control, and that, subsequent to the promulgation of the regulation quoted, the consent or approval of the Secretary validated the assignment made without the lessor's consent, even in cases where such consent was provided for in the lease. To this I cannot agree. The Secretary could only approve or disapprove. When the lease was approved by him, it then became a valid and binding contract between the parties, and in my opinion it was not within the province of the Secretary to waive the consent of the lessor by subsequent regulation.

The requirement that the assignment be with the consent of the lessor is clear and unequivocal. The lessor did not consent to the attempted assignment under which Seep and Barnsdall claim, and therefore, by the plain terms of the lease, the assignment is void, and gives Seep and Barnsdall no legal right to operate upon the land.

Counsel for defendants devote a large portion of their brief to the discussion of the question of forfeiture, as applied to the lease to the Midland Oil Company. They contend that, even if the assignment is void, the attempt to assign without the lessor's consent does not amount to a violation of any of the covenants, stipulations, or provisions referred to in that paragraph of the lease which provides that such violation shall work a forfeiture. It is true that a court of equity, while ever ready to relieve against, is very loath

to enforce, a forfeiture. But I cannot see how the question of the forfeiture of the original lease is really in this case. The Midland Oil Company are making no claim to the property, having turned it over to Seep and Barnsdall, and have virtually abandoned it. It is therefore unnecessary to determine what effect, if any, the attempted assignment had by way of forfeiting the original lease. The case is narrowed down to a controversy between the plaintiff and Seep and Barnsdall, and it is the respective rights of these parties alone that the court must now determine.

Under the facts in this case, some of the contentions of the plaintiff herein are not such as favorably address themselves to a court of equity. A court of equity seeks to compensate the plaintiff, but it must be a very strong case, if any, in which it will go further and punish the defendant. As said in *Winchester v. Craig*, 33 Mich. 205:

"The law rather aims so far as possible, to protect the plaintiff; but at the same time it has a due regard to the rights of the defendants, and it will not inflict an undue or unjust punishment upon them, in cases where they are not deserving it, as a means of righting an injury, especially where it would much more than compensate the owner for the injury which he sustained."

It appears from the affidavit of Barnsdall, which by consent of parties is taken as a deposition in the case, that the lease to the Midland Oil Company was taken by his agent, Mitchell; that he intended that it should be taken in the name of Seep, and believed it had been so taken; that he advised Seep by wire that the lease had been taken for him, and to go ahead, meaning to go ahead and have the lease approved. Barnsdall was then in the East, and Seep was here in the West. It appears that Seep understood that he was then at liberty to go ahead and develop the property. He did so, and it appears that, upon the mistake being called to the attention of the Midland Oil Company, it executed an assignment of the lease, but not until after the commencement of this suit. This assignment, as we have seen, was not consented to by the lessor, and was therefore void. In the meantime, Seep had spent several thousand dollars on the property in developing it. By some arrangement between themselves, Barnsdall was to share in the profits of the production from the lease after expenses of development were paid, but up to the commencement of this suit it appears that Seep was operating the property. Under these facts, while I find that Seep was technically a trespasser upon the land, he was what the law terms an innocent trespasser. It appears that he believed that he had a lawful right to enter upon the property. In this he was mistaken. While the operations were in the name of Seep and Barnsdall, it appears that the actual development work was done by Seep, and it does not appear that, prior to the commencement of this suit, Barnsdall knew that Seep had not secured and perfected a lease.

If this were the case of a mine producing gold or silver or coal, the recovery of the plaintiff would be the value of the ore in the mine, not its value after raised to the surface and treated and ready for market. As said by Judge Sanborn in *Resurrection Gold Min-*

ing Company v. Fortune Gold Mining Company, 129 Fed. 668, 64 C. C. A. 180:

"The measure of damages for wrongfully taking ore from the land of another through inadvertence or mistake, or in the honest belief that one is acting under his legal rights, is the value of the ore in the mine."

In 27 Cyc. p. 639, it is said:

"An innocent trespasser, one who, by mistake or unintentionally, or in the honest belief that he is lawfully exercising a right which he has, enters upon the property or upon the vein of another, and takes ore, coal, oil, or other substances therefrom, may limit the owner's recovery to the value of the substance so taken, less the actual cost of production, including digging, tramping, hoisting, transportation, and treatment."

Under the circumstances of this case, in my judgment the most practicable means of determining the value of this oil to the plaintiff, as it lay in the ground, is to determine the royalty its production would have afforded her. Under the lease to the Midland Oil Company this would have been 10 per cent. of the value of the oil when produced and ready for the market, and it is a matter of general knowledge that this was the prevailing royalty at the time.

I therefore find that the plaintiff should recover from the defendants, Seep and Barnsdall, an amount equal to 10 per cent. of the value of all oil produced from the premises prior to the commencement of this action, with interest thereon at the legal rate from the time this suit was begun, the amount of oil so produced and its value to be determined upon proof taken herein before the master in chancery of this court, unless the parties hereto shall agree upon such amount without such reference. In this, the plaintiff secures the same royalty she would have realized under a valid lease. The remainder of the oil produced before the commencement of this action or its proceeds, after the payment of the said 10 per cent. to the plaintiff, shall be and remain the property of the defendants Seep and Barnsdall.

The defendants Seep and Barnsdall may within 60 days from the date of decree herein remove from said premises all tools, boilers, boiler houses, pumping and drilling outfits, tanks, engines, and machinery which they may have erected or placed upon said property during their occupancy of the same.

The plaintiff is adjudged and decreed to be the owner of all oil produced from said premises under the receivership since the commencement of this action, and the receiver will account to her therefor. The defendants will be enjoined and restrained from interfering with the plaintiff in the possession and peaceful enjoyment of the premises, and from exercising or attempting to exercise any further rights of possession or ownership therein, excepting so far as shall be necessary to remove the articles above referred to.

The costs of this action, including one-half the salary of the receiver, shall be paid by defendants Seep and Barnsdall. The remainder of the receiver's salary shall be paid by the plaintiff.

The receiver will deliver the possession of said premises to the

plaintiff, and will at an early date file his final report as such receiver, upon the approval and confirmation of which he shall be finally discharged.

Let decree be entered accordingly.

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DE VALLE DA COSTA v. SOUTHERN PAC. CO.  
(Circuit Court, D. Massachusetts. February 17, 1900.)

No. 244.

1. COURTS (§ 347\*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.

The provision of Rev. Laws Mass. c. 173, § 121, that the allowance by the court of an amended declaration shall be conclusive evidence of the identity of the cause of action stated therein with that relied on in the original declaration, is not made binding on a federal court in that state by the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]); the allowance of amendments in such courts being governed by Rev. St. § 954 (U. S. Comp. St. 1901, p. 696).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.\*]

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. LIMITATION OF ACTIONS (§ 127\*)—COMMENCEMENT OF ACTION—AMENDMENT OF DECLARATION.

Where an amended declaration is based on a statute of another state, not counted on in the original declaration, the suit upon such cause of action, for the purpose of the question of limitation, was not commenced until the filing of such amended declaration.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

3. DEATH (§ 8\*) — ACTIONS FOR WRONGFUL DEATH—WHAT LAW GOVERNS—SPECIAL LIMITATION—KENTUCKY STATUTE.

The right of action for wrongful death given by Const. Ky. 1891, § 241, and by Ky. St. 1903, § 6, was originally given by Act March 10, 1854, and therein expressly conditioned on the bringing of an action within one year from the time of death. The later constitutional and statutory provisions, above cited, do not contain any specific limitation; but the same have been included in Ky. St. 1903, § 2516, as a part of the general statute of limitations. *Held*, following the interpretation placed on such provisions by the Kentucky Court of Appeals, that the limitation is still an integral part of the right thereby given, and governs an action based thereon, although brought in a foreign jurisdiction.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 52; Dec. Dig. § 8.\*]

What law governs actions, see note to Burrell v. Fleming, 47 C. C. A. 606.]

At Law. On motion to set aside verdict.

See, also, 160 Fed. 216.

W. P. Murray, John S. Patton, and Charles F. Smith, for plaintiff.

Foster & Turner, for defendant.

LOWELL, Circuit Judge. The writ in this case, which was removed from the state court, was dated November 21, 1906. The

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

original declaration alleged a liability for the death of the plaintiff's intestate about December 29, 1905, and apparently for his conscious suffering. To this declaration the defendant pleaded in abatement for reasons which need not be stated here. One of the counts was based upon certain statutes of Massachusetts, and at the argument the defendant's liability was assumed by the plaintiff to rest altogether upon these statutes, so far as it did not rest upon the common law. The plea was sustained, and, with the defendant's consent, the plaintiff filed an amended declaration on December 23, 1907, the substance of which was set out in the report of this case in 160 Fed. 216. After the proceedings therein described the case was tried to a jury, to which the following issues were submitted:

(1) Was the accident to Rodriguez caused by the negligence of the defendant? Answer: Yes.

(2) Did the accident happen within the state of Texas? Answer: No.

(3) What are the damages, and how shall they be divided among Rodriguez' wife and children? Answer: \$5,000.

Thereafter, by direction of the court, the jury returned a general verdict in favor of the plaintiff for \$5,000. Subsequently the defendant amended its answer by setting up the statute of limitations contained in section 2516 of the Kentucky Statutes of 1903. The defendant also moved seasonably to set aside the general verdict for the plaintiff on the ground that this could be based only on the third count, and that an action on that count was barred by the last-mentioned statute.

The defendant is right in its contention that only the third count is left for the court's consideration. The first count was disposed of by the special finding of the jury. The second count set out no cause of action enforceable in this court. The Kentucky Constitution and statutes referred to, which were in force and which bore upon the case, are as follows:

Const. Ky. 1891, § 241:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person."

Ky. St. 1903, § 6:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased. The amount recovered, less funeral expenses and the cost of administration, and such costs about the recovery, including attorney fees as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order, viz.: (1) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to such widow or husband. (2) If the de-



ceased leaves either a widow and children or a husband and children, then one-half to such widow or husband and the other one-half to the children of the deceased. (3) If the deceased leaves a child or children, but no widow or husband, then the whole to such child or children. If the deceased leaves no widow, husband or child, then such recovery shall pass to the mother and father of deceased, one moiety each, if both be living; if the mother be dead and the father be living, the whole thereof shall pass to the father; and if the father be dead and the mother living, the whole thereof shall go to the mother; and if both father and mother be dead, then the whole of the recovery shall become a part of the personal estate of the deceased; and after the payments of his debts, the remainder, if any, shall pass to his kindred more remote than those above named, as is directed by the general law on descent and distribution."

Ky. St. 1903, § 2516:

"An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice, or servant, or for injuries to person, cattle, or stock, by railroads, or by any company or corporation; an action for a malicious prosecution, conspiracy, arrest, seduction, criminal conversation, or breach of promise of marriage; an action for libel or slander; an action for the escape of a prisoner arrested or imprisoned on civil process, shall be commenced within one year next after the cause of action accrued, and not thereafter."

Section 6 can be traced back to the Kentucky statute of March 10, 1854 (Acts 1854, p. 175, c. 964) sections 3 and 4 of which read as follows:

"Sec. 3. That if the life of any person is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid.

"Sec. 4. The actions under this act shall be commenced within one year from the time of his death."

This is the first statute passed in Kentucky giving an action for death. The words "willful neglect," in the statute of 1854, whatever they may mean, have become "negligence or wrongful act" in the present law. The defendant's argument in support of its motion to set aside the verdict rests upon the following three propositions:

1. The amended declaration set up a new cause of action different from that set up in the original declaration. To support this proposition the defendant relies upon *Union Pacific R. R. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, which is conclusive generally. As the case at bar was originally brought in the state court, the plaintiff was required to set out the Kentucky statute in his declaration, if he relied upon it. His failure to do so emphasizes the fact, otherwise obvious, that his original reliance was not upon the Kentucky statute, but upon a different cause of action. The plaintiff contends, however, that the identity of the two causes of action has become *res judicata* by this court's allowance of his amended declaration. He relies upon *Rev. Laws Mass. c. 173, § 121*, the material parts of which read as follows:

"The cause of action shall be considered to be the same for which the action was brought, if the court finds that it is the cause of action relied on by the plaintiff when the action was commenced, however the same may be

misdescribed; and the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action."

This provision of law, the plaintiff contends, is enforceable in this court by virtue of Rev. St. U. S. § 914 (U. S. Comp. St. 1901, P. 684). But a federal court is bound by Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), as well as by section 914. To some extent Congress itself has regulated the allowance of amendments in the federal courts, and its regulations control as far as they extend. Moreover, the language of section 914 does not require a universal following of the state practice, pleadings, forms, and modes of proceeding, although this court is bound to conform to them "as near as may be." The federal courts have been unable to frame a criterion which shall distinguish unmistakably those instances in which they are bound to conform to the state practice from those in which they must differ therefrom because required to conform to it only "as near as may be." A federal court is supposed to know all the statutes of all the states, though its attention has not been called to them. But the particular federal judge here concerned was in fact ignorant of all the state statutes above cited at the time when he allowed the amended declaration. An understanding knowledge of the statutes of Kentucky required an historical investigation of considerable extent. For the judge's ignorance of the Massachusetts statute there was less excuse. By his allowance of the amendment to the declaration the judge had no more intention of deciding conclusively that the cause of action set out in the amendment was identical with that originally declared on than had the judge who allowed the amendment in the Wyler Case. The learned counsel before him appear to have been as ignorant and unsuspicious as was he. Sometimes a judge finds that he has made an irrevocable decision without knowing it. But under the circumstances here existing it appears to me that I am not bound by the Massachusetts statute, and that I may now hold, as is plainly the fact, that the amendment here allowed set out a new cause of action.

The application of section 914 to a case like that at bar has not been dealt with in any reported case which I have been able to find; but some analogy is found in *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, *Mex. Con. R. R. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699, *Lange v. Union Pac. R. R.*, 126 Fed. 338, 62 C. C. A. 48, and *Van Doren v. Penn. R. R.*, 93 Fed. 260, 35 C. C. A. 282. Moreover, in Massachusetts, the allowance of an amendment by the trial court appears to be reviewable in matter of law, and to be conclusive only in matter of fact. *Herlihy v. Little*, 200 Mass. 284, 86 N. E. 294. See *Mann v. Brewer*, 7 Allen (Mass.) 202. That the amendment here under consideration was made with the defendant's consent was decided to be immaterial in the Wyler Case, *supra*. See, also, *U. S. v. Dalcour*, 203 U. S. 408, 423, 27 Sup. Ct. 58, 51 L. Ed. 248. That the defendant went to trial and did not plead the statute of limitations until after verdict is also immaterial, inasmuch as the court allowed the amendment to the answer at that time for reasons which it deemed sufficient and which need not be re-

heard here. From these considerations it follows that the amendment set up a new cause of action.

2. The defendant further contends that suit upon this newly alleged cause of action, arising under the Kentucky Statutes, was not brought until the amendment to the declaration was filed in this case, more than a year after the cause of action arose. This contention, also, is established by the Wyler Case, *supra*. As the amended declaration was filed more than a year after the date of the writ, the precise date of Rodriguez' death is immaterial, and the application of the statute is manifest from the pleadings.

3. The defendant contends lastly that the cause of action set up in the amended declaration was barred by the Kentucky statute of limitations above cited. Speaking generally, the statute of limitations applicable in any case appertains to the remedy, and so to the *lex fori*. But, where the cause of action is created by a statute which in terms limits the time within which suit is to be brought thereupon, a court of foreign jurisdiction, required to enforce the statutory right, enforces it with the statutory limitations. The plaintiff must take the whole statute or nothing. *Boston & Maine R. R. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193. Is the right here sued on by the plaintiff in this jurisdiction subject to the statute of limitations of Kentucky or to that of Massachusetts? The former, if applicable, would bar the plaintiff. The plaintiff contends that the latter had not run when the amended declaration was filed. As in the case at bar, a court sometimes finds it hard to ascertain into which of the two classes above mentioned a given statute of limitations falls, *viz.*: (1) A general statute of limitations; and (2) a limitation specifically applicable to a statutory right. The former is to be sought in the *lex fori*; the latter in the statute creating the right sued on, to whatever jurisdiction that statute may belong. Had the suit before this court been brought immediately after the passage of the Kentucky statute of 1854, the question would have been answered in favor of the statute of Kentucky. The limitation imposed upon an action brought to enforce the right which was given by that statute was an integral part of the statute itself. If the attempt had then been made to enforce that liability in a state court of Massachusetts, or in a federal court sitting in Massachusetts, the plaintiff must have taken the limitation of the statute along with its benefit. But the statutes of Kentucky have been changed since 1854. The statute which gives the right of action here sued upon is now separated by nearly half a thick volume from the statute which limits the remedy for the enforcement of that right. This suit might have been maintained without any statute at all, under the section of the Constitution above quoted, which is enforceable in the absence of statute. *East Tenn. Tel. Co. v. Simms*, 99 Ky. 404, 36 S. W. 171. In Kentucky an action in contravention of the common law was given by the original statute of 1854. Both before and after 1854 enlargements of the common law, generally but not precisely similar, were made in those countries where the common law prevails, until the common law became generally modified in this respect. At the present time there is hardly a

jurisdiction in which some right of action for death has not existed for a generation. As this came to be true, and as some right of action for death became matter of course, though the rights differed slightly in different jurisdictions and were still in contravention of the common law, the limitations governing the remedies for the enforcement of these rights tended more and more to become part of the statutes of limitation applicable to other suits for personal injuries. In Massachusetts, it is true, the statutes giving right of action for death still have their specific limitations. In Kentucky it is otherwise. Moreover, in Kentucky, the plaintiff's right of action for death is now neither at common law nor exclusively by statute, since it has been made part of the Constitution, the fundamental law of the state. Under these circumstances, can it be said that section 2516 is an integral part of the right given by the Constitution and by section 6, and not rather an ordinary statute of limitations, a part of the remedy appertaining to the *lex fori*?

It is for the courts of Kentucky, however, to construe the Constitution and statutes of that state. If those courts have held that the Constitution and the statute giving the right of action and the statute imposing the limitation thereupon still remain component parts of one and the same statute, other courts will be disposed to follow this construction. In *Louisville & N. R. Co. v. Simrall's Administrator*, 104 S. W. 1011, 31 Ky. Law Rep. 1269, this appears to be the conclusion reached by the Court of Appeals of Kentucky. There the court observed:

"The act of 1854 (Acts 1853-54, p. 175, c. 964), upon a revision of the statutes, was transferred to chapter 57 of the General Statutes, together with other provisions, under the title 'Injuries to Persons or Property.' Section 4, which prescribed the time within which actions allowed under the act should be brought, was, however, in form omitted from the General Statutes, but in substance retained in section 3, art. 3, c. 71, thereof. \* \* \* In the next revision of the statutes we find section 3, art. 3, c. 71, Gen. St., transferred to section 2516 of the Kentucky Statutes of 1903. \* \* \* In other words, if section 4 of the act of 1854 is in meaning and effect included in section 3, art. 3, c. 71, Gen. St., then it must follow that it is also included in section 2516 of the Kentucky Statutes of 1903; and therefore it conclusively appears that from 1854 until the present day the legislative intent has been that the cause of action for the death accrues as of the date of the death."

See *Carden v. L. & N. R. R.*, 101 Ky. 113, 39 S. W. 1027.

It is true that the question in *Louisville & N. R. Co. v. Simrall's Adm'r* concerned the date from which the year limited by the statute should begin to run, and not the precise question presented in this case. Indeed, the question presented in this case could not arise in a court of Kentucky, where the law of the jurisdiction which adopted the Constitution and statute and the *lex fori* would necessarily coincide. But the case cited appears generally to hold that the remedy which originated in section 4 of the act of 1854 and which was then an integral part of the right given by section 2, has remained an integral part of that right through the subsequent changes, both statutory and constitutional. Therefore I follow the interpretation put upon the Kentucky Constitution and statute by the highest courts of Kentucky, and hold the Kentucky statute of limitations to be applicable here.

It follows that the plaintiff's action was barred, the defendant's motion must be granted, and the verdict for the plaintiff must be set aside.

### FULGHAM v. MIDLAND VALLEY R. CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. February 19, 1909.)

1. COMMERCE (§ 58\*)—FEDERAL RAILROAD EMPLOYER'S LIABILITY ACT—SCOPE.  
The federal railroad employer's liability act of April 22, 1908, c. 149, § 1, 35 Stat. 65, supersedes all state statutes regulating the relations of railroad employers and employes engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 58.\*]

2. DEATH (§ 10\*)—FEDERAL RAILROAD EMPLOYER'S LIABILITY ACT—ACTION FOR INJURY TO EMPLOYÉ—SURVIVAL.

Under the railroad employer's liability act of April 22, 1908, c. 149, § 1, 35 Stat. 65, which gives a right of action, in case of death of any employé injured in interstate or foreign commerce through the negligence of such employer, to his personal representative, the employé's right of action for an injury does not survive his death.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 10.\*]

#### At law.

The questions discussed and decided in this case arose upon an argument based upon two motions, the one to strike out certain portions of the complaint which looked to the recovery of damages by the plaintiff as administrator of the estate of E. C. Pogue, deceased, for the benefit of said estate, growing out of pain and suffering and loss of time and expenses incurred by the deceased before his death; and in the other motion it was insisted that the complaint contained in one count two separate and distinct causes of action, and defendant moved the court to require plaintiff to elect whether he would stand upon the cause of action which related to damages for the benefit of the widow and children of the deceased, or whether he would stand on the cause of action looking to recover damages for pain and suffering and loss of time and expenses incurred by the deceased before his death. Both motions, by consent, were argued and submitted together. The opinion sufficiently indicates the views of the court on those motions. The views expressed by the court were acquiesced in by counsel, and an amended complaint filed, confining the right of recovery to the injury to the widow and children of the deceased, because of his death.

Oscar L. Miles, for plaintiff.

Ira D. Oglesby, for defendant.

ROGERS, District Judge. On April 22, 1908, Congress passed what is known as the "Railroad Company Employer's Liability Act," the first section of which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such em-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ployee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment." Act April 22, 1908, c. 149, 35 Stat. 65.

The complaint in this case is in two counts. The first is for the benefit of the estate of the deceased, and involves the right of the administrator to recover for pain and suffering, mental and physical (including wanton and negligent treatment of the deceased after his injury), up to the period of his death. The second count is for the benefit of the surviving widow and children of the deceased, and involves damages for his wrongful death, etc.

It is apparent that these two separate and distinct causes of action are modeled upon the legislation of the state of Arkansas (Kirby's Digest, §§ 6285-6290), which were interpreted in the case of *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. In that case one cause of action was given under section 6285, and the other under sections 6289 and 6290. The former was for the benefit of the estate; the latter for the benefit of the widow and next of kin. Section 6285 expressly provides for the survival of the right of action for the injury in case of death as the result therefrom, and vests the right of action in the personal representatives of the deceased, for the benefit of his estate. The other two sections give a right of action for a death caused by negligence, and also vests the right of action in the personal representatives of the deceased for the benefit of the widow and children. The court in *Davis v. Railway*, supra, held that the statutes creating these two causes of action were not in conflict, were in their natures separate and distinct, and both vested in the personal representative, and might proceed *pari passu* in one suit.

What of the federal statute quoted above? First, can plaintiff avail himself of the Arkansas statutes in this character of case for any purpose? It is admitted the suit was brought under the federal statute quoted. It could not have been brought in this court had it not been, for the citizenship of the parties is the same. The authority for enacting the statute must be found in the interstate commerce clause of the federal Constitution (Const. art. 1, § 8, cl. 3). The very terms of the act are conclusive of that, and it is not controverted. A reference to the whole act clearly shows Congress undertook to regulate the relations of employers and employes engaged in interstate commerce by railroad. This act is intentionally limited to interstate commerce. Another act on the same subject had been declared unconstitutional because it covered the regulation of intrastate commerce. The *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. This court held in *Smeltzer v. St. Louis & San Francisco Railroad Company* (C. C.) 158 Fed. 649-651, upon authorities there cited, that:

"The power of Congress under the interstate commerce clause of the Constitution is plenary, and without limitation other than those prescribed in the Constitution itself."

In *Atlantic & Tel. Company v. Philadelphia*, 190 U. S. 162, 23 Sup. Ct. 817, 47 L. Ed. 995, the court, speaking through Mr. Justice Brewer, said:

"First. As said by Mr. Justice Bradley, speaking for the court, in *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492, 7 Sup. Ct. 592, 593, 30 L. Ed. 394: 'The Constitution of the United States, having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation.'

"In addition to the many cases referred to by him, the following subsequent decisions may also be cited: *Fargo v. Michigan*, 121 U. S. 230, 246, 7 Sup. Ct. 857, 30 L. Ed. 888; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336, 346, 7 Sup. Ct. 1118, 30 L. Ed. 1200; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 357, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465, 497, 8 Sup. Ct. 639, 31 L. Ed. 700; *Leloup v. Port of Mobile*, 127 U. S. 640, 648, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Asher v. Texas*, 128 U. S. 129, 131, 9 Sup. Ct. 1, 32 L. Ed. 368; *Stoutenburgh v. Hennick*, 129 U. S. 141, 148, 9 Sup. Ct. 256, 32 L. Ed. 637; *Leisy v. Hardin*, 135 U. S. 100, 110, 10 Sup. Ct. 681, 34 L. Ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; *McCall v. California*, 136 U. S. 104, 109, 10 Sup. Ct. 881, 34 L. Ed. 392; *In re Rahrer*, 140 U. S. 545, 555, 11 Sup. Ct. 865, 35 L. Ed. 572; *Crutcher v. Kentucky*, 141 U. S. 47, 58, 11 Sup. Ct. 851, 35 L. Ed. 649; *Brennan v. Titusville*, 153 U. S. 289, 304, 14 Sup. Ct. 829, 38 L. Ed. 719; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 471, 14 Sup. Ct. 1125, 38 L. Ed. 1047; *United States v. E. C. Knight Co.*, 156 U. S. 1, 21, 15 Sup. Ct. 249, 39 L. Ed. 325; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785."

It is clear that the act of April 22, 1908, *supra*, superseded and took the place of all state statutes regulating relations of employers and employes engaged in interstate commerce by railroads. It covered not only injuries sustained by employes engaged in that commerce resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making in certain cases, at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive. All state legislation on that subject must give way before that act. *Miss. Railroad Commission v. Ills. Cent. R. R. Company*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; *Sherlock et al. v. Alling, Administrator*, 93 U. S. 104, 23 L. Ed. 819. These last cases serve to show that, until Congress has acted with reference to the regulation of interstate commerce, state statutes regulating the relations of master and servant and incidentally affecting interstate commerce, but not regulating or obstructing it, may be given effect; but when Congress has acted upon a given subject, state legislation must yield. In *Gulf Colorado, etc., Railroad Co. v. Hefley*, 158 U. S. 99, 15 Sup. Ct. 804, 39 L. Ed. 910, the court said:

"When a state statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerning it, the state statute must give way."

I come now to examine the act under consideration. It is in derogation of the common law, and must be strictly construed, but not so strictly as "to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning." *Johnson v. Southern Pacific Railroad Company*, 196 U. S. 1, 25 Sup. Ct.

158, 49 L. Ed. 363. I think this act is in harmony with the purposes and recommendations of the President in at least two messages, and also in harmony with what it is claimed is the strong trend of the public mind in nearly all civilized countries at this time. It proceeds on the theory that the railroad corporations are quasi public corporations, and that the railroad company in the first place, and the public in its final analysis, should be insurers of the lives and persons of its employes while engaged in interstate commerce, for if the railroad companies are to be the insurers of their employes they must in the end be reimbursed also by their customers for whom they do the carrying business, and in its last analysis their customers are simply the public. The theory of this legislation is that the public should share the misfortunes of the families of those who are injured or killed in the quasi public business in which railroads are engaged. So it is provided, in substance, where the employe is injured in the service of a railroad while engaging in interstate commerce, he shall have a cause of action for that injury, and this action he can maintain in his own name, although he may have by his own negligence contributed to the injury; but the damages in such case shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. Here the common-law doctrine of contributory negligence is abrogated in the interest of the employe and the doctrine of comparative negligence substituted, which, pro tanto, encourages care and diligence upon the part of the employe. The act further provides that the servant's contributory negligence shall not deprive him of compensatory damages to any extent, if the master's failure to observe any statute enacted for the protection of the employe has contributed to the servant's injury; nor shall the servant be held to have assumed the risk under such condition; and no device, rule, regulation, or contract the master may make with his servant, or for his guidance, shall relieve him from any liability imposed by the act. These changes are all distinctive advantages to the employe, and all in derogation of the common law, and some of them far in advance of the statutes of this state in like cases. But it will be observed on the other hand that the act makes no provisions for the survival of that action, so given, for an injury sustained, in the event of the death of the injured employe. In *Ward v. Blackwood*, Ad., 41 Ark. 298, 48 Am. Rep. 41, the court said:

"At common law no action for a tort survived the death either of him who inflicted or of him who received it. 'No action,' said Lord Mansfield, 'where in form the declaration must be *quare vi et armis et contra pacem*, or where the plea must be that the testator was not guilty, could lie against the executor; upon the face of the record the cause of action arises *ex delicto*. and all private criminal injuries or wrongs, as well as all public crime, are buried with the offender.' *Hamblly v. Trott*, Cowper, 375.

"So an action would not lie for the personal representative. 'Executors and administrators are the representatives of the temporal property—that is, the debts and goods—of the deceased, but not of their wrongs, except when those wrongs operate to the temporal injury of their personal estate.' *Chamberlain's Adm'r v. Williamson*, 2 Maule & S. 408, per Lord Ellenborough.

"But our statute has changed the common law. Section 4760 of Gantt's Digest provides: 'For wrongs done to the person or property of another, an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, or, after his death, against his executor or



administrator, in the same manner and with the like effect in all respects as actions founded on contracts.”

But it will be seen that the statute of Arkansas did precisely what the statute under consideration did not do—it provided expressly for the survival of the action, and vested the right of action in the personal representative in the event the injured person died. It cannot be that legislation so much discussed in and out of Congress, and which had to be so carefully matured and drawn in order to meet the views of the courts, legislation, too, which inherently shows the skill of the lawyer evidently familiar with the settled principles of the common law, which it modifies in the interest of justice and humanity, is not expressive of the will of Congress, or omits anything which Congress intended to do by it. It would have been so easy for Congress to have said, as the legislation of so many states had previously provided, that in the event the employé injured should die from the injury his cause of action should survive to his personal representative, that it can scarcely be conceived that the provision would have been omitted had Congress so intended. But whatever Congress may have intended, it has not done so, and the courts must confine themselves to the administration of the law, and neither add nor take from a statute where its language is clear and unambiguous. In the opinion of the court the right of action given to the injured employé by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, as at common law, perishes with the injured person. I might add that this conclusion is in harmony with the known purposes of the act, which was intended to make some provision for the unfortunate family of the deceased employé, and not to make provision for the creditors of his estate. Can it be supposed that Congress would make a railroad company the insurer of an employé, killed in its service, for the purpose of paying the debts the employé had incurred in his lifetime? And yet that would be the inevitable result if the contention of plaintiff's counsel is sound, for whatever is recovered on account of injuries sustained and for which the injured employé had a cause of action in his lifetime must go to his estate. Indeed, such is the prayer of the complaint in this very case.

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WHALEY v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Montana. April 13, 1908.)

No. 766.

1. PUBLIC LANDS (§ 29\*)—HOMESTEAD LAW—LANDS WITHDRAWN FROM ENTRY.

Act June 5, 1872, c. 308, 17 Stat. 226, provided for the survey and sale to actual settlers of not more than 15 townships of the lands in the Bitter Root Valley in Montana, lying above the Lo Lo fork of the Bitter Root river, which had been ceded by the Flathead and other Indians by the Stevens treaty of July 16, 1855, 12 Stat. 975, but expressly provided that “none of the lands in said valley above the Lo Lo fork shall be open to settlement under the homestead and pre-emption laws of the United States.” The only subsequent legislation respecting said lands was the amendatory act of February 11, 1874, c. 25, 18 Stat. 15, which ex-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tended the benefit of homestead law to settlers on lands within said 15 surveyed townships. *Held*, that no other lands within the valley above the Lo Lo fork were subject to homestead settlement or entry.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 29.\*]

**2. WORDS AND PHRASES—"VALLEY."**

The common understanding of the word "valley" as applied to a mountainous country is as meaning lowlands in contradistinction to mountain slopes and ridges.

**3. PUBLIC LANDS (§ 35\*) — HOMESTEAD LAW — REQUISITES OF SETTLEMENT — "RESIDENCE."**

To establish a residence under the homestead law, there must be a combination of act and intent, the act of occupying and living upon the claim, and the intention of making the place a home to the exclusion of a home elsewhere.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

**In Equity.**

The object of this suit is to have the Northern Pacific Railway Company adjudged to hold the legal title to a certain tract of land to which it has a patent in trust for complainant.

The allegations of the complainant's bill are substantially as follows: That in November, 1897, complainant settled upon, occupied, and improved the southwest quarter of section 29, township 10 north, of range 18 west, of Montana meridian, in Ravalli county, Mont., containing 160 acres; that the said tract of land is situated in the Bitter Root Valley above the Lo Lo fork creek, on the east side of the Bitter Root river, and that the water from said land flows into the Bitter Root river, and that the land was subject to entry under the homestead laws of the United States; that on July 16, 1855, a treaty was concluded between the United States and the Flathead, Kootenai, and Upper Pend d'Oreille Indians, which said treaty was ratified by the United States Senate on March 8, 1859, and proclaimed by the President on April 18, 1859. 12 Stat. 975. This treaty is generally known as the "Stevens Treaty."

The eleventh article of said treaty is as follows: "Article 11. It is moreover provided that the Bitter Root Valley, above the Lo Lo fork shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead Tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for said tribe. No portion of the Bitter Root Valley above the Lo Lo fork shall be open to settlement until such examination is had and the decision of the President made known."

Complainant alleges that after the ratification of the treaty and the proclamation by the President on April 18, 1859, all of the land in the Bitter Root Valley above the Lo Lo fork, and including that upon which complainant says he settled under the homestead laws, was placed in reservation by virtue of the said eleventh article of the Stevens treaty, and remained in such state until December 14, 1871, when the reservation was terminated by the President, by executive order dated November 14, 1871, wherein it was recited that "the Bitter Root Valley above the Lo Lo fork, in the territory of Montana, having been carefully surveyed and examined in accordance with the eleventh article of the said Stevens treaty concluded at Hell Gate in the Bitter Root Valley between the United States and the Flathead, Kootenai and Upper Pend d'Oreille Indians, which was ratified by the Senate March 8, 1859, has proved, in the judgment of the President, not to be better adapted to the wants of the Flathead Tribe than the general reservation provided for in said treaty. It is therefore deemed unnecessary to set apart any portion of said Bitter Root Valley as a separate reservation for Indians referred to in said treaty."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is alleged that Congress afterwards enacted a law entitled "An act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley in the territory of Montana," wherein it was provided that, as soon as practicable after the approval thereof, the Surveyor General of Montana Territory should cause to be surveyed the lands in the Bitter Root Valley lying above the Lo Lo fork of the Bitter Root river, and that said lands should be open to settlement, and should be sold in legal subdivisions to actual settlers only who had the necessary qualifications to enter land and acquire title thereto, under the pre-emption and homestead laws of the United States, in quantities not exceeding 160 acres to each settler, at the price of \$1.25 per acre: Provided, that not more than 15 townships of said land should be subject to the provisions of said act; and also providing that none of the lands in said valley above the Lo Lo fork should be open to settlement under the homestead and pre-emption laws of the United States. Act June 5, 1872, c. 308, 17 Stat. 226.

The bill also alleges that Congress afterwards enacted another law, approved February 11, 1874, entitled "An act to amend an act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley in the territory of Montana, approved June 5, 1872"; and that section 2 of the act last aforesaid reads as follows: "Sec. 2. That the benefit of the homestead act is hereby extended to all the settlers on said lands who may desire to take advantage of the same." Act Feb. 11, 1874, c. 25, 18 Stat. 15.

Complainant sets forth that, under the act last referred to, the Surveyor General of Montana, in 1872, caused a portion of the said Bitter Root Valley to be surveyed, namely, 4 full and 15 fractional townships, which said surveys were approved and the plats filed in the United States land office at Helena; that in making the surveys aforesaid the surveyor confined his surveys to the bottom lands and the low bench lands on each side of the Bitter Root river, and in his field notes represented that it was "impracticable to extend the surveys owing to the rough mountainous country," when, in truth, there were large areas of good arable agricultural lands lying on the east side of the said Bitter Root Valley, and also in the upper or south end of the said valley, and outside of the lands so surveyed in 1872, and which have since been surveyed, platted, and opened to filing and entry to settlers, and much of which has been entered and patents issued therefor.

Complainant says that the commissioner of the General Land Office caused to be prepared a diagram of all the lands in the Bitter Root Valley which had been surveyed in 1872, which diagram was approved by the Commissioner of the General Land Office on the 4th day of March, 1894, and that the purpose and intention of the diagram, which is attached to the bill, was to define the lands comprising said Bitter Root Valley as contemplated by article 11 of the Stevens treaty, and that since the diagram was approved on March 4, 1894, and filed in the General Land Office, the Interior Department has erroneously decided and held that the lands embraced within the exterior lines of said diagram constituted and comprised the entire Bitter Root Valley as contemplated by the terms of article 11 of the Stevens treaty, and that all lands outside of the exterior lines of said diagram are no part of the said Bitter Root Valley, although said lands are so situated that streams flowing through them are tributaries of the Bitter Root river, which flows through the Bitter Root Valley. The bill alleges that in 1901 the government caused to be surveyed certain fractional townships containing large areas of agricultural and timber lands, and situated upon streams which are tributaries of the Bitter Root river, and that the surveys of said lands were approved on March 5, 1903, and that the land office was open to receive filings of settlers upon the said lands on April 16, 1903; that all of the lands just referred to are in the Bitter Root Valley, above the Lo Lo fork, and are a portion of the Bitter Root Valley, within the meaning and intent of article 11 of the Stevens treaty; that on April 16, 1903, having previously settled upon, occupied, and made improvements upon the land heretofore referred to as embraced within his homestead claim, he made the necessary application to enter said land and obtain patent therefor, and delivered the same to the officers of the land office at Missoula, and tendered the necessary fees, but that the officers refused to accept the application and the fees, basing their refusal upon the grounds that the said land was on an odd-numbered section and within the 40-mile limit of the grant made by Congress to the Northern Pacific

Railroad Company July 2, 1864, and therefore not subject to homestead entry. Complainant alleges that within the proper time he appealed from the action of the register and receiver of the local land office at Missoula to the Commissioner of the General Land Office, and that the matter came on regularly for hearing, but that the Commissioner of the General Land Office affirmed the decision of the register and receiver, and that thereafter he appealed to the Secretary of the Interior, but that he also affirmed the act of the local land office in refusing to receive the filing; that thereafter a motion for a review was made before the Secretary of the Interior, but that that was denied. He then alleges that all the rulings made against him were erroneous and wrongful; and that the Secretary of the Interior and the Commissioner of the General Land Office exceeded their jurisdiction in ordering and having prepared the diagram made part of the bill, and in deciding that the lands included within the exterior boundaries shown on said diagram comprised all the lands in the Bitter Root Valley above the Lo Lo fork. It is alleged that the parties to the Stevens treaty, at the time the same was signed and concluded, considered, understood, and intended that the words "the Bitter Root Valley above the Lo Lo fork," mentioned and contained in article 11 of the Stevens treaty, should and did embrace all of the country and lands lying above the Lo Lo fork, and from which the waters flowed into and were tributary to the Bitter Root river. It is alleged that on December 19, 1905, patent for the land involved in this suit was issued to the Northern Pacific Railroad Company, but that in equity and good conscience complainant is entitled to the land.

The respondent, Northern Pacific Railway Company, by answer, denies that the complainant has ever settled upon the land described in his bill in good faith, and alleges that he is endeavoring to obtain valuable timber land illegally, and under guise of the homestead law. Defendant says that the land involved is not situated in the Bitter Root Valley; that it has no value substantially for agriculture, but is heavily timbered and is valuable for its timber. It is denied that the land reserved by proclamation of the President on April 18, 1859, included the lands herein involved. Defendant says that the said lands are substantially 5,000 feet above sea level, and more than 1,600 feet above the Bitter Root river, and that they are in a high, mountainous country, which is part of the mountain range forming the divide between the Bitter Root river west thereof and Rock creek on the east; and that the country is broken and rugged, and is not a part of the Bitter Root Valley in any sense of the word; that the lands are mountain lands. It is alleged that the Bitter Root Valley referred to in the treaty had been carefully surveyed and examined, in accordance with the requirements of the Stevens treaty, and that the surveys made in 1872 did not include the lands in question, because the lands beyond the boundaries of the survey and plat were of the general character described by the respondent. Respondent sets up that the decision of the Interior Department was correct, and that, by the terms of the treaty and the proclamations of the President, the limits of the Bitter Root Valley were determined, and that it has been adjudicated that the term "valley" in the treaty referred to the character of lands, and those only, shown on the plat annexed to the complainant's bill. Defendant admits that complainant made the application to enter the lands, as he states, admits that patent was issued to it, and prays to be dismissed.

The replication denies the affirmative matter pleaded by the defendant.

The testimony was taken before an examiner and filed with the court. Thereafter argument was had, and the matter submitted for determination.

Woody & Woody, for complainant.

C. W. Bunn and W. Wallace, Jr., for defendant.

HUNT, District Judge (after stating the facts as above). A careful examination of the Stevens treaty, the acts of Congress, and decisions of the Supreme Court of the United States applicable to the facts of this case leads me to these conclusions:

The most favorable attitude that can be assumed in complainant's behalf is that since April 16, 1903, he has in good faith claimed a

homestead upon land situate in the Bitter Root Valley above the Lo Lo fork, and that his claim is not within the 15 townships which, by the act of Congress of 1872 (*infra*), had been opened for settlement.

By article 11 of the Stevens treaty, made in 1855, no portion of the Bitter Root Valley above the Lo Lo fork was to be open for settlement until the examination and survey had been made, as required by the terms of the treaty, and until the decision of the President concerning the adaptability of the valley to the wants of the Flatheads had been made known. Act July 16, 1855, 12 Stat. pp. 975-979.

On November 14, 1871, the President issued his proclamation to the effect that the Bitter Root Valley above the Lo Lo fork had been surveyed, and expressing his judgment that it was not better adapted to the wants of the Flatheads than the general reservation set apart by the treaty.

Upon June 5, 1872, Congress passed another act to provide for the removal of the Flathead and other Indians from the Bitter Root Valley. Act June 5, 1872, c. 308, 17 Stat. 226.

Section 2 of this last aforesaid act is all-important. After providing for a survey of 15 townships, it expressly provides that none of the lands in said valley above the Lo Lo fork shall be open to settlement under the homestead and pre-emption laws of the United States. In my judgment, the language of this act is unmistakably clear and comprehensive in its words of exclusion, so that, unless there is later legislation which entitles this complainant to claim rights to lands outside of the 15 townships as a homesteader, it is determinative, and he must fail in his suit. I quote the section in full:

"Sec. 2. That as soon as practicable after the passage of this act, the Surveyor General of Montana Territory shall cause to be surveyed, as other public lands of the United States are surveyed, the lands in the Bitter Root Valley lying above the Lo Lo fork of the Bitter Root river; and said lands shall be open to settlement, and shall be sold in legal subdivisions to actual settlers only, the same being citizens of the United States, or having duly declared their intention to become such citizens, said settlers being heads of families, or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres to each settler, at the price of one dollar and twenty-five cents per acre, payment to be made in cash within twenty-one months from the date of settlement, or of the passage of this act. The sixteenth and thirty-sixth sections of said lands shall be reserved for school purposes in the manner provided by law. Town-sites in said valley may be reserved and entered as provided by law: Provided, that no more than fifteen townships of the lands so surveyed shall be deemed to be subject to the provisions of this act: And provided further, that none of the lands in said valley above the Lo Lo fork shall be open to settlement under the homestead and pre-emption laws of the United States. An account shall be kept by the Secretary of the Interior of the proceeds of said lands, and out of the first moneys arising therefrom there shall be reserved and set apart for the use of said Indians the sum of fifty thousand dollars, to be by the President expended, in annual installments, in such manner as in his judgment shall be for the best good of said Indians, but no more than five thousand dollars shall be expended in any one year."

Now, the only later act appears to be that of February 11, 1874 (Act Feb. 11, 1874, c. 25, 18 Stat. 15); but this cannot avail complainant, as it is plainly limited in its application to the 15 townships that had been thrown open for settlement under the act of 1872. The court can imply no meaning from the letter of the act of June 5, 1872,

whereby homestead claims may be made to lands not within the 15 townships thrown open to settlement, for the language, being unambiguous, will not bear such a construction.

Regarding the complainant, therefore, as bound by the act of 1872, as I read and interpret it, his bill must be dismissed, and it will be so ordered.

As the foregoing conclusion disposes of the case, discussion of the question whether the particular lands filed upon by complainant on April 16, 1903, were embraced within the words "the Bitter Root Valley above the Lo Lo fork," as used in the Stevens treaty, would be supererogation. The student of the history of the treaties with the Salishan and other Indians will find much of interest upon the treaty generally by reading the life of Isaac I. Stevens, by Hazard Stevens, where the colloquies between the chiefs and Governor Stevens at Hell Gate are given with considerable detail. Volume 2, c. 31. Mention of the scope of the treaties is also made in Reverend Father Palladino's book, "Indian and White in the Northwest."

It is certain that the definition of what is the valley above the Lo Lo fork given to the words as used in the treaty by the Department of the Interior restricts the valley to the area of lowlands or depressions of considerable size, with bottoms of gentle slope as compared to the sides; that is to say, the valley is defined to be the space inclosed between the ranges of mountains. Under either of these commonly accepted definitions, the lands involved in this suit have been excluded from the valley lands; and decision of where the valley ends and where the range of mountains began became one of fact to be ascertained by the Interior Department, as does decision of what are swamp lands. *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063. True, in construing a treaty had by the United States with Indians, we must always consider the words used by their plain import; yet, doing this, the common understanding of the word "valley" is to look upon it as meaning lowlands, in contradistinction to mountain slopes and mountain ridges.

Again, in reading the whole Stevens treaty, it is to be noticed that in article 1, "the main ridge of the Rocky Mountains" is referred to, and reference is had to "the divide" between certain streams, and, again, to "the source of main branch of the Jocko river." As these several descriptive words also have commonly accepted definitions, well known by Indians, as by whites, it would seem to be but just to assume that when the words "Bitter Root Valley" were used in article 11, they were employed as much with relation to their ordinary significance as were the words "main ridge" or "divide" or "source." If this reasoning is fair, then the contention that there has been a misinterpretation of the treaty throughout these many years must fail, and the evidence of the Indians concerning the scope of the treaty is irrelevant.

Lastly, complainant has made a very weak showing under the homestead laws of the United States. It would be a very severe strain upon the liberality of the homestead act to extend its protection to complainant, who really never made an earnest effort to establish his actual home upon the place to the exclusion of any other home. He seems to have had a notion that "representation" would do. and that

this was possible by occasional visits to the place, followed by some slight evidences of occupancy and cultivation. I do not believe that such acts constitute that good faith demanded of one who claims as a homesteader. Inhabitaney is always required, and surely it is not a compliance with the law for a man to file on a tract of land with no intention of making it his home, with no purpose of living there, with no intention of cultivating the place and of acquiring it for a place to reside in. Occasional visits made for a day or two every few months, when such visits are made solely for the purpose of complying technically with the law, do not constitute a compliance with the statute. To establish a residence under the homestead laws, there must be a combination of act and intent, the act of occupying and living upon the claim and the intention of making the place a home to the exclusion of a home elsewhere.

Tested by these demands of the law, under the facts and circumstances adduced in the record, complainant's showing is so weak that he could not complain if relief were denied to him, solely upon the ground that he has never tried in good faith to comply with the homestead laws.

#### UNITED STATES v. LESLIE

(Circuit Court, D. South Dakota. February 6, 1909.)

##### 1. INDIANS (§ 15\*)—LANDS—CONVEYANCE BY HEIRS OF ALLOTTEE.

Under Act March 27, 1902, c. 888, § 7, 32 Stat. 275, which provides that "the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs, their interests shall be sold only by a guardian duly appointed, \* \* \* but all such conveyances shall be subject to the approval of the Secretary of the Interior," the approval of the Secretary is necessary to the validity of any such conveyance, whether by an adult or a guardian.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.\*]

##### 2. INDIANS (§ 27\*)—LANDS—CLOUD ON TITLE—JURISDICTION—ADEQUATE REMEDY AT LAW.

The United States may maintain a suit in equity for the cancellation as a cloud on its title of an invalid conveyance made by the heir of an Indian allottee, who held under a trust patent, the legal title remaining in the United States; there being no adequate remedy at law.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 27.\*]

##### 3. COURTS (§ 335\*)—FEDERAL COURTS—REMEDY GIVEN BY STATE STATUTE.

Where the statutes of a state give an owner of land a right of action to quiet title or remove a cloud although out of possession, such remedy may be enforced in the federal courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 335.\*]

In Equity. On demurrer to bill.

E. E. Wagner, U. S. Atty., and William G. Porter, Asst. U. S. Atty.  
Joe Kirby, for defendant.

CARLAND, District Judge. The material facts admitted by the demurrer are as follows: Some time prior to the commencement of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this action, Nellie Yellow Horse received from complainants a trust patent for the northwest quarter of section 35, township 95 north, range 70 west of the fifth P. M., Gregory county, S. D., under the provisions of the act of Congress approved March 2, 1889, c. 405, 25 Stat. 888. After the receipt of said trust patent, and before the expiration of the 25-year trust period, said Nellie Yellow Horse died, leaving as her only surviving heir her father Swift Bear Yellow Horse. On or about May 29, 1907, Swift Bear Yellow Horse conveyed the land hereinbefore described to the defendant, Karl Leslie, who is now in possession thereof. The conveyance of Yellow Horse to Leslie was made without the approval of the Secretary of the Interior. Complainants bring this action for the primary purpose of having said conveyance set aside and canceled of record as wholly unauthorized, and as creating a cloud upon the title to said land. As there are no allegations in the bill to support a claim for damages, that feature of the case will be disregarded.

Counsel for defendant, in support of the demurrer, seek to maintain two propositions: First. That the approval of the Secretary of the Interior is not necessary to the validity of a conveyance by an adult heir of an Indian allottee. Second. The complainants cannot maintain this action, as, the defendant being in possession of the land, the remedy at law is adequate.

As to the first proposition, it is only necessary to refer to section 7, Act March 27, 1902, c. 888, 32 Stat. 275, which is in the following language:

"Sec. 7. That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. \* \* \*"

Manifestly the expression "all such conveyances" refers to all conveyances made by heirs of deceased Indians to whom a trust or other patent containing restrictions upon alienation had been issued. The only conveyances spoken of in the section quoted are conveyances by adult and minor heirs. An adult heir can convey with the approval of the Secretary of the Interior, but a minor heir, being incompetent to make a conveyance, must convey, if at all, through a guardian. But whether the conveyance is by the adult heirs or by the guardian, it must receive the approval of the Secretary of the Interior. It would seem that if the expression "all such conveyances" were to be limited at all, they must be limited to adult heirs, as there would be some reason for holding that as to minor heirs the law had imposed the responsibility of the sale on the court. This position, however, if sound, would not help the defendant, as the conveyance in this case was made by an adult heir. No construction of the law ought to be adopted which would leave the



Indian heir free to convey without any supervision, unless the language of the statute leaves no other reasonable alternative.

As was said by the Court of Appeals of this circuit in *United States v. Thurston County*, 143 Fed. 291, 74 C. C. A. 429:

"The act of 1902 (Act March 27, 1902, c. 888, 32 Stat. 275) authorized these heirs to sell and convey their inherited lands only when the proposed sales were approved by the Secretary of the Interior. It thereby vested in the Secretary of the Interior plenary power to permit or to forbid the sale proposed. The whole is greater than any of its parts, and includes them all, and the authority to allow or to prohibit proposed sales necessarily included the power to consider and determine the terms and conditions on which such sales should be approved."

The first contention of defendant's counsel, therefore, must be overruled.

In regard to the second contention, it is necessary to consider in the first instance the nature of the title held by complainants. In *United States v. Rickert*, 188 U. S. 436, 23 Sup. Ct. 480, 47 L. Ed. 532, the Supreme Court uses the following language:

"The word 'patents,' where it is first used in this section (Act Feb. 8, 1887, c. 119, § 5, 24 Stat. 389), was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show for a period of 25 years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void."

The primary object of this action being to have the conveyance from Yellow Horse to Leslie declared invalid and canceled of record as a cloud upon the title, no action at law would be adequate to accomplish this purpose. The complainants, having the legal title, may therefore maintain this action to remove the cloud therefrom, unless they are precluded by the rule of equity jurisprudence that requires that a party be in possession of land in order to maintain an action to quiet the title thereof. The complainants are constantly maintaining actions to cancel patents to lands conveyed by them where the possession of the lands is actually in others than the United States, and it is doubtful whether the equity rule referred to applies in all its force to complainants, as the United States have the actual possession of only comparatively few tracts of land. Laying aside, however, the discussion of this question, it is certainly true that complainants have the same rights in bringing this action in the state of South Dakota as any other suitor would have.

Sections 675 and 678, Rev. Code Civ. Proc. S. D., are as follows:

"Sec. 675. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claims."

"Sec. 678. In an action brought by a person out of possession of real property, to determine an adverse claim or an interest or estate therein, the person making such adverse claims and persons in possession may be joined as defendants, and if the judgment be for the plaintiff he may have a writ for the possession of the premises, as against the defendant in the action, against whom the judgment has passed."

In the case of *Ely v. New Mexico & Arizona Railway Co.*, 129 U. S. 291, 9 Sup. Ct. 293, 32 L. Ed. 688, the Supreme Court spoke as follows concerning similar laws of the territory of Arizona:

"The manifest intent of the statute, as thus amended, is that any person owning real property, whether in possession or not, in which any other person claims an adverse title or interest, may bring an action against him to determine the adverse claim and to quiet the plaintiff's title. It extends to cases in which the plaintiff is out of possession and the defendants in possession, and in which at common law the plaintiff might have maintained ejectment."

In *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 132, 39 L. Ed. 167, the Supreme Court, in speaking of similar laws of the state of Iowa, used the following language:

"This method of adjusting titles by bill in equity proved so convenient that in many of the states statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases. The statute of Iowa upon which this bill is based is an example of this legislation, and provides (section 3275) that an action to determine and quiet title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto though not in possession. It will be observed that this statute enlarges the jurisdiction of courts of equity in the following particulars: (1) It does not require that the plaintiff should have been annoyed or threatened by repeated actions of ejectment. (2) It dispenses with the necessity of his title having been previously established at law. (3) The bill may be filed by a party having an equitable as well as a legal title. (4) In some states it is not even necessary that the plaintiff should be in possession of the land at the time of filing the bill.

"These statutes have generally been held to be within the constitutional power of the Legislature; but the question still remains to what extent they will be enforced in the federal courts, and how far they are subservient to the constitutional provision entitling parties to a trial by jury, and to the expressed provision of Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), inhibiting suits in equity in any case where a plain complete and adequate remedy may be had at law. These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action, the laws of the several states to the contrary notwithstanding. Section 723 has never been regarded, however, as anything more than declaratory of the existing law (*Boyce v. Grundy*, 3 Pet. 210, 7 L. Ed. 655), and, as was said in *N. Y. Guaranty Company v. Memphis Water Co.*, 107 U. S. 205, 210, 2 Sup. Ct. 279, 27 L. Ed. 484, 'was intended to emphasize the rule, and to impress it upon the attention of the court.' It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction had been previously upheld. Again, in the same case, the court uses the following language: 'The real question, then, to be determined in this case is whether the plaintiffs have

an adequate remedy at law; if they have, then section 723 is controlling, and notwithstanding the local practice under the Code, where no discrimination is made between actions at law and in equity, they authorize such suit, the federal courts will not entertain the bill, but will remit the parties to their remedy at law."

In *Darragh v. H. Wetter Manufacturing Co.*, 78 Fed. 14, 23 C. C. A. 609, the Court of Appeals for this circuit, in holding that under the laws of Arkansas a simple contract creditor might file a creditors' bill without first reducing his claim to judgment, spoke as follows:

"Upon a careful review of all these authorities, and especially in view of the last two cases to which we have adverted, it may, we think, be safely said that the following rules relative to the jurisdiction and power of the federal courts to enforce rights created, and to administer remedies provided by states' statutes for enforcement and administration in the courts of the state, have been firmly established in the jurisprudence of the United States. Rights, created or provided by the statutes of the states to be pursued in the state courts, may be enforced and administered in the federal courts, either at law, in equity, or in admiralty, as the nature of the new rights may require. *Ex parte McNell*, 13 Wall. 236, 20 L. Ed. 624; *Cummings v. Banks*, 101 U. S. 153, 157, 25 L. Ed. 903; *Trust Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474.

"An enlargement of equitable rights by statutes of the states may be administered by the national courts as well as by the courts of the states. *Case of Broderick's Will*, 21 Wall. 503, 520, 22 L. Ed. 599; *Clark v. Smith*, 13 Pet. 195, 202, 10 L. Ed. 123; *Holland v. Challen*, 110 U. S. 15, 25, 3 Sup. Ct. 495, 28 L. Ed. 52; *Frost v. Spittley*, 121 U. S. 552, 557, 7 Sup. Ct. 1129, 30 L. Ed. 1010; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; *Chapman v. Brewer*, 114 U. S. 158, 170, 171, 5 Sup. Ct. 799, 29 L. Ed. 83; *Gormley v. Clark*, 184 U. S. 338, 348, 349, 10 Sup. Ct. 554, 33 L. Ed. 909; *Cowley v. Railroad Company*, 159 U. S. 569, 583, 16 Sup. Ct. 127, 40 L. Ed. 263.

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624; *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447; *Cowley v. Railroad Co.*, 159 U. S. 569, 583, 16 Sup. Ct. 127, 40 L. Ed. 263."

The Court of Appeals in the case last cited was not considering the question as to how far section 723 of the Revised Statutes (U. S. Comp. St. 1901, p. 583) would prohibit the enforcement of remedies provided by states' statutes; and the case is cited for the purpose of showing that the national courts will enforce such remedies, unless there is some rule of equity or some statute of the United States prohibiting such enforcement. In the opinion of the court, there is no remedy at common law whereby the complainants could obtain the relief for which they ask, and therefore they may avail themselves in this court of the provisions of the laws of South Dakota hereinbefore quoted, and maintain this action although the defendant is in possession.

The demurrer, therefore, will be overruled, with leave to the defendant to answer on or before the next rule day.

## LOCKARD et al. v. ST. LOUIS &amp; S. F. R. CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. February 3, 1909.)

**1. RAILROADS (§ 394\*)—INJURY TO PERSON ON TRACK—ACTION FOR DAMAGES—PLEADING.**

The complaint, in an action against a railroad company and the engineer of a train to recover for the death of a person killed on the track, construed, and held to state only a cause of action for negligence on the part of the engineer in failing to keep a lookout as required by the Arkansas statute (Kirby's Dig. Ark. § 6607).

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 394.\*]

**2. REMOVAL OF CAUSES (§ 61\*)—SEPARABLE CONTROVERSIES—JOINT OR SEVERAL CAUSES OF ACTION.**

Kirby's Dig. Ark. § 6607, which makes it the duty of all persons running railroad trains to keep a constant lookout for persons or property on the track, and provides that "if any persons or property shall be killed or injured by the neglect of any employes of any railroad to keep such lookout the company owning and operating any such railroad" shall be liable in damages, gives a right of action against the company alone and not against the negligent employé; and, since no right of action for failure to keep a lookout exists at common law, the complaint in an action against a railroad company and its engineer to recover for the killing of a person on the track, the alleged negligence being the failure of the engineer to keep such lookout, does not state a cause of action against the engineer, although it may in terms allege the joint negligence of both defendants, and the cause is removable from a state to the federal court by the railroad company if a citizen of another state.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 61.\*]

Separable controversy, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valletstown Mineral Co.*, 35 C. C. A. 155.]

On Motion to Reconsider Order Remanding Cause to State Court.

Sam Lawrence and F. A. Youmans, for plaintiffs.

B. R. Davidson, for defendant.

ROGERS, District Judge. This case is before me on a motion for a reconsideration of an order remanding it to the state court. When the original motion was before the court, it was decided upon the case of *Alabama Great Southern Railway Company v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441. On the motion to reconsider, I gave this case a more careful consideration, and I have examined with much greater care the *Thompson Case*, supra, and have concluded that the action of the court in remanding this case was an error.

In the first place, an analysis of the complaint shows clearly that the case made upon its face is one of simple negligence, in the failure to keep a lookout, as the statute required, by Daniels, who was the engineer of the train which killed the deceased. The statute under which the case is brought reads as follows:

"It is the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any persons or property shall be killed or injured by the neglect of any employes of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and responsible to the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

person injured for all damages resulting from neglect to keep such lookout, and the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed."

That section gives a right of action, to one who is injured in person or property by the failure of those who are running the train, against the company which owns and operates the railroad, for the failure of those running the train to keep a lookout, but it does not give any right of action against the persons who are running the train. This statute is in derogation of the common law. No right of action existed at common law for failure to keep a lookout. The common law only held the railroad company liable for an injury to one trespassing upon its track after the trespasser was discovered by those operating the train, and only then when they were guilty of negligence in not avoiding the injury. The rule of construction is that where the statute is in derogation of the common law it shall be strictly construed, and the provisions of this statute should not be construed to give a cause of action against any one except the railroad company. If it had been the purpose of the Legislature to have given a cause of action against the engineer running the train, it would have been an easy matter to have said so. The Legislature did not say so, and therefore it must follow that it did not intend to give the action. Keeping this in view, this complaint (which is inartistically drawn) in one place charges that it was the duty of the defendants—that is, the railroad company and Daniels, its codefendant and engineer, "to keep a constant lookout for persons upon the said railroad track." It is absurd to say that the railroad company should keep a lookout. The lookout could only be kept by its employes running the trains, and the statute does not require a railroad company to keep a lookout. So, the charge that it was the duty of both defendants to keep a lookout is of no avail, because the statute fixes the duty upon those who are running the train, and there is no concurrent duty upon the part of the defendant railroad company. The charge, therefore, in the complaint that it was the duty of the railroad company to keep a lookout is made futile by the terms of the statute, which in effect negatives any such duty upon the part of the railroad company. So that there was no joint duty growing out of that allegation of the complaint. But there is another allegation in the complaint which charges that the engineer, Daniels, in charge of said train—

"did discover and could by the exercise of ordinary care have discovered, if he had been keeping a constant lookout, as the law requires, William T. Lockard on said railroad track for a distance of 300 yards ahead, and after seeing him, and with the exercise of ordinary care could have seen that the said William T. Lockard was unconscious of the approach of said railroad train, wrongfully, negligently, and carelessly failed and refused to give any danger signals, or to check the speed of the said train so as to avoid injuring him, the said William T. Lockard; but, on the contrary, recklessly, negligently, and carelessly ran the said train on, to, and against him, the said William T. Lockard," etc.

Upon examining this complaint, the court was of opinion that it contained two distinct and contradictory causes of action improperly pleaded and joined, and that it was for the state court to say what

steps should be taken to separate these causes of action and to compel the plaintiff to elect upon which he would rely, because both could not be true; but, upon a more careful and thorough consideration of the subject, I have reached the conclusion that these passages, taken as a whole and in connection with other parts of the complaint, simply intend to state that the said defendants were guilty of negligence, and not that they willfully and intentionally ran the train over the said Lockard after seeing him. The court's mind at the time was influenced by the words "wrongfully, negligently, and carelessly," and the further words "recklessly, negligently, and carelessly," as intending to convey the idea that the act was willful, but these words, and stronger ones, have been construed in like cases to mean nothing more than negligence, and do not mean to charge that the killing was willfully done. *C., C. & St. L. v. Tartt*, 64 Fed. 823, 12 C. C. A. 618.

Giving these words the construction there placed upon them by the Circuit Court of Appeals for the Seventh circuit (and I have concluded the opinion sound upon that subject), the cause of action here stated is one of pure and simple negligence in not keeping a lookout, and therefore running over deceased, William T. Lockard, without seeing him. Viewed from that standpoint, no joint cause of action is stated in this complaint, because the cause of action given by the statute to which I have referred is against the railroad company alone, and not against its employé. The railroad company is simply liable because of the negligence of its servants, under the doctrine of *respondeat superior*. There are two decisions much more recent than any of those cited by counsel which bear directly on this subject. One is *Chicago, Rock Island & Pacific R. Co. v. Stepp et al.* (C. C.) 151 Fed. 908, the opinion being delivered by Judge Phillips, but under a statute much more elaborate, but in substance and principle the same as that upon which this action is brought. After discussing the statute, and the decisions on the subject, he says:

"It is scarcely necessary to add that where the petition on its face, as in this case, and the petition for removal, show that the actual relation of the local defendant Collier was that of a mere engineer in the employ of the railroad company, against whom no recovery can be had under the statute on which the action is predicated, the mere subsequent allegation in the petition that 'the defendants' negligently did so is ineffective to prevent the railroad company, a nonresident corporation, from removing the case into this jurisdiction. *Gustafson v. Chicago, Rock Island & Pacific Railway Company* (C. C.) 128 Fed. 85."

The facts as stated in the opinion are practically the same as those stated in this complaint.

In *Atlantic Coast Line R. Co. v. Bailey* (C. C.) 151 Fed. 891, Judge Speer, delivering the opinion of the court, says:

The petition, which is in the usual form under the practice of this state, alleges that the petitioner was working under a certain car, removing and replacing sills, and his work had been almost completed—

"when the said J. F. Bailey came to said car, and, without notice or warning to petitioner, placed a jack under said car at the end opposite to where peti-

tioner was working, and raised the same while petitioner was under the car. He raised the said car by the use of said jack, and removed the two stands and blocks thereon which supported said car at that end."

It is also alleged that by reason of the insecure placing of the jack the car began to fall down, that petitioner then made a rush to get from under the car, and—

"in doing so his foot was caught under a scantling which was being used to detach the said sills from the flooring of said car, whereby he was thrown headlong to the ground, his left knee striking a piece of iron belonging to said car which was lying upon the ground."

For the resulting injuries, he charges in his petition that J. F. Bailey and the Atlantic Coast Line are jointly liable for concurrent negligence, and claims that there is no separable controversy.

The weight of authority upon the principle here involved is expressed by *Creagh v. Equitable Life Assurance Society* (C. C.) 88 Fed. 1, in the following language:

"When a master is made liable for the negligent or wrongful act of his servant, solely upon the ground of relationship between them, and the application of the rule respondeat superior, and not by reason of personal participation in the negligent or wrongful act, he is liable severally, and not jointly, with the servant."

The learned Circuit Court continues:

"I consider it a logical sequence from this rule that, although the master and his delinquent servant be named as codefendants in such an action, the complaint shows affirmatively that there is no joint liability, and that either defendant may properly claim that there is a separable controversy between himself and the plaintiff."

See, also, *Helms v. Northern Pacific R. Co.* (C. C.) 120 Fed. 389; *Prince v. Illinois Cen. R. Co.* (C. C.) 98 Fed. 1; *Gableman v. Peoria, etc.* (C. C.) 82 Fed. 790. It is true that the Supreme Court of the United States, in *Chesapeake, etc., R. Co. v. Dixon* (Chief Justice Fuller *loquitur*) 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, has held that, when concurrent negligence on the part of a railroad company and its employé was charged, the liability of the defendants was joint, the cause of action entire, and the controversy was not separable as matter of law. That case, however, is very clearly differentiated from the one at bar. Here the language of the petition is as follows:

"Said injury was caused by the joint and concurrent negligence of said Atlantic Coast Line Railroad Company and said J. F. Bailey in raising said car while petitioner was working under the same, and by removing said stands while petitioner was working under said car, and using and placing said jack in such manner as to permit it to fall, the falling of said car and the consequent injury to your petitioner being the direct consequence of said negligent acts. Petitioner specifies each of said acts as negligence, and alleges them to be the proximate cause of his injury."

Negligence or liability is not necessarily joint merely because the pleader so charges it in terms. The deduction of joint negligence must be based upon specific facts in the petition which justify it. It is nowhere alleged how or when the company participated in the negligence or caused the injury. There is no logical construction of the

above language, taken in connection with other paragraphs, than that J. F. Bailey alone committed the alleged tort, and the company is sought by the pleader to be made liable therefor solely as employer, under the rule of respondeat superior. The supposition from these averments that the corporation participated in "raising" the car, "placing" the jack, would seem somewhat strained. That generality in the description of joint negligence did not exist, however, in *Railroad Co. v. Dixon*, supra, the case before the Supreme Court, where it was charged:

"That the negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment, and said negligence was the joint negligence of all the defendants."

This appears in the language of the Chief Justice:

"Assuming this averment to be inconsistent with a charge of direct action by the company, it may nevertheless be held to amount to a charge of concurrent action when coupled with the previous averment that (the deceased) was killed while crossing the track at a turnpike crossing, by the negligence of the company and the other defendants in charge of the train. The negligence may have consisted in that the train was run at too great speed, and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined."

It will be observed that in the case at bar there is no allegation of either joint or concurrent negligence upon the part of the two defendants, and there are no facts stated in the complaint from which any just deduction can be drawn that there was any act of negligence except that of the defendant in failing to keep a lookout. Indeed, it is shown by positive testimony (of the plaintiff's attorney Mr. Sam Lawrence) as follows:

"Q. There was no dereliction on the part of the company itself except through Mr. Daniels? A. No, I reckon not, as I understand the law. I may be wrong about that."

There was, nothing, therefore, alleged in the complaint as to how or when the defendant company participated in the negligence, or caused the injury, and there is no logical construction of the complaint from which any deduction can be had other than that the negligence complained of is that of the defendant Daniels in failing to keep a lookout, and that the company is sought by the pleader to be made liable therefor under the rule respondeat superior. It seems to me that this decision of Judge Speer's is full of common sense and sound law. Both of these decisions were delivered in 1907, after the *Thompson Case*, supra, and after the case of *Wecker v. National Enameling & Stamping Company*, 204 U. S. 177, 27 Sup. Ct. 184, 51 L. Ed. 430, which last-named case makes it clear that the Supreme Court did not intend that the *Thompson Case*, supra, should have as broad a construction as the court placed upon it when it formally ruled upon the motion to remand. In the *Wecker Case*, supra, the court heard the evidence on the question of fraud, and sustained the jurisdiction of the court upon the merits. In the case at bar, but for the evidence of the witness Lawrence, there would be



no possible doubt as to the duty of the court to retain the case here, because no issue was made in the petition for removal charging fraud, and in the absence of Lawrence's testimony it would have been taken as confessed; but Lawrence testified that he had no idea in joining Geo. Daniels for the purpose of defeating this court of its jurisdiction; that he thought he was jointly liable, and still thinks so. But that does not meet the situation. The trouble is he has not alleged any facts in the complaint showing joint liability, and he has not alleged any joint or concurrent acts of negligence, even as a conclusion of fact or law, and, as heretofore shown, the proper construction of his complaint relieves Daniels under the statute stated, and under the doctrine of respondeat superior, from any liability whatever.

There are two facts which differentiate the Thompson Case, *supra*, from the one at bar. In the former the suit, so far as the opinion shows, was not brought under any statute; in this case it was. In the Thompson Case the charge was negligence upon the part of the conductor and engineer, who were made defendants with the railroad company, and who had the management and control of the train, for simple negligence upon the part of the employés. In the case at bar the charge of negligence is the "failure to keep a lookout." In the class of cases to which the Thompson Case belongs, the court said that the decisions in England and in this country were in conflict as to whether the servant is jointly liable with the master where the only negligence is that of the servant; but in the case at bar there can be no conflict, for "the failure to keep a lookout" is made actionable against the master only. The result is that the allegation of negligence in this case as against the engineer in keeping no lookout is not a cause of action as against him at all. Why? Because that was not a cause of action at common law, and it is not made so by statute. It follows that there is no cause of action stated against the engineer in any aspect of the complaint. The real cause of action in this suit is one against the railroad company only, in which Daniels is made a party without any semblance of liability, joint or otherwise. It matters not, therefore, whether the intent of the pleader was to make Daniels a party to defeat the jurisdiction of the court or not, since in any event, without reference to the purpose, the complaint states no cause of action as stated against him, and, no cause of action being stated against him, the railroad company had the right to remove the cause against it to this court. In other words, the cause of action is made separable because there is no cause of action stated against Daniels, and could not be under the statute under which this suit was brought. *Prince v. Ill. Cen. R. Co.* (C. C.) 98 Fed. 1; *Helms v. Mo. Pac. Ry. Co.* (C. C.) 120 Fed. 389.

The court, therefore, feels that the order heretofore made remanding this cause should be revoked, and the motion to remand overruled. It is so ordered.

## ORIGINAL CONSOL MINING CO. V. ABBOTT.

(Circuit Court, D. Montana. August 10, 1908.)

No. 268.

**1. EQUITY (§ 42\*)—JURISDICTION OF SUBJECT-MATTER—WAIVER OF OBJECTION BY FILING CROSS-BILL.**

The filing by a defendant of a cross-bill alleging new facts and praying for affirmative relief is a waiver of any objection to the jurisdiction of a court of equity over the subject-matter of the suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 119; Dec. Dig. § 42.\*]

**2. MINES AND MINERALS (§ 49\*)—ADVERSE POSSESSION—PRESUMPTIONS AND BURDEN OF PROOF.**

The owner in fee of a patented lode mining claim is presumed to be in possession of the surface included within the lines of the location, and the burden of proof rests on one claiming any part thereof by adverse possession.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 49.\*]

**3. ADVERSE POSSESSION (§ 85\*)—PRESUMPTION AND BURDEN OF PROOF—TENANCY.**

Possession of real property shown to have been at one time a tenancy at will from the owner of the fee is presumed to have continued such, and cannot become adverse against the owner unless the tenant has openly repudiated the relationship in terms or by some act necessarily evincing such intention.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 656; Dec. Dig. § 85.\*]

**4. ADVERSE POSSESSION (§ 43\*)—TACKING SUCCESSIVE POSSESSIONS—CHARACTER OF FORMER POSSESSION.**

The successor in possession of a tenant at will, who at all times recognized the rights of the owner, cannot tack the possession of such tenant to his own for the purpose of making title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 224; Dec. Dig. § 43.\*]

**In Equity.**

The Original Consolidated Mining Company, a corporation of the state of Washington, on January 26, 1905, brought its bill as complainant against Wheelock H. Abbott, a citizen of the state of Montana, as defendant, alleging, in substance, that it is the owner in fee, in the possession, and entitled to the possession of the Steward lode mining claim, located in Silver Bow county, Mont., patent for which the United States had issued, on May 29, 1879, to the predecessors in interest of the complainant; that ever since said date complainant and its predecessors in interest have been in the lawful, quiet, peaceable, and undisturbed possession of said Steward lode, together with all of the surface rights, and all the rights to the ores, minerals, and mineral-bearing rock, veins, ledges, and deposits contained within the exterior limits of said lode, the tops or apexes of which lie within the exterior limits thereof; that the defendant claims an estate or interest in said lode, or in some part or parcel thereof, adverse to the complainant; that the said claim of the defendant is without any right, and that the defendant has no estate, right, title, or interest whatever in the said lode, or any part thereof. The complainant prayed that defendant be required to set forth the nature of his claim, and that all adverse claims of the defendant be determined by decree of the court; that it be adjudged that the defendant has no estate or interest whatever in or to any part of said Steward lode, and that the title of the complainant to said lode is good and valid; and that the defendant be for-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ever enjoined and debarred from asserting any claims whatever in or to any part of said lode, adverse to the complainant.

In his answer, the defendant set up that he claims ownership of only a portion of the ground embraced in the Steward claim, of which portion he is, and ever since April 26, 1900, has been, continuously and without interruption, to the knowledge of complainant and its predecessors in interest, in possession; that while said ground was granted to the predecessors in interest of the complainant on May 29, 1879, neither the complainant, nor any grantor to, nor any predecessor in interest of, complainant, has been possessed of any portion of said ground claimed by defendant within 24 years preceding the filing of the bill of complainant; that on May 29, 1880, William A. Clark was the owner as of his own demesne in fee of all of said ground, and that he never at any time between May 29, 1880, and February 3, 1900, conveyed any portion of said ground to any person or corporation; that on June 20, 1881, one Sandberg, without leave, let, lease, permission, or consent of William A. Clark, entered upon said ground and used the same, by placing cabins, corrals, fences, and building stone thereon, and used the whole thereof as a stoneyard; that for the full period of five years next succeeding June 20, 1881, said Sandberg was in the open, honest, adverse, uninterrupted, continuous, hostile, and notorious possession of said ground, under color of title of an instrument in writing made to him on said date granting said ground; that for the full period of 10 years succeeding June 21, 1881, said Sandberg was in the open, honest, adverse, uninterrupted, continuous, hostile, and notorious possession of said ground; that said Sandberg was in the open, notorious, honest, adverse, uninterrupted, continuous, and hostile possession of said ground for the entire period of time commencing on June 20, 1881, up to and until April 26, 1900, claiming to own the same; that Sandberg never sought or obtained the consent or permission of William A. Clark, or any one else, to use, occupy, and enjoy the said ground, nor did said Sandberg ever tender or pay to William A. Clark, or to any other person, any money as rent therefor, nor did he ever admit that any other person than himself had any right, title, or interest in the said ground during any of the said time; that on April 26, 1900, said Sandberg conveyed said ground to one Patrick J. Hennessy; that on the same day said Hennessy, by deed, conveyed an undivided half interest therein to the defendant; that thereafter, on November 23, 1904, said Hennessy, by deed, conveyed the other undivided half interest in said ground to the defendant; and that, therefore, defendant avers he is the owner as of his own demesne in fee simple absolute of all of said ground from the surface to the center of the earth, and of all space and substances embraced within the limits of the planes formed by projecting its surface boundaries to the center of the earth. The defendant thereupon filed its cross-bill for affirmative relief, and prayed for a decree adjudging that the title of the defendant is good and valid, and that complainant be forever enjoined and restrained and debarred from asserting any claim whatever to said ground adverse to the defendant.

The complainant filed its replication to the bill, denying the averments of the answer, and filed its answer to the cross-bill, denying, in substance, the allegations thereof. The cross-complainant filed its replication to the answer of the cross-defendant, denying the averments thereof. Thereupon the testimony was taken before an examiner.

W. M. Bickford and Geo. F. Shelton, for complainant.

Robt. B. Smith, H. L. Maury, and S. Hogwoll, for defendant.

HUNT, District Judge (after stating the facts as above). My opinion is that the court has jurisdiction of the suit, and can determine the merits. Such a ruling can safely be put upon the ground that the defendant, having filed a cross-bill alleging possession in himself, and praying for equitable relief, has waived the question of jurisdiction. *Small v. Peters* (C. C.) 104 Fed. 401; *Mining Company v. Mining Company* (C. C.) 139 Fed. 838; *Radcliffe v. Scrubbs*, 46 Ark. 96;

Bates on Fed. Equity Procedure, § 386; Lowenstein v. Glidewell, Fed. Cas. No. 8,575; Daniell's Ch. Plead. & Prac. § 1553; Brown v. Lake Superior Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; Story's Equity Pleadings, § 399.

Upon the merits, complainant should prevail. The title in fee, as does the title of record, stands in the name of the Original Consolidated Mining Company. This title rests upon the patent of the United States, issued to complainant's predecessors in interest on May 29, 1879, and also upon use and occupation of the ground under the surface for mining purposes. The presumptions in favor of the holder of a patent for a lode mining claim are in favor of the right of possession and enjoyment of all the surface included within the lines of the location, and of all veins, lodes, or ledges throughout their entire depth, the tops or apexes of which lie inside of such surface lines extended downward vertically. Section 2322, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1425); Maloney v. King, 27 Mont. 428, 71 Pac. 469; Lindley on Mines, § 780. See, also, section 486, Code Civ. Proc. Mont. 1895 (Rev. Codes, § 6435).

The burden of proof is upon defendant and cross-complainant, who claims by adverse possession. Section 486, Code Civ. Proc. Mont.; McConnell v. Day, 61 Ark. 464, 33 S. W. 731. A defendant and cross-complainant, claiming by adverse possession, must prove that his possession was notorious, exclusive, continuous, open, and adverse. Holtzman v. Douglas, 168 U. S. 280, 18 Sup. Ct. 65, 42 L. Ed. 466.

The evidence sustains the finding by the master that J. E. Sandberg occupied part of the surface of the mining claim as a tenant at will, recognizing the title of complainant's predecessors in interest. Sandberg never claimed any rights whatsoever, except as a tenant at will in subordination of his lessors. Defendant bought and took possession of the surface, and initiated any further rights that he claims, in 1900. Under such a condition of facts, he cannot set up title even to the surface by adverse possession, unless he vacated and then retook possession, or did some act necessarily evincing his intention to put an end to the presumed relationship of a continued tenancy at will, and unless he held adversely for the period of 10 years. Section 487, Code Civ. Proc. Mont. 1895 (Rev. Codes, § 6436). The authorities sustain the principle that, in a case like this, where it is shown that possession at a certain time was held in subordination to the title of another, it will be presumed so to continue, and it cannot afterwards become adverse as against the latter without proof that it was held in hostility to such other's title. It must also be shown that the possessor repudiated the permissive or subordinate character of the possession as it previously existed, and that the full period of limitation has expired since such repudiation. Warville on Ejectment, § 431.

In Handlan v. McManus, 100 Mo. 124, 13 S. W. 207, 18 Am. St. Rep. 533, the Supreme Court of Missouri said:

"There is no doubt that possession, to be of any avail as a defense under the statute of limitations, must be adverse, and not subordinate to the true title. The possession cannot be adverse so long as it is held under a lease or license. \* \* \* " Bond v. O'Gara, 177 Mass. 139, 58 N. E. 275, 83 Am. St.

Rep. 265; *Anderson v. McCormick*, 18 Or. 301, 22 Pac. 1062; *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923.

Defendant cannot tack the possession of Sandberg, which was not adverse, but permissive, to his own possession so as to let him acquire adverse title: *Daveis v. Collins* (C. C.) 43 Fed. 31; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241.

Believing these principles are applicable, complainant is entitled to a decree as prayed for in its complaint. So ordered.

## UNITED STATES v. NEW YORK MERCHANDISE CO.

(Circuit Court, S. D. New York. February 15, 1909.)

No. 5,354.

### CUSTOMS DUTIES (§ 25\*)—CLASSIFICATION—CUT PASTE—"GLASS."

Congress in its tariff legislation having distinguished between glass and the form of glass known as paste, articles in chief value of paste, cut, are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 (U. S. Comp. St. 1901, p. 1633), for goods in chief value of cut "glass," but are dutiable as manufactures of "paste," under paragraph 112, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 46; Dec. Dig. § 25.\*

For other definitions, see Words and Phrases, vol. 2, p. 1808.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below reversed the assessment of duty by the collector of customs at the port of New York. The board's opinion, which is reported as G. A. 6,808 (T. D. 29,265), reads as follows, so far as pertinent:

SHARRETTS, General Appraiser. The goods covered by these protests consist of hatpins the heads of which in all cases are of more value than the shaft and other metal parts. The claim relied upon by the importers is that the pins in question are dutiable at 45 per cent. ad valorem under paragraph 112, 30 Stat. 158 (U. S. Comp. St. 1901, p. 1635), as manufactures composed in chief value of "paste," and not at 60 per cent. ad valorem, as assessed by the collector, under the provision of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 (U. S. Comp. St. 1901, p. 1633), for articles composed in chief value of "glass" cut. \* \* \* It is conceded that the heads thereof are cut, and it only remains for the board to determine whether they are in fact paste, and, if so, are they included in the provision of paragraph 100 for articles of glass cut?

In G. A. 6,658 (T. D. 28,391), this board held that pins of the same description as those now in dispute were not commonly known as "jewelry," but nevertheless affirmed the collector's assessment of duty thereon at 60 per cent. ad valorem, on the ground that the heads in question were composed of glass cut; hence the articles were dutiable under paragraph 100, not paragraph 434, Schedule N, 30 Stat. 192 (U. S. Comp. St. 1901, p. 1676), of the present tariff act. The solicitor of customs in his brief concedes that the goods in dispute, as shown by the evidence, are neither jewelry nor imitation jewelry. No attempt was made by the importers, in G. A. 6,658, supra, to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

show that the pins were composed in chief value of the particular kind of glass known as "paste," for which reason the board did not consider this question, which is the crucial point upon which the present case hinges. The present tariff act, as well as former acts, denominatively provided for both glass and paste. Act Oct. 1, 1890, c. 1244, § 1, Schedule B, 26 Stat. 572, in paragraph 108 provided for all manufactures of glass at 60 per cent. ad valorem, and paragraph 459 levied a duty of 25 per cent. ad valorem on manufactures of paste. Act Aug. 27, 1894, c. 349, § 1, Schedules B, N, pars. 102, 351, 28 Stat. 514, 535, laid different rates of duty on paste and glass, while the act of 1897, in paragraph 112, named the two descriptions of glass, but imposed 45 per cent. duty on both kinds. We then have indisputable proof that Congress regarded glass and paste as separate substances; and the correctness of this conclusion is confirmed by reference to the accepted authorities on this subject.

Under the caption of "Paste" we find the following definitions: International Encyclopedia, vol. 8, p. 518: "Those imitation gems that are made by chemical process are generally a special variety of glass known as paste or strass." Century Dictionary: "Heavy glass, made by fusing silica (quartz, flint, or pure sand), potash, borax, and white oxide of lead, etc., to imitate gems; hence, a factitious gem of this material. To this glass addition may be made of antimony glass, or of oxides of manganese, cobalt, copper, or chromium; the lead often being largely in excess of the normal silicate. Also called strass." Standard Dictionary: "A vitreous composition used for making false gems; strass; hence, false jewelry."

As shown by the evidence, the commercial and common understanding differ in no essential respects. The witnesses for the government contented themselves with proving that the heads of the pins in question were composed of glass. None of them displayed any familiarity with paste; indeed, a majority of them disclaimed any knowledge of such a substance in trade parlance. None of these witnesses asserted that the merchandise in dispute was not paste; while, on the other hand, the importers' witnesses testified that the imitation jet and precious stone pinheads were composed of the particular kind of glass that is commonly and commercially regarded as paste, the material being comparatively soft, brilliant, and capable of receiving a high polish. We accordingly find that the disputed articles are composed in chief value of paste, and can reach no other conclusion than that the provision of paragraph 100 for articles composed in chief value of glass does not include such as are composed in chief value of paste. This conclusion is in harmony with decisions of the board and courts. See *U. S. v. Field & Co.*, 85 Fed. 862, 29 C. C. A. 458; *Blumenthal v. U. S.*, 144 Fed. 384, 75 C. C. A. 322; *Worthington v. U. S. (C. C.)* 90 Fed. 797; *U. S. v. Popper*, 66 Fed. 51, 13 C. C. A. 325; also *G. A. 3,965* (T. D. 18,408), and *G. A. 5,687* (T. D. 25,329).

Following these decisions, we sustain the claim in the protests that the merchandise \* \* \* is dutiable at 45 per cent. ad valorem under paragraph 112. \* \* \* *G. A. 6,658* (T. D. 23,391), is hereby modified to conform with the principles enunciated herein.

J. Osgood Nichols, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

HOLT, District Judge. Affirmed, on decision of board.

## SILZ v. UNITED STATES (two cases).

(Circuit Court, S. D. New York. February 15, 1909.)

Nos. 5,188, 5,191

## CUSTOMS DUTIES (§ 30\*)—CLASSIFICATION—"POULTRY"—GUINEA FOWL—TURKEYS—"BIRDS AND LAND FOWLS."

Guinea fowl and turkeys, that are not shown to have been in a wild state, are classifiable as "poultry," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), rather than as "birds and land \* \* \* fowls," under section 2, Free List, par. 494, 30 Stat. 196 (U. S. Comp. St. 1901, p. 1681).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.\*

For other definitions, see Words and Phrases, vol. 6, p. 5476.]

## On Application for Review of Decisions by the Board of United States General Appraisers.

The decisions below affirmed the assessment of duty by the collector of customs at the port of New York. One of the opinions filed by the board (G. A. 6,701, T. D. 28,652) reads in part as follows:

WAITE, General Appraiser. The importations in these cases consist of guinea fowls [and] turkeys. \* \* \* They were sold and the invoices were made out in London. It is claimed by the importer that they were primarily shipped from Italy. They were passed at this port as "poultry," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652), which is as follows: "278. Poultry, live, three cents per pound; dressed, five cents per pound." It is claimed by the importer that they are free, under section 2, Free List, par. 494, 30 Stat. 196 (U. S. Comp. St. 1901, p. 1681), which reads: "494. Birds and land and water fowls." In other words, the importer claims they are game birds, caught or killed in their wild state. The burden is therefore upon him to show that fact.

We think it can be safely said, from a careful perusal of the testimony that all there is to support that contention is the fact that they are treated and handled as game. The guinea hen is a well-known barnyard fowl in this country, as is also the turkey. It is asserted by the government, and undisputed, that the turkey is a native of North and Central America, and the guinea hen of Western Africa, \* \* \* from which it appears that no one of the birds in question is a native of Italy. The presumption, therefore, is very strong that if they are imported from Italy they must have been domesticated there. At all events, there is nothing to show that they were taken there and bred in a wild state, and it is difficult to believe that there are places in Italy where such large quantities of these domestic birds, especially the guinea hen and turkey, can be procured in a wild state. We have held that some wild blood and wild characteristics do not remove from the class of poultry what is known as an ordinary barnyard fowl. G. A. 6,646 (T. D. 28,345). The importer relies merely upon his examination of the dead bodies of these birds in determining whether they are game, classifiable under paragraph 494, or poultry, provided for in paragraph 278. This examination of the feathers and flesh was made while the birds were being handled on their arrival, and was, we think, somewhat cursory, even if the question could be determined by such inspection of the birds. Upon this point the testimony is conflicting.

The protests are confined to the claim above stated. There might be some question as to whether poultry in the condition of that imported was dressed, or, if the similitude clause be invoked, whether the merchandise resembles more closely the live poultry than the dressed poultry provided for in paragraph 278. This, however, we do not deem it necessary to decide.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inasmuch as the overruling of the protests will leave the decision of the collector to govern in these cases. \* \* \* The protests are therefore \* \* \* overruled as to the guinea fowls and turkeys. \* \* \*

We therefore find \* \* \* (2) that the proof offered by the importer does not show that the birds were wild, or that they were caught or procured in a wild state, or, in fact, where they were originally obtained; (3) that the guinea fowls and turkeys are dutiable under paragraph 278 as "poultry."

D. Macon Webster, for importer.

D. Frank Lloyd, Asst. U. S. Atty.

HOLT, District Judge. Affirmed, on decision of board.

# MORIMURA BROS v. UNITED STATES.

(Circuit Court, S. D. New York. February 15, 1909.)

No. 5,126.

CUSTOMS DUTIES (§ 37\*)—CLASSIFICATION—HINOKI BASKETS—"MANUFACTURES OF CHIP."

Baskets made of twisted hinoki wood shavings held dutiable as "manufactures of chip," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 449, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.\*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The case relates to so-called hinoki baskets, stated in the opinion below to have been "made of twisted hinoki wood shavings." These articles were classified by the collector of customs at the port of New York as manufactures of "wood," under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168 (U. S. Comp. St. 1901, p. 1647). The importers contended for classification as manufactures in chief value of "chip," under Schedule N, par. 449, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678). The board overruled this contention because the evidence was not satisfactory. Further evidence was taken in the circuit court.

Kammerlohr & Duffy (Joseph G. Kammerlohr of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

HOLT, District Judge. I think that the baskets in controversy were manufactures of which chip was the component material of chief value, and as such dutiable at 30 per cent. under Act July 24, 1897, c. 11, § 1, Schedule N, par. 449, 30 Stat. 193 (U. S. Comp. St. 1901, p. 1678). The previous decisions of the Board of General Appraisers, which were relied on, seem of little weight. One was rendered by default, and the evidence in the other shows that the government appraiser acceded to the importers' claim that the article in question was dutiable as chip, and the subsequent appraisal of it as a manufacture of wood was apparently a blunder. The difficulty of reliquidating, referred to in the appraisers' decision, from the indefiniteness

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



of the testimony then before them, has been in my opinion removed by the evidence since taken in this court.

The decision of the appraisers is reversed, and the baskets in question held to be dutiable at 30 per cent. under section 449.

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R. B. MACLEA CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 15, 1909.)

No. 4,950.

CUSTOMS DUTIES (§ 32\*) — CLASSIFICATION — FIGURED COTTON CLOTH — "THREADS."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 313, 30 Stat. 178 (U. S. Comp. St. 1901, p. 1659), relating to "cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form figure," the term "threads" is used in a sense that includes the remnants of threads so introduced, which have been clipped off where they appear at intervals on the back of the fabric.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 32.\*

For other definitions, see Words and Phrases, vol. 8, p. 6963.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York. The board's opinion, reported as G. A. 6,592 (T. D. 28,173), reads as follows:

DE VRIES, General Appraiser. The merchandise consists of cotton cloth. It was assessed for duty under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule I, pars. 304-309, 30 Stat. 172, 173 (U. S. Comp. St. 1901, pp. 1656-1658), at the countable rates, and in addition thereto at 2 cents per square yard under paragraph 313 of said act (30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]).

Paragraphs 304 to 309 are the well-known provisions of the cotton schedule, providing duties upon cotton cloth according to weight, count of threads, value, etc. Paragraph 313 reads: "Cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure, whether known as lappets or otherwise, and whether unbleached, bleached, dyed, colored, stained, painted, or printed, shall pay, in addition to the duty herein provided for other cotton cloth of the same description, or condition, weight, and count of threads to the square inch, one cent per square yard if valued at not more than seven cents per square yard, and two cents per square yard if valued at more than seven cents per square yard."

The merchandise consists of ordinary cotton cloth, into which other than the ordinary warp and weft threads are introduced for the purpose of forming a figure. These extra threads have been clipped off on the back at interval spaces where they are not interwoven. The sole contention of the importers is that the substance used to form the figures is not "threads," and therefore the extra 2 cents per square yard duty does not attach. In a brief filed in the case, as well as in the oral contentions at the hearing, it is asserted that the substances herein are filaments or yarns, which do not arrive at the dignity of threads, and therefore not included within the term "threads" as used in paragraph 313.

An examination of all the provisions of the cotton schedule fails to disclose wherein the word "threads" as used in paragraph 313 in any wise differs from the word "threads" as used in the other provisions of that schedule. In all the provisions therein, when speaking of the component factors of cotton

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cloth, the word "threads" is used. Manifestly it is used interchangeably with and to include yarns and other filaments of textile fiber employed in the manufacture of cotton goods. From an examination of the merchandise in question it appears to us that there is no substantial difference between the filaments or threads which are used to form the figures and those which are used to form the body of the fabric. We are of the opinion that, whatever the character of the yarn or "threads" used to form the figures in the cloth, they would be within the purview of paragraph 313. The fact that, after having been thrown in, by whatever process, to form a figure, the underside has been at intervals clipped off, does not change the character of the material used, though this is the contention of the importers. Suffice it to say, in complete answer to this contention, that the fabric, at a stage when completely woven, has not the backs trimmed, and therefore the goods, on the very contention of the importers, at that stage would contain other than the ordinary warp and filling threads introduced for the purpose of forming a figure. We are unable to discover any merit in this contention. The fabric must be woven before it can be clipped, and this clipping would not destroy the character of any of the clipped components.

The same character of goods was before the Circuit Court of Appeals for the Second Circuit in the cases of *Mills et al. v. U. S.*, 114 Fed. 257, 52 C. C. A. 92, and *Claffin v. U. S.*, 114 Fed. 259, 52 C. C. A. 94; the court holding the same dutiable under paragraph 313.

The protest is overruled, and the decision of the collector affirmed.

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.  
J. Osgood Nichols, Asst. U. S. Atty.

HOLT, District Judge. Affirmed, on decision of board, with which I entirely concur.

# UNITED STATES v. TWO BALES OF RUGS.

(District Court, E. D. Pennsylvania. August 24, 1908.)

No. 8.

## CUSTOMS DUTIES (§ 130\*)—FORFEITURE—NEW TRIAL.

At a trial for the forfeiture of imported merchandise, a foreign shipper, who was charged with fraudulent conduct, was not heard. *Held*, that he was entitled to a hearing and that, where he seasonably appeared and asked for a new trial, the request should be granted.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 130.\*]

In Rem. On information for the forfeiture of imported merchandise. Motions for new trial, etc.

Jasper Yeates Brinton, Asst. U. S. Atty.  
William M. Stewart, Jr., for Davies, Turner & Co.  
James E. Hood, for Norton Downs.  
Walter Evans Hampton, for E. Hatoun.

J. B. McPHERSON, District Judge. I regret very much that the unexpected motion made on behalf of E. Hatoun seems to compel a new trial of this case. It was not until June 3, 1908—the day when the government filed its amended information—that Hatoun was charged upon the record with fraudulent conduct in connection with the importation in question, and the motion by his counsel to appear on his

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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behalf, and to take such steps as the new situation might indicate, was seasonably made thereafter. Ordinarily a man is not to be condemned unheard, and, under the circumstances—much as the consequent delay is to be deprecated—I cannot avoid the conclusion that the request should be granted and that Hatoun should have an opportunity to meet the serious charges that are made against him. Accordingly a new trial is granted, and it is further ordered that the appearance of E. Hatoun be entered, and that he file an answer to the amended information on or before October 1, 1908.

The motion of Davies, Turner & Co., filed on June 3, 1908, to strike off the amended information, is refused. Their demurrer, filed on the same day, is overruled, but without prejudice to their right to renew the objections raised thereby in any appropriate form, at the trial of the case or afterwards.

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UNITED STATES ex rel. HENDRICKS v. PENDLETON.

(Circuit Court, E. D. Pennsylvania. February 13, 1909.)

No. 464, Oct. Sess. 1908.

1. ARMY AND NAVY (§ 19\*)—ENLISTMENT OF MINORS—EFFECT OF ENLISTMENT WITHOUT CONSENT OF PARENT OR GUARDIAN.

Rev. St. § 1419, as amended by Act Feb. 23, 1881, c. 73, § 2, 21 Stat. 338 (U. S. Comp. St. 1901, p. 1007), providing that "minors between the ages of 14 and 18 years shall not be enlisted for the naval service without the consent of their parents or guardians," is for the protection of the parent or guardian; and an enlistment in violation thereof is valid as to the minor, and voidable only by the parent or guardian before the minor attains the age of 18 years.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45-50; Dec. Dig. § 19.\*]

2. ARMY AND NAVY (§ 19\*)—ENLISTMENT OF MINOR WITHOUT PARENT'S CONSENT—RIGHT OF PARENT TO DISCHARGE.

A minor enlisted in the navy, although without the consent of his parent and in violation of the statute, is punishable for breach of discipline, and cannot be discharged on habeas corpus at suit of his parent while undergoing such punishment.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45-50; Dec. Dig. § 19.\*]

Arno P. Mowitz, for relator.

Jasper Yeates Brinton, Asst. U. S. Atty., and J. Whitaker Thompson, U. S. Atty., for defendant.

J. B. McPHERSON, District Judge. The relator in this proceeding is the father of John H. Hendricks, who is now imprisoned in the Philadelphia Navy Yard under the sentence of a court-martial imposed to punish his desertion from the navy. The facts have been agreed upon by counsel and are as follows:

The minor was 17 years old on July 9, 1905. In the early part of January, 1906, he was a telegraph operator by occupation. On January 5th he made a written application to a recruiting officer for the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States navy at Cincinnati to be enlisted as "landsman for electrician, third class." On the same day the officer telegraphed to the relator, who was then at Morristown, Ind., asking if he was willing that his son should "enlist in the navy for electrical department." He replied in the affirmative, and on the same day the officer confirmed his telegram by letter and inclosed a formal consent paper for the father's signature. This was signed on January 6th and gives consent to his son's enlistment as "landsman for electrician." On January 8th the minor executed an enlistment paper or shipping articles, but in this he is rated as "apprentice seaman." He immediately entered upon his service under this rating, and continued to serve as apprentice seaman until May 24th, when he received the rating of ordinary seaman. On July 13th, in accordance with his own application, he was detailed for instruction in the electrical school at Newport, R. I., where he remained until September 21, 1906, when he deserted from the service. Up to the time of his desertion, he received pay and allowance as apprentice seaman and as ordinary seaman. He was afterwards arrested, and on August 28, 1908, was delivered to the naval authorities, by whom he was tried, convicted, and sentenced on October 8th. Part of his sentence was imprisonment for six months, and he is now undergoing confinement thereunder at the Philadelphia Navy Yard.

The father seeks the minor's release upon the ground that the enlistment was not only voidable, but wholly void. It is argued that the father's consent was obtained by a false representation, the recruiting officer having declared that the minor was to be enlisted as a "landsman for electrician," whereas he was actually enlisted as an "apprentice seaman," and that the conduct of the officer nullified the father's formal consent, thus making the minor's enlistment absolutely void, and giving him the right to quit the service whenever he pleased without exposing himself to punishment as a deserter. But I do not think that this argument can be allowed to prevail in the face of several authoritative decisions of the federal courts. For the purposes of this case the government concedes that the father's consent was not such as the law contemplates—he was asked to agree to his son's enlistment under a specified rating, while the actual enlistment was under a different rating—and therefore that the minor was enlisted without the legal consent of his parents. And the government further concedes that, if the father had taken proper and timely steps to obtain his son's release before the minor had reached the age of 18 years, and before he had been tried and convicted for the offense in question, the effort would have been successful; but the government contends that, as no such steps were taken until January 9, 1909, when the son had passed the age of 20 years, and, moreover, was in confinement under a sentence for desertion, the present writ cannot be maintained. This position, I think, is sound. The enlistment of the minor was not void, whether his father validly consented, or not. So far as he himself was concerned, it was legally binding. Section 1419 of the Revised Statutes, as amended by Act Feb. 23, 1881, c. 73, § 2, 21 Stat. 338 (U. S. Comp. St. 1901, p. 1007), namely, "Minors between the age of 14 and 18 years, shall not be enlisted for the naval

service without the consent of their parents or guardians," was intended primarily for the protection of the parents or guardian of the minor, and only incidentally for the protection of the minor himself. In discussing the similar provision concerning the enlistment of minors for the army, the Supreme Court said in *Re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644:

"But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of the minor to his or her control; but it gives no privilege to the minor. The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends upon the Legislature. \* \* \* Congress has declared that minors over the age of 16 (14 in the navy) are capable of entering upon the military service and undertaking and performing its duties.

"An enlistment is not a contract only, but effects a change of status. \* \* \* It is not, therefore, like an ordinary contract, voidable by an infant. At common law an enlistment was not voidable, either by the infant or his parents or guardians [citing cases]. In this case the parent never insisted upon her right of custody and control, and the fact that he had a mother living at the time is therefore immaterial. The contract of enlistment was good so far as the petitioner is concerned. He was not only *de facto*, but *de jure*, a soldier—amenable to military jurisdiction."

See, also, *Solomon v. Davenport*, 87 Fed. 318, 30 C. C. A. 664; *Re Miller*, 114 Fed. 838, 52 C. C. A. 472; *United States v. Reaves*, 126 Fed. 127, 60 C. C. A. 675.

Since, therefore, the minor's enlistment could not have been questioned by himself at any time, and since it could not be questioned, even by his father, after he arrived at the age of 18 years (*Re Dohrendorf* [C. C.] 40 Fed. 148), it follows that the present proceeding must be dismissed.

This disposes of the case; but it may not be amiss to add that, even if the father were otherwise entitled to his son's release, it is well settled that the son could not be discharged on habeas corpus until the end of the term to which he has been sentenced. His enlistment being valid so far as he himself is concerned, he was properly subjected to trial and punishment for the military offense of desertion, and the father's right to his custody must yield to the superior right of the naval authorities to imprison for the minor's breach of discipline. See the cases above cited; also *Re Dowd* (D. C.) 90 Fed. 718, *Re Scott*, 144 Fed. 79, 75 C. C. A. 237, and *Ex parte Lewkowitz* (C. C.) 163 Fed. 646.

The relator's petition for the discharge of his son is refused.

## BLOCK v. RICE.

(District Court, E. D. Pennsylvania. February 20, 1909.)

## No. 2.

## BANKRUPTCY (§ 164\*)—VOIDABLE PREFERENCE—PAYMENT BY DEBTOR—TRUST FUNDS.

A trustee in bankruptcy, within four months prior to his own bankruptcy and when he was insolvent, paid to himself as such trustee a sum equal to certain collections which he had made as trustee but which he had deposited in his individual bank account. *Held* that, the fund not having been kept separate, in the absence of evidence showing that the net balance of his bank account had at all times been equal to the amount of such deposits, so that they could have been followed as a trust fund, the payment was preferential, and the amount was recoverable by his own trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.\*]

At Law. On motions for judgment non obstante veredicto and for new trial.

Clinton O. Mayer and Irwin L. Sessler, for plaintiff.  
Emanuel Furth, for defendant.

HOLLAND, District Judge. On or about the 10th day of August, 1907, Joseph Rice, as trustee in bankruptcy of the estate of Samuel Fine, sold at public sale certain goods of the Fine bankrupt estate for the sum of \$1,000. The purchaser paid by check, at that time, only \$250, leaving a balance of \$750 due. The purchaser of the property was a friend of Rice and unable to raise all the purchase price on the day of sale, and Rice had drawn his individual check, which was there exhibited or given to the auctioneer, and it, together with the \$250 paid by the purchaser, was turned over to Rice or his attorney. Rice, however, did not use his own \$750 check, but gave the purchaser credit to that amount, and permitted him to pay it subsequently. On September 28, 1907, Joseph Rice paid himself, as trustee of the estate of Samuel Fine, the bankrupt, the sum of \$797.90. Rice, who was called by plaintiff, testified at the trial that this money had been paid to him by the purchaser from time to time, and that he had put it in his individual bank account. About two weeks after Rice had drawn his individual check to himself as trustee of the Fine bankrupt estate, a petition was filed against him, and shortly thereafter he was adjudicated a bankrupt, and Gordon A. Block, the plaintiff, was appointed his trustee, who instituted this suit as such trustee, and set forth in his statement:

"That the said Joseph Rice on the 28th day of September, 1907, at a time when he was insolvent and with knowledge of his insolvency, and with intent to prefer himself as trustee of the estate of Samuel Fine over his other creditors, paid unto himself, as such trustee, the sum of \$797.90, being the amount then due and owing by him to the said estate of Samuel Fine, of which he was trustee."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At the trial, the defendant presented no defense. On the plaintiff's evidence the jury rendered a verdict in his favor in the sum of \$829.-80. The defendant, at the close of the plaintiff's evidence, asked the court to give binding instructions to the jury to find a verdict in favor of the defendant, which was refused, and the court instructed the jury:

"That if they believed that Joseph Rice knew or had reason to know that he was insolvent on September 28, 1907, when he made a payment to himself as trustee of Samuel Fine, that said payment was preferential, and the plaintiff was entitled to a verdict for the amount of such judgment."

Exception was taken to this part of the charge and the refusal of the court to give binding instructions for the defendant, and in due time the motions, for judgment non obstante veredicto under the Pennsylvania practice act, and for a new trial, were filed, assigning as reasons therefor (1) the refusal of the court to give binding instructions to the jury to find a verdict for the defendant, and (2) the charge of the court above set forth.

It is the contention of the defendant's counsel that Rice individually had a right to pay over this sum to the Fine bankrupt estate, of which he was the trustee, whether he knew he was solvent or not, and that it would not under the circumstances be a preferential payment under the bankruptcy act of July 1, 1898, c. 541, § 1, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), because the Fine bankrupt estate could have followed the trust fund in Rice's possession, and therefore his act in paying the same over was but an anticipation of an order of the court had the Fine estate applied for it.

It may be conceded, if Rice collected the \$750 of trust funds belonging to the Fine bankruptcy estate and held it intact in a separate fund, or if it be shown that he received the money and deposited it in his own bank account, and that at all times after the receipt of the trust fund and its deposit the net balance of his bank account exceeded the amount of the trust fund, that upon application the Fine bankruptcy estate, by an order of court, could have secured possession of the fund so held by Rice, and under these conditions it may be that, as against Rice's creditors, a voluntary payment of this trust fund by Rice to the Fine bankrupt estate within four months of the time of filing a petition in bankruptcy against him would be a lawful payment, although Rice knew at the time he was insolvent, and that such a payment would not be held to be preferential under the act. *Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *In re Royea* (D. C.) 16 Am. Bankr. Rep. 141, 143 Fed. 182. But the difficulty the defendant encounters in setting up that defense here is that his right to follow this trust fund in the possession of Rice depends upon its having been kept separate, or upon its having been received by him, deposited in bank, and the net balance of his bank account at all times exceeding the \$750, and this must be made to appear by him to the satisfaction of the jury. The burden of showing this rests upon him. I recall no evidence whatever in the case to this effect. It was simply established that Rice had collected the \$750 and deposited it in his own bank account, and the schedules filed by Rice in his bankruptcy estate show that he had only \$155 in bank, and personal property which sold for less than \$500. The in-

debtedness was over \$37,000. This, together with Rice's shifty, evasive, and unreliable manner as a witness, is sufficient to warrant the jury in finding, as they evidently did, that Rice had appropriated the \$750 trust fund to his own use, in which case, of course, it could not be identified and followed by the trust estate (In re Marsh [D. C.] 8 Am. Bankr. Rep. 576, 116 Fed. 396; In re Mulligan [D. C.] 116 Fed. 715), and his payment of this amount to the Fine bankruptcy estate, of which he was trustee, within the two weeks of his own bankruptcy proceedings, would be preferential if Rice knew he was insolvent at the time, which question was submitted to the jury and the verdict establishes the fact of such knowledge.

The motion for judgment non obstante veredicto is refused, and the motion for a new trial is overruled.

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UNITED STATES v. NEVADA COUNTY NARROW GAUGE R. CO.

(District Court, N. D. California. November 28, 1908.)

1. RAILROADS (§ 254\*)—VIOLATION OF REGULATIONS—PENALTIES—ACTIONS.

In an action brought to recover the statutory penalty under the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), a preponderance of the evidence that the defective car was hauled as alleged is sufficient to charge the defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. § 254.\*]

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. MASTER AND SERVANT (§ 111\*)—APPLIANCES—RAILROAD CARS—STATUTORY REQUIREMENTS.

If the coupling and uncoupling apparatus on a car is so constructed that in order to open the knuckle when preparing the coupler for use, or in uncoupling the car, it is reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position, such car is not equipped as required by section 2 of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 215; Dec. Dig. § 111.\*]

(Syllabus by the Court.)

The Interstate Commerce Commission lodged with the United States attorney information showing violations of the safety appliance law by the Nevada County Narrow Gauge Railroad Company. The declaration was in two counts, each count charging a violation of section 2 of the statute; the allegation being that the couplers were out of repair and inoperative.

Alfred P. Black, Asst. U. S. Atty., and Monroe C. List, Special Asst. U. S. Atty.

Fred Searls, for defendant.

DE HAVEN, District Judge (charging jury). The statute under which this suit is being prosecuted makes it unlawful for any common

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



carrier engaged in interstate commerce "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." The complaint in this case charges the defendant with a violation of this statute, and the question is for you to determine. It is a simple question of fact for you to determine.

The jury is instructed that if it believes from a preponderance of the evidence that the defendant hauled the car, as alleged in the first count of plaintiff's petition, when the coupling and uncoupling apparatus on either end of said car was so constructed that, in order to open the knuckle when preparing the coupler for use, it was reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position, then its verdict should be for the government.

You are instructed that if you believe from a preponderance of the evidence that the defendant hauled the car, as alleged in the first count of plaintiff's petition, when said car was not equipped with couplers coupling automatically by impact, and which could be both coupled and uncoupled without the reasonable necessity of a man going between the end sills of said cars, then your verdict should be for the government.

There are two counts in this petition. The first one is the only one that is contested. The second has been admitted by the defendant; that is, there is no defense to it.

The form of the verdict is, "We, the jury, find for the" plaintiff or defendant, as you believe, on the first count of the petition, and for the plaintiff on the second count of the petition.

Verdict for government on both counts.

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## UNITED STATES v. ATCHISON, T. & S. F. RY. CO.

(District Court, N. D. California. December 1, 1908.)

### 1. RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT—AUTOMATIC COUPLING.

If a carrier hauls over its line any cars which cannot be coupled automatically by impact, either by reason of being improperly equipped or the equipment being out of order, or disconnected, or otherwise inoperative, the act is in violation of the safety appliance law (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]).

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.\*]

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

### 2. RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT—COUPLERS.

The safety appliance statute (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT—DUTY TO REPAIR.**

Carriers are required immediately to repair defects in cars caused during the time they are being hauled, if they can do so with the means and appliances at hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. If requisite means are not at hand, carriers have the right, without incurring the penalty of the law, to haul the defective car to the nearest repair point on their line. But, if they haul such car from a repair point, they are liable for the statutory penalty.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.\*]

**4. RAILROADS (§ 229\*)—REPAIR POINTS—DUTY TO MAINTAIN.**

It is the duty of the carrier, subject to the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), to establish reasonable repair points along its line for the making of repairs of the kind necessary to comply with the law. At such repair points there should be the material and facilities to make all such repairs.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.\*]

(Syllabus by the Court.)

Alfred P. Black, Asst. U. S. Att'y., and Monroe C. List, Special Asst. U. S. Att'y.

C. L. Brown and Horace Pillsbury, for defendant.

DE HAVEN, District Judge (charging jury). You are instructed that section 2 of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) imposes upon the defendant an unqualified duty to equip its cars with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars; and, if the defendant hauled over its lines of railroad any cars which could not be so operated, either by reason of being improperly equipped or by reason of the original equipment being out of order or disconnected, or otherwise inoperative, your verdict should be for the government as to each and every car so hauled.

You are instructed that section 2 of the safety appliance act applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled. The equipment on each end of every car must be in such condition that whenever called upon for use it can be operated without the necessity of men going between the ends of the cars.

You are instructed that in actions arising under the safety appliance act the government is only required to prove by a fair preponderance of the evidence the existence of the defects as set out in the complaint.

If from the evidence you find that the cars or either of them described in the petition or in some count thereof were equipped with the requisite couplers and grab irons, and that they were in the condition required by the law when they were received by the defendant to be hauled over its line of railroad as stated, but during the time they were being so hauled the couplers or grab irons from any cause became injured or out of repair upon any of the cars so that they were not in an operative condition, then the defendant would be re-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quired to immediately repair said defects, and put the appliances in operative condition if it could do so with the means and appliances at hand at the time and place when and where it discovered their defective and inoperative condition, or when such condition should have been discovered by the exercise of reasonable care on the part of its agents or servants charged with that duty. But, if it did not at such time and place have the requisite means or appliances at hand to remedy such defect and put the couplers and grab irons in operative condition, then it would have the right, without incurring the penalty of the law, to haul such car or cars to the nearest repair point on its line where such defects could be repaired and the appliances put in operative condition. But, if such defective or inoperative condition of the couplers and grab irons existed at a repair point on defendant's line or at a place where such defects could have been remedied, then, if it hauled said car or cars from such place in such condition, it would do so at its peril, and be liable for the statutory penalty for so hauling or using such car described in any count of the petition.

You are instructed that it is the duty of a railroad company, subject to the provisions of the safety appliance act, to establish reasonable repair points along its line of railway for the making of repairs of the kind necessary to comply with the law—that is to say, repair points at places where they are reasonably required—that it is also the duty of such railroad company to have on hand at such repair points the material and facilities necessary to make all such repairs, and that such railway company must use reasonable foresight in providing material and facilities for such purpose; and, if the jury believes that the defendant hauled any car defective as to safety appliances over its line of railroad from any such repair point, where by the exercise of reasonable diligence and foresight such repairs could have been made, your verdict should be for the government as to each and every car so hauled.

You are instructed that, if the defendant hauled any car over its line of railroad from or through any point in a defective condition, it is wholly immaterial that the defendant had no shops, material, or facilities for repairing the defects at that place, if it can be shown that said car had started from a repair point upon the line of defendant's railroad in the same defective condition, and where such repairs could have been made had the defendant exercised reasonable diligence and foresight in providing such repair point with the proper material and facilities for the making of all repairs necessary to comply with the safety appliance act, your verdict should be for the government as to each and every car so hauled.

Your verdict should be for the government as to each and every car so hauled upon that state of facts.

The jury returned a verdict for the United States on the second, fourth, fifth, and eighth causes of action, and, not being able to agree as to the balance of the counts, was discharged.

## UNITED STATES v. SOUTHERN PAC. CO.

(District Court, N. D. California. December 4, 1908.)

## 1. RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT.

If a carrier hauls over its line any cars which cannot be coupled automatically by impact, either by reason of being improperly equipped or the equipment being out of order, or disconnected, or otherwise inoperative, the act is in violation of the safety appliance law (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.\*]

## 2. RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

The safety appliance statute (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.\*]

## 3. RAILROADS (§ 254\*)—SAFETY APPLIANCE ACT—CONSTRUCTION—PENALTY.

Carriers are required immediately to repair defects in cars caused during the time they are being hauled, if they can do so with the means and appliances at hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. If requisite means are not at hand, carriers have the right, without incurring the penalty of the law, to haul the defective car to the nearest repair point on their line. But, if they haul such car from a repair point, they are liable for the statutory penalty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 765, 766; Dec. Dig. § 254.\*]

## 4. RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

It is the duty of the carrier, subject to the safety appliance act, to establish reasonable repair points along its line for the making of repairs of the kind necessary to comply with the law. At such repair points there should be the material and facilities to make all such repairs.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.\*]

## 5. RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

The railway company is under no obligation to receive from any other company cars defective as to safety appliances, and, when it does receive cars from another company at any point, it must know at its peril that each car so received is equipped with the safety appliances required by law, and that such appliances are in good order and condition.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.\*]

## 6. RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

It is the use of a car in a defective condition that the law seeks to prevent, and not the length of the haul.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.\*]

## 7. RAILROADS (§ 254\*)—SAFETY APPLIANCE ACT—PENALTIES.

If an employé of a railway company deliberately puts coupling devices on a car being used in interstate traffic in a condition which the law

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

undertakes to prevent, then the company is liable to respond under the penalty for the unlawful act of the employé.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 765, 766; Dec. Dig. § 254.\*]

(Syllabus by the Court.)

Alfred P. Black, Asst. U. S. Atty., and Monroe C. List, Special Asst. U. S. Atty.

Charles P. Heggerty, for defendant.

DE HAVEN, District Judge (charging jury). You are required to return a verdict in each of these cases. The first one is 13,757, and contains ten causes of actions. The second one is numbered 13,760, and contains two causes of action.

The first two causes of action stated in No. 13,757 charge a violation of section 1 of what is known as the "Safety Appliance Act." In reference to those two counts, I now instruct you it will be your duty to return a verdict for the government. The remainder of the counts in No. 13,757 charge a violation of section 2 of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]). And that you may understand precisely the questions of fact upon which you are called to pass, I will read this section of the law to you:

"That from and after the first day of January, eighteen hundred and ninety-eight it shall be unlawful for any such common carrier—that is, a common carrier engaged in interstate traffic—to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

This section of the law applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on any adjacent car or on any car to which each car sued upon was or was to be coupled. The equipment on each end of every car must be in such condition that whenever called upon for use it can be operated without the necessity of men going between the ends of the cars.

The law also means that each car must be equipped with an uncoupling lever on each end thereof, by means of which such car can be at all times uncoupled from another car by a man standing at one end on the side of the car, and without the reasonable necessity of going between such car or any other car, or without going around the end of the train in which said car might be hauled, or without crawling under or over said cars, in order to reach the uncoupling lever of the adjacent car.

While the safety appliance law does not ask a railway company to do the impossible, it does nevertheless place upon such company the responsibility of properly equipping its cars in the first instance, and the maintaining of such equipment in good operative condition at all times thereafter. Of course, if, while a car is being hauled between repair stations, some defect occurs to its safety appliances, such railway company must use the utmost care to discover and repair such defects,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

if the nature of the repairs will permit of their being made at that time and place. Should such defect be of a heavy nature only to be made at repair stations, then the company would have the right, without incurring the penalty of the law, to haul such car to the nearest place where such repairs can be made. In doing this the company cannot choose its place of making repairs, but must avail itself, for that purpose, of the nearest point where, by the exercise of diligence and foresight, it may prepare to make such repairs. And it is the duty of every railway company subject to this law to establish reasonable repair points along its line of railroad for the making of all repairs necessary to comply with the law; that is, it is its duty to establish repair points at all places along the line of road where it is reasonably necessary that they should be established in order faithfully to comply with the law. Inasmuch as inability alone will not excuse a company from a literal compliance with the law, it is the duty of such company to have the material and facilities on hand at every repair point to make repairs of the kind necessary to comply with the provisions of the safety appliance act. And if a defect exists at a repair point, or at any place where such defect could have been repaired, and the company moves the car while in the defective condition, it does so at its peril, and it becomes then subject to the penalty of the law. The law is not satisfied by the exercise of reasonable care to this end; but the company must at its peril discover and repair all defects before removing a car from a repair point.

A railway company is under no obligation to receive from any other company cars defective as to safety appliances, and, when it does receive cars from another company at any point, it must know at its peril that each car so received is equipped with the safety appliances required by law, and that such appliances are in good order and condition.

The penalty under the safety appliance act applies to every defective car hauled contrary to its provisions, whether or not each car was hauled separately or in a train together, and it matters not how far each car was hauled. It is the use of the car in a defective condition that the law seeks to prevent, and not the length of the haul.

Now, as to the different counts:

In the first and second counts of 13,757 you are instructed to find for the plaintiff.

The third count charges the hauling of Chicago, Burlington & Quincy car No. 61488 when the coupling and uncoupling apparatus was missing from the B end, and when said car was chained to another car. If you believe that the defendant so hauled this car from Truckee in this condition, and that Truckee was a repair point along the line of the defendant company, your verdict should be for the government.

The fourth count charges the hauling of Southern Pacific car No. 48602, when the knuckle was missing from the A end and when the car was chained to another car. You are instructed that the law lays an unqualified duty upon a railroad company to keep its coupling devices in a certain prescribed condition, and, if an employé of such company deliberately puts such devices in another condition, which condition the law undertakes to prevent, then the company is liable

to respond under the penalty for the unlawful act of the employé, and if you believe from the evidence that the knuckle was removed from this car for the purpose of chaining it to another car, and that the car was so hauled in interstate traffic in that condition, and in that condition it would be necessary for a man to pass between the end of that car and an adjacent car in order to couple and uncouple them, your verdict should be for the government.

The fifth count charges the hauling of Baltimore & Ohio car No. 57286 when the keeper or inner casting was broken on one end and the uncoupling lever hanging down on the coupler. If you believe that this uncoupling lever was in such condition that any reasonable effort would not operate the same, and that, in order to uncouple this car from another car, it would have been reasonably necessary for a man to go between the cars, and that in that condition the car was hauled over the line of defendant's road in interstate traffic, then your verdict should be for the government on that count.

The sixth count charges the hauling of Chicago, Milwaukee & St. Paul car No. 58960, when the bottom clevis pin was missing on the A end. If you believe that the car was in that condition, and that the absence of this pin rendered the uncoupling lever inoperative, and that in order to uncouple this car from another car it was reasonably necessary for a man to go between the ends of the cars, and that in that condition the car was hauled over the line of defendant's road in interstate traffic, then your verdict should be for the government.

The seventh count refers to a "kinked" chain. If this car left Truckee while the chain was so "kinked," and while in this condition the coupler was inoperative, requiring the reasonable necessity of a man to go between the cars to couple or uncouple them, your verdict should be for the government.

The eighth and ninth counts are similar to the fifth and seventh counts, respectively, and what I have said in regard to those you can apply to these counts.

The tenth and the last count in No. 13,757 charges the use of a locomotive engine when the coupler was missing from the A or front end. It is not necessary that this end of the locomotive was used or was coupled to any car; that is, the front end or A end. It is the use of the locomotive in a defective condition that the law seeks to prevent, and, if you believe that this locomotive was used by the defendant upon its line of railroad in connection with other cars engaged in hauling interstate traffic, and not used for the purpose of taking it to the nearest point where it could be repaired, your verdict should be for the government. Of course, if you find that it was only taken to Sparks, and find that that was the nearest place where it could be repaired, and that it was only taken there for that purpose, then your verdict should be for the defendant on that count.

The first and second counts and the only counts in case No. 13,760 charge the hauling of two cars chained together. If you believe that these cars were delivered to the Southern Pacific Company by another company in such a condition as has been testified to by the witnesses for the government—and you should find that the defendant in hauling interstate traffic used them on its train engaged in interstate traffic,

your verdict should be for the government. One carrier cannot receive a defective car from another carrier and excuse itself. It must discover such defect at its peril before it receives and hauls any such car in interstate traffic.

I may say to you, that you are the exclusive judges of the credibility of the different witnesses who have testified in your hearing; that is, you must determine for yourselves which witness or witnesses you will believe, and then, after you have fixed that in your mind, you are also the exclusive judges of what ultimate facts are shown by such testimony. In considering this testimony, positive testimony is to be preferred to negative testimony, other things being equal; that is to say, when a credible witness testifies as to the existence of a fact at a particular time and place and another equally credible witness testifies to having failed to observe such fact, the positive declaration is ordinarily to be preferred to the negative in the absence of other testimony or evidence corroborating the one or the other. Nevertheless, that is a question for you solely in passing on the weight to be given to this positive and negative testimony. If, in your judgment, the testimony of the witness who says that he did not see a thing is entitled to weight, that the circumstances surrounding him at that time, at the time he made the examination, were such that if the fact had existed he would have seen it, then as a matter of course you would be at liberty to find that the fact did not exist. That is simply a rule of common sense in weighing testimony.

In regard to the burden of proof, the burden of proof is on the government to establish by preponderance of evidence the facts charged in the different counts of the petition. And by a preponderance of evidence is not meant the greater number of witnesses, but it means that evidence which to your mind is the most satisfactory and is entitled to the greatest weight.

A Juror: I should like to ask a question: In taking that engine from Truckee to Sparks, is it a breaking of the law as interpreted by hitching it to a train, or does it have to go down alone?

The Court: If Truckee was a repair point and a place where the engine ought to have been repaired, and it was attached to a train engaged in interstate traffic and taken to Sparks, that would be a violation of the law. But if Truckee was not a repair point, and the engine could not have been repaired at Truckee, and was simply taken down to Sparks for the purpose of repair, I should say that that would not be a violation of the statute.

Another Juror: I should like to ask a question in regard to the two cars at Richmond: Would those two cars be considered as engaged in interstate traffic?

The Court: That is a question for the jury to determine from the evidence in this case. If they were attached to other cars engaged in interstate traffic, then they would be engaged in interstate traffic.

Another Juror: If the engine referred to needed repairs, and could only be repaired at Sparks, but was used between Truckee and Sparks in the hauling of a train as far as that point, should we find for the government?



The Court: If the engine could not be repaired at Truckee, and the company, under the law I have laid down before you, was not required to be able to repair it there, and it was moved to Sparks for the purpose of being repaired, I should say that the mere fact that it was attached to an interstate traffic train would not render the company liable if the main purpose in removing was to repair it.

The jury returned the following verdict: In case 13,760, for the United States; in case 13,757, for the United States on the first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action set forth in the complaint; and for the defendant on count 10.

## BIGELOW v. CALUMET & HECLA MINING CO. et al. (two cases).

(Circuit Court, W. D. Michigan, N. D. October 3, 1908.)

### 1. CORPORATIONS (§ 377\*)—POWERS—PURCHASING STOCK IN OTHER CORPORATIONS—MICHIGAN MINING STATUTE.

A mining corporation of Michigan may exercise the power to purchase stock of other similar corporations conferred by Pub. Acts Mich. 1905, p. 153, No. 105, although its articles of incorporation do not in terms include such power, the state laws under which it was organized and by which it is governed being expressly subject to amendment or alteration under Const. Mich. art. 15, § 1; and the acceptance of the statutory amendment is sufficiently expressed by the exercise of the power given by the amendment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1531; Dec. Dig. § 377.\*]

Acquisition by corporation of stock of other corporation, see note to Anglo-American Land, Mortgage & Agency Co. v. Lombard, 68 C. C. A. 120.]

### 2. CORPORATIONS (§ 377\*)—POWERS—HOLDING STOCK IN OTHER CORPORATIONS.

Pub. Acts Mich. 1905, p. 153, No. 105, which authorizes corporations organized under the mining laws of the state to purchase the stock of any other corporation organized thereunder, does not limit the purpose of such purchases, and the purchasing company may exercise all the lawful rights of a stockholder, including voting the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1531; Dec. Dig. § 377.\*]

### 3. MONOPOLIES (§ 12\*)—COMBINATIONS IN RESTRAINT OF TRADE—INTENTION OF PARTIES.

In determining whether a transaction constituted an illegal contract, combination, or conspiracy in restraint of interstate trade or commerce, or to monopolize the same in violation of the Sherman anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), the intention of the parties may or may not be material, depending on whether or not the necessary effect of the agreement or acts done is to directly restrain such trade or to create such monopoly. If not, the intention is important.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

### 4. MONOPOLIES (§ 12\*)—COMBINATIONS IN RESTRAINT OF TRADE—FEDERAL STATUTE.

A combination is not illegal as in violation of the Sherman anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), merely because it may indirectly, incidentally, or remotely restrain interstate trade or tend toward monopoly, if its main purpose and chief effect are to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

promote the business and increase the trade of the parties in a legitimate way.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

5. MONOPOLIES (§ 20\*)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS BY MINING CORPORATIONS.

The securing by one copper mining corporation, through stock purchases authorized by the laws of the state and proxies obtained from other stockholders, of control over a competing corporation owning and operating adjacent mines, does not necessarily restrain interstate trade or create a monopoly in violation of the Sherman anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), although it is the intention to place the two corporations to a large extent under a common directorate and general control; and such purchase will not be held illegal under the statute because of such facts, where its primary purpose is to secure through friendly co-operation and the joint use of facilities a more economical operation of the mines, especially where the controlled corporation is one of a group previously under a common control and management, and whose products were sold through a common agency; nor does the fact that such purchase will result in the transfer of such agency as to its product to that of the purchasing company tend to unlawfully restrain competition.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*]

6. MONOPOLIES (§ 20\*)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS BY MINING CORPORATIONS.

Lake Superior copper of the grade known in the market as "Best Lake" copper is not so distinct from Western copper as a commercial product as to render a combination between two or more of the few companies producing the same unlawful as a monopoly or attempted monopoly of such Best Lake copper, in view of the recently employed process of electrolytic refining which has practically, and to a large extent commercially, eliminated the difference between the Lake and Western products.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*]

7. MONOPOLIES (§ 20\*)—COMBINATIONS IN RESTRAINT OF TRADE—MICHIGAN STATUTES.

The purchase by one mining corporation of a controlling interest in the stock of another competing corporation *held*, under the evidence, not unlawful as in violation of Pub. Acts Mich. 1899, p. 409, No. 255, which prohibits combinations for the purpose of preventing competition in "manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity," or of Pub. Acts Mich. 1905, p. 507, No. 329, which declares illegal all combinations entered into "for the purpose and with the intent of establishing and maintaining, or of attempting to establish and maintain a monopoly."

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*]

8. MINES AND MINERALS (§ 105\*)—CORPORATIONS—POWERS—RESTRICTIONS AS TO REAL PROPERTY—MICHIGAN MINING CORPORATIONS.

The land holdings of a Michigan copper-mining corporation, shown to require 30,000,000 feet of timber per year in its mines, *held* not so excessive as to be illegal under Pub. Acts Mich. 1907, p. 214, No. 162, relating to mines, which provides that "every corporation organized or existing under this act shall have the power to purchase, hold and convey all such real estate as the purposes of the corporation shall require."

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 229; Dec. Dig. § 105.\*]

9. MINES AND MINERALS (§ 105\*)—CORPORATIONS—POWERS—RESTRICTIONS AS TO REAL PROPERTY.

In determining whether the land holdings of a mining corporation exceed the statutory limit, which is fixed at the amount the purposes of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the corporation shall require, lands owned by other mining corporations which it controls through stock ownership are not to be taken into account.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 229; Dec. Dig. § 105.\*]

For opinion of Circuit Court of Appeals affirming decree, see 167 Fed. 721.

Herbert E. Boynton and Arthur C. Denison, for plaintiff.

Allen F. Rees and Otto Kirchner, for defendant Calumet & Hecla Mining Co.

John E. More, for defendant Osceola Consol. Min. Co.

KNAPPEN, District Judge. In the opinion filed by this court upon the application for a preliminary injunction in the case first above entitled (*Bigelow v. Calumet & Hecla Mining Company* [C. C.] 155 Fed. 869), the claims of the complainant presented in that cause, as well as the conclusions reached upon the various legal questions there raised, are fully stated. The bill of complaint in the second cause contains, so far as material to this opinion, substantially the same allegations of fact and legal deductions therefrom as the bill in the first cause, except in certain respects to which attention is especially called in this opinion. Briefly summarized, both bills allege in substance that the purchase by the Calumet & Hecla Company of 22,671 shares of stock in the Osceola Company, and the obtaining of proxies in the interest of the Calumet & Hecla Company, for the voting of the stock of other shareholders in the Osceola Company, is an attempt on the part of the Calumet & Hecla Company to monopolize, in part, interstate commerce, in violation of the Sherman act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), to effect a combination for the purpose and with the intent of establishing and maintaining a monopoly of the business of mining, manufacturing, and selling copper, contrary to the Michigan statute against trusts and monopolies, and in violation of the common law relating to monopoly; that such action is part of the general plan of the Calumet & Hecla Company to secure control of practically the entire output of so-called "Lake copper," and thereby to secure a complete and absolute monopoly of such copper throughout the United States; that, in pursuance of said alleged unlawful plan, the Calumet & Hecla Company had also acquired a control of the stock in the Allouez and Centennial Companies (both alleged to be actively competing companies), and of stock interests in a large number of other companies, and was seeking to acquire further controlling holdings of stock in still other actively competing mining companies, notably the Tamarack, Ahmeek, and Isle Royale, which are operated in connection with the Osceola under complainant's management; that the action of the Calumet & Hecla Company in making such stock purchases and in procuring such proxies was ultra vires, illegal, and void; that the Calumet & Hecla Company has obtained and is holding lands greatly in excess of the 50,000 acres allowed by the mining law in force when the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bills were filed; that if the Calumet & Hecla Company shall secure the attempted control of the Osceola Company by the election of a board of directors, it can and will control the Osceola Company in the interest of the Calumet & Hecla Company, and not in the interest of complainant and other stockholders in the Osceola Company.

The bill in the first case (which was filed by complainant in virtue of his stockholding in the Osceola Company) asks an injunction against the voting, at the annual stockholders' meeting, on the part or behalf of the Calumet & Hecla Company, of the Osceola stock held by it, as well as the proxies held in its interest.

The bill in the second case (filed in virtue of complainant's ownership of a small amount of stock in the Calumet & Hecla Company, purchased after the commencement of the first suit, and for the purpose of protecting complainant's interest as an Osceola stockholder) asks a decree declaring the purchases of lands by the Calumet & Hecla Company in excess of 50,000 acres to be illegal, and that such excessive purchases be vacated; that the purchases made of stocks in other mining companies be declared illegal, and that steps be taken for the vacating of the same; that the Calumet & Hecla Company be enjoined from carrying out options and from paying assessments upon, and from purchasing or voting stock in, any other mining company, as well as from soliciting stock proxies in any competing mining company, and from voting stock or proxies before obtained in any such company, as part of a plan for acquiring the management and control of such company; and from buying or carrying out options for the purchase of further lands; and from arranging for joint operations between the Calumet & Hecla, Al-louez, Centennial, and Osceola mines, including joint use of shafts; and from hauling, crushing, or smelting the products thereof by the railroads, stamp mills, or smelters of the Calumet & Hecla Company.

This court held, upon the motion for preliminary injunction in the first case, that the 1905 amendment to the Michigan mining law (Pub. Acts Mich. 1905, pp. 153, 154, No. 105) empowered the Calumet & Hecla Company to purchase stock in the Osceola and other companies, subject to the restriction that such purchase be not made with the intent and for the purpose of restraining trade or creating a monopoly; but that a control by way of stock purchase and proxies, if made for that purpose and with that intent, was a violation of the state and federal statutes, which were held broad enough to cover any means purposely adopted for, and manifestly adapted to, the accomplishment of the unlawful purpose; and that the prima facie case presented by the bill, and evidence by way of ex parte affidavits, justified preserving the existing status until full and final hearing upon the merits. The motion for injunction in the second case was never heard.

The conclusion heretofore reached as to the power of the Calumet & Hecla Company to make the stock purchases in question, except so far as prohibited by the anti-trust and anti-monopoly laws, state

or federal, must be adhered to. It is, however, urged by complainant that the exercise by the Calumet & Hecla Company of the power to purchase stock in other mining companies, given by the 1905 amendment to the mining act (Pub. Acts Mich. 1905, p. 153, No. 105), violates the contract between the Calumet & Hecla stockholders as expressed in their articles of incorporation, which do not in terms include such power. Assuming (but not holding) that complainant is entitled to raise the question, the proposition is not, in my judgment, sustainable. The power to make the statutory amendment in question is directly given by section 1, art. 15, of the Constitution of Michigan, which provides for the formation of corporations under general laws, and that "all laws passed pursuant to this section may be amended, altered or repealed." The stockholders are as much bound by this provision as if it had been contained in their articles of incorporation. *Attorney General v. Looker*, 111 Mich. 498, 69 N. W. 929; *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; *Polk v. Mutual Reserve Fund Life Association*, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222. It is doubtful whether this power to purchase stock in another corporation engaged in the same business was such a substantial departure from the purposes of the corporation as expressed in its articles as to require the express acceptance of the amendment by the corporation. *Louisville Trust Company v. Louisville, New Albany & Chicago Railway Company*, 22 C. C. A. 378, 75 Fed. 433, 448. But if such acceptance was necessary it was, in my judgment, sufficiently expressed by the adoption, after due notice, of a by-law conferring such power upon the directors, by corporate action had thereunder, in the purchase of the stock, and by the subsequent ratification thereof by the stockholders after due notice. *Zabriskie v. Cleveland, Columbus & Cincinnati Railway Company*, 23 How. 381, 396, 16 L. Ed. 488; *Louisville Trust Company v. Louisville, New Albany & Chicago Railway Company*, 75 Fed. 488, 22 C. C. A. 378; *Venner v. Atchison, Topeka & Santa Fé Railway Company* (C. C.) 28 Fed. 581, 587, 589.

It is further urged that the statute should be constructed as authorizing stock purchases for investment only, and not for control. Except so far as this proposition involves the question of conflict with anti-trust and anti-monopoly laws, it is without apparent force. Not only does the statute contain no express limitation to purchases for investment, but the object of the provision, which is apparently to further the active and profitable prosecution of the business of the purchasing corporation by way of holding interests in other corporations carrying on the same or a directly allied business, seems more consistent with the right of active participation in the affairs of the corporation whose stock is purchased than with a mere right of investment without such active participation. The right to vote the stock so purchased is expressly given by the Michigan mining act (2 Comp. Laws Mich. § 7002), and such right is incidental to the ownership of the stock. *Rogers v. Nashville, Chattanooga & St. Louis Railway Company*, 33 C. C. A. 517, 91 Fed. 312; *Taylor v. Southern Pacific Railway Company* (C. C.) 122 Fed. 147, 151.

The contention that the acquiring and holding of the stock proxies in the interest of the Calumet & Hecla Company is beyond the power of that company cannot be sustained. The mining act (2 Comp. Laws Mich. § 7002) expressly provides that "stockholders may appear and vote in person, or by proxy duly filed, or by their duly constituted attorneys." No question of the right of the Calumet & Hecla Company to act as the attorney for a stockholder in the Osceola Company is involved, for the corporation does not attempt to so act. But no reason is apparent why a corporation shareholder should not have the same legal right as other shareholders to protect its interest, both by giving and soliciting proxies for effecting a lawful concert of action.

We are thus brought to the consideration of the question whose answer must control the disposition of the first case, viz., whether the purchase of the Osceola stock and the obtaining of the Osceola proxies by the Calumet & Hecla Company have the necessary effect, or were made and done with the intent, to restrain trade or create or maintain a monopoly within the meaning of the law.

And, first, as to the Sherman act. The sections involved here are section 1, which declares illegal "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations"; and section 2, which declares it a misdemeanor to "monopolize or attempt to or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations."

It is important, at the outset, to consider the intent and purpose of the action complained of; for while it is not necessary to a violation of the act to show affirmatively a specific intent to restrain commerce or create a monopoly, provided such restraint or such monopoly be the direct, immediate, and necessary result of the combination (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Chesapeake & Ohio Fuel Company v. United States*, 53 C. C. A. 256, 115 Fed. 610, 623), yet, as said by Mr. Justice Holmes in *Swift & Company v. United States*, 196 U. S. at page 396, 25 Sup. Ct. at page 279, 49 L. Ed. 518, "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, a monopoly—but require further acts in addition to the mere forces of nature in order to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen;" and, as said by Mr. Justice Peckham in the *Joint Traffic Association Case*, in commenting upon the decision in the *Trans-Missouri Case*, "An unlawful intent in entering into the agreement was held immaterial, but only for the fact that the agreement did in fact and by its terms restrain trade."

In many of the leading cases, both under state statutes and the common law, the express intent to restrain trade or create a monopoly was treated as material, and in some cases controlling. Thus, in *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457, the

object of the organization of the Diamond Match Company, which was there held to be a monopoly, was stated to be "to monopolize and control the business of making all the friction matches in the United States and establish the price thereof." In *Dunbar v. American Telephone Company*, 224 Ill. 9, 79 N. E. 423, 115 Am. St. Rep. 132, the direct object of the purchase by the American Telephone Company (the so-called "Bell monopoly") was alleged to be to put the Kellogg Company out of business, or to so use and control it as to prevent rivalry in business and create a monopoly. In *Hunt v. Riverside Co-operative Club*, 140 Mich. 538, 104 N. W. 40, 112 Am. St. Rep. 420, the legality of defendant's undertaking was said "to be determined by ascertaining their central and controlling object," which was found to be to create a monopoly in favor of the plumber members.

The facts necessary to be considered in determining the intent and purpose with which the Calumet & Hecla Company made the purchases and entered upon the expansion policy in question are these: The mines of the Calumet & Hecla Company are upon the Calumet conglomerate and the Osceola and Kearsarge amygdaloid lodes, which underlie from the surface in the order named. Until 1904 the Calumet & Hecla Company mined from the conglomerate lode only. Since that year about one-tenth of its output has been taken from the Osceola lode. Only about one-third of that lode (so far as developed on the Calumet & Hecla property) is said to be capable of profitable mining. Upon the Kearsarge lode the Calumet & Hecla Company has thus far done no profitable mining. The conglomerate rock mined by the Calumet & Hecla Company originally yielded 100 pounds of copper to the ton, but the percentage of copper has decreased with the depth at which the vein is mined, until now it yields but little more than 40 pounds. The testimony fairly indicates that the profitable life of the Calumet & Hecla Company, in mining upon the conglomerate lode, at the present rate of production, is about 15 years, and that when this lode is exhausted, unless considerably more territory is secured, the industrial life of the Calumet & Hecla Company will be greatly impaired, and several million dollars worth of equipment and plants rendered in large part valueless. Parts of the Kearsarge lode on the Calumet & Hecla property are barren, the workings of that company yielding from that vein an average of 17 to 18 pounds of copper per ton of rock. To produce the same output from the Kearsarge lode, the Calumet & Hecla Company must mine several times as much rock as on the Calumet conglomerate; and for the reason stated, and in order to use the existing large equipment and conduct mining operations with the present degree of profit, it would be necessary, in working the Kearsarge vein, to mine over a large territory at once.

The Osceola, Centennial, Allouez, and La Salle mines are upon the Kearsarge lode, the mines of the Osceola Company being also upon the Osceola lode. The Osceola Company has worked both the Osceola and Kearsarge veins, producing from both in 1906 about 18½ million pounds of copper. The Allouez and Centennial properties have never been fully developed, the former yielding in 1906 about

3½ million and the latter about 2½ million pounds of copper. In the case of the other companies involved, development has in no case been carried to the point of profitable production. The Centennial immediately adjoins the Calumet & Hecla, a portion of the Osceola lies between and immediately adjoining the Centennial, and the Allouez and another portion of the Osceola lie between and immediately adjoining the Calumet & Hecla and the La Salle, in which the Calumet & Hecla Company has acquired a controlling interest. The Kearsarge lode can be most advantageously worked by the Calumet & Hecla Company, through friendly co-operation with the Osceola, Centennial, Allouez, and La Salle mines, not unusual between mining companies sustaining friendly relations toward each other. Certain abandoned shafts of the Osceola Company are thought by the Calumet & Hecla Company to be available for mining the Osceola amygdaloid lode as well as the conglomerate lode of the Calumet & Hecla property, and certain shafts of the Osceola Company it is thought may ultimately be profitably extended into the Allouez and Centennial workings, and certain shafts upon other properties in which the Calumet & Hecla Company is interested it is believed can be advantageously used in the Osceola Company's territory. The relations between the Calumet & Hecla and the Osceola Companies were not such as to permit co-operation.

Copper production in the Lake region has steadily increased for many years past. In 1906 there were at least 22 producing companies in that region. At least 13 other mining companies were then developing and exploring. The copper-bearing range contains other profitable lodes besides those before named, including the Pewabic (on which the Quincy operates), the Arcadian (worked by the Isle Royale), and the Baltic (on which the Copper Range mines are operated). The Calumet & Hecla ratio of production toward the total Lake production has gradually declined from about 66 per cent. in 1879 to 38 per cent. in 1905, increasing to about 43 per cent. in 1906.

I am convinced, from a careful consideration of the testimony, that the controlling motive and purpose of the Calumet & Hecla Company in acquiring its interest in the mining properties mentioned was to extend its industrial life and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negatives a design thereby to reduce the output of any of the companies, or artificially to increase or maintain the price of the product, or to stifle competition between the related companies, or to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company, a common management with separate detailed organization being contemplated. The evidence does not indicate that any use of the facilities of the associated companies is contemplated, except upon terms and in manner mutually advantageous. The testimony indicates that the stock of the Osceola, Allouez, and Centennial Companies was bought on the exchange, as the only practicable method of procuring control of those properties; the legislative bill of 1905, authorizing the purchase of stock in other mining companies, having been introduced at the instance of the Calumet & Hecla Company.



The allegation in the bill that the Calumet & Hecla Company was seeking to purchase interests in the Tamarack, Ahmeek, and Isle Royal Companies is not sustained by the evidence, except to this extent: that the Calumet & Hecla Company made an offer for the holdings of complainant and his associates, but only after complainant (having reason to suspect that the Calumet & Hecla Company was buying Osceola stock to obtain control) offered the same for sale, conditioned upon receiving the assurance that the Osceola stock was being bought for control. While this assurance was not given, the fact was neither admitted nor denied.

It is only just to complainant to say that the charges made against his management of the Osceola Company, to the effect that its product has not been economically manufactured and sold, and that it has not been made to bring the best prices, are shown to be without foundation.

A consideration of the evidence has failed to convince me that the Calumet & Hecla Company is seeking to restrain trade or create a monopoly, unless such monopoly or restraint of trade shall be found to be the necessary result of the control in question over the competing companies involved.

We are thus brought to the question whether the necessary effect of the alleged combination is to restrain trade or create a monopoly. It is settled that a combination does not violate the federal statute merely because it may indirectly, incidentally, or remotely restrain trade or tend toward monopoly. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition, while its main purpose and chief effect are to promote the business and increase the trade of the consumers, it is not denounced or voided by that law. *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Whitwell v. Continental Tobacco Company*, 60 C. C. A. 290, 125 Fed. 454, 64 L. R. A. 689; *Chesapeake & Ohio Fuel Company v. United States*, 53 C. C. A. 256, 115 Fed. 610, 622; *Davis v. A. Booth Company*, 65 C. C. A. 269, 131 Fed. 31; *Phillips v. Iola Portland Cement Company*, 125 Fed. 593, 594, 595, 61 C. C. A. 19.

Is, then, the direct and immediate and necessary effect of the mere fact of control on the part of the Calumet & Hecla Company over the Osceola Company (as obtained by the election of a majority of the board of directors, and thus the power to direct the affairs of the latter company, through the election of officers and otherwise) to restrain trade or create a monopoly within the meaning of the Sherman act?

In *United States v. E. C. Knight Company*, supra, it was broadly held that a monopoly of manufacturing was not within the prohibition of that law. There the American Sugar Refining Company, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock in four Philadelphia sugar refineries, such disposition over those manufactories throughout the United States as gave it practically a monopoly

of the business. It was held that it does not follow that an attempt to monopolize, or the actual monopoly of the manufacture, was an attempt to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. Chief Justice Fuller there said (page 16 of 156 U. S., page 255 of 15 Sup. Ct. [39 L. Ed. 325]):

"Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy."

It is urged, however, that the authority of the Knight Case has been destroyed by subsequent decisions of the Supreme Court. Apart from this question, an examination of the later decisions which are thought to have that effect is of value; for in each of the cases so cited, and in which the effect of the combination in question has been held to be to restrain trade or create monopoly, there is found to have existed some special element (apart from the mere combination of manufacturing companies selling their product in interstate and foreign trade) from which a direct, immediate, and necessary restraint upon competition was found to result.

Thus: By the agreement in question in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, the adoption of governing rates for all companies interested was directly provided for, and this was the announced purpose of the combination.

In *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, the facts were similar to those in the *Trans-Missouri Case*. In the *Joint Traffic Case*, Justice Peckham said:

"To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri Case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

In *Addyston Pipe Company v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, the defendants, who were manufacturers of cast iron pipe, entered into a combination to "raise the price of pipe for all the states west of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States," by "voluntarily agreeing to sell only at prices fixed by their committee"; whereby the defendants were able to "compel the public to pay an increase over what the price would have been if fixed by competition between the defendants." Justice Peckham there said of the *Knight Case*:

"The plain distinction between manufacture and commerce was pointed out, and it was observed that a contract or combination which directly related to manufacture only was not brought within the purview of the act, although, as an indirect and incidental result of such combination, commerce among the states might be thereafter somewhat affected."

In *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, the Tile, Mantel & Grate Association involved had been organized for the express purpose of creating a monopoly between dealers within a certain radius and the Eastern manufacturers of tile. By reason of the association, plaintiffs were wholly unable to procure at any price tiles from the manufacturers (from whom they had always before bought), or from dealers in San Francisco unless at a price more than 50 per cent. above what members of the association were to pay.

In *Swift & Company v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the case was heard upon demurrer to the bill, which charged a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against, or only in conjunction with, each other, in order to regulate prices in, and induce shipments to, the live stock markets in other states, to restrict shipments, establish uniform rules of grading, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors, with the intent to monopolize commerce among the states. Mr. Justice Holmes, in holding the combination invalid, said, with reference to the alleged restraint of interstate commerce, that:

It "is a direct object, it is that for which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, where the subject-matter of the combination was manufactures, and the direct object monopoly of manufacture within a state. However likely monopoly of commerce among the states in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect of such sales."

In *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the combination embraced competing or parallel lines of railroad. These railroads were directly engaged in commerce between the states, and the agreement provided for a pro-rating of the earnings between the two companies involved, thus effectually restraining competition.

Turning to the cases elsewhere, in which the direct and necessary effect of a given combination has been held to be to restrain trade, there is found to have existed some special element or consideration, apart from the mere combination of manufacturing companies, from which a direct, immediate, and necessary restraint upon competition was held to result.

For example, in *Chesapeake & Ohio Fuel Company v. United States*, 53 C. C. A. 256, 115 Fed. 610, 14 coal producers of a given district, formerly independent, were compelled to sell at a price fixed by the executive committee or not to sell at all. The executive committee also determined each month what percentage of the total product each member might ship. The rule was expressly recognized that it is not every case of incidental restraint which makes a contract void, the court saying: "But the question is, is it an effect of the contract to directly restrain interstate commerce?"

In *Cravens v. Carter-Crume Company*, 34 C. C. A. 479, 92 Fed. 479,

a combination of manufacturers of woodenware, representing 80 per cent. of the production of the country, was formed for the purpose of restricting production and keeping up prices, which were to be regulated by the central organization. The direct purpose was held to be to create a monopoly and restrain freedom of commerce.

It is urged that certain remarks found in the opinions of the courts in the Pearsall, Great Northern, Trans-Missouri, Northern Securities, Addyston, and other cases sustain the proposition that a control by one corporation over a competitor creates the tendency and the power to suppress competition, and that this tendency and power operate ipso facto as a direct and immediate restraint upon trade and in the direction of monopoly. The Pearsall Case (161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838) involved the question of fact whether certain acts amounted to a consolidation, lease, purchase, or any form of control on the part of the Great Northern over the Northern Pacific, and thus violated a statute of Minnesota forbidding railroad corporations to "consolidate with, lease, or purchase, or in any way become owner of or control any other railroad corporation, or any stock, franchise or rights or property thereof, which owns or controls a parallel or competing line." The nature of the other cases referred to has been already stated. Considering the remarks referred to in connection with the light of attending facts and the points decided, I find nothing in them sustaining the proposition that the direct, immediate, and necessary effect of a control by a corporation over a competitor, through stock ownership, is to restrain trade or create a monopoly either in manufacturing or selling. On the other hand, it is well settled that individual stockholders may lawfully own a controlling interest in each of two competing companies (Pearsall v. Great Northern Railway Company, 161 U. S. 646, 671, 16 Sup. Ct. 705, 40 L. Ed. 838; Northern Securities Company v. United States, 193 U. S. 361, 362, 24 Sup. Ct. 436, 48 L. Ed. 679), and that the same person may as director lawfully represent two competing companies (Adams Mining Company v. Senter, 26 Mich. 73; Twin-Lick Oil Company v. Marbury, 91 U. S. 587, 23 L. Ed. 328). The fact that Calumet & Hecla officers or representatives are to act as directors in the Osceola Company, whose corporate organization and affairs are to be separately maintained and conducted, affords no presumption that such directors will violate the law or abuse their trusts as directors of the Osceola Company. Any attempt to do so, will, of course, subject them to restraint or correction by the courts. Rogers v. Nashville, C. & St. L. Ry. Company, 91 Fed. 313, 33 C. C. A. 517. Beyond such indirect restraint as is incidental to a common management, it is difficult to see that competition will be necessarily unlawfully restricted. It is true that an opportunity for restricting competition is afforded by the relation; but this is equally true of every case of a common general management; true, for example, of the relations between the Osceola, Tamarack, Ahmeek, and Isle Royale Companies, which have in complainant a common president, who is largely interested as a stockholder; which have a common general management and control; and which own stock in a common smelter, railroad, and chemical works, and sell through a common

agent. In either of the cases presented, "further acts in addition to the mere forces of nature" are required to bring about the restraint of competition beyond such restraint as indirectly, remotely, and incidentally results from the relation of a common management. The practical certainty that under the proposed control the selling of the Osceola product would be taken from the United States Metals Selling Company, and will be sold in connection with that of the Calumet & Hecla Company, and thus under a general Calumet & Hecla management, is urged as necessarily restricting competition. But not only does not the employment of a common selling agent necessarily tend of itself to restrain trade (*United States v. Joint Traffic Association*, 171 U. S. 567, 19 Sup. Ct. 25, 43 L. Ed. 259), but it would seem that any decrease of competition between the Calumet & Hecla and the Osceola Companies is likely to be offset by new competition between the Osceola on the one hand, the Ahmeek and Tamarack on the other, and by new competition between the Osceola and the United States Metals Selling Company, which now sells two-thirds of the copper product of the United States, including the large output of the competing Amalgamated Copper Company. The conclusion reached is that, whatever may be the remaining authority of the Knight Case as distinguishing between a monopoly of manufacturing and a monopoly of interstate selling, the authorities do not go to the extent of holding that in the absence of intent, or of special features or conditions, every case of control by a manufacturing or a mining corporation over a competitor, through stock ownership and consequent direction of corporate management, creates per se, directly, immediately, and necessarily, a restraint upon trade; and I am not prepared to hold that such is its effect.

It is, however, earnestly and forcefully contended that Lake copper is a commodity so distinct from other copper, and so peculiarly in a class by itself, and that its production is so small and so necessarily limited, that a control by the Calumet & Hecla Company over the Osceola Company will directly and necessarily tend to substantially restrict competition and create a monopoly in Lake copper, and especially in what (as distinguished from Western or Electrolytic copper) is called "best" or "prime" Lake copper; which is alleged to be produced by only a few companies other than the Calumet & Hecla and Osceola (viz., the Quincy, Tamarack, Wolverine, and Ahmeek), and in comparatively small amounts.

It is well settled that a monopoly, in order to be unlawful, need not be complete; and that it may exist although limited to a narrow territory. A combination must, however, in order to violate the law against monopolies, directly, necessarily, and substantially tend toward monopoly. See *Whitwell v. Continental Tobacco Company*, 60 C. C. A. 290, 125 Fed. 454, 462, 64 L. R. A. 689, where the federal cases on the subject are discussed. As said in the *Addyston Case* (page 245 of 175 U. S., page 109 of 20 Sup. Ct. [44 L. Ed. 136]):

"It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded."

The important facts relating to this branch of inquiry are these: The record shows that the world's production of copper was in 1906 about 1,600 million pounds, of which the United States was producing about 913 million pounds. Of this last amount about 224 million pounds were produced in the neighborhood of Lake Superior, and is therefore Lake copper. This Lake copper in place differs from most of the other world's copper in that it is "native"—that is to say, it is usually found "free" and substantially pure, the arsenic and other impurities being usually regarded as united with the rock with which the metal is associated; while in most other coppers the metal is carried by an ore, and is directly united with other chemical substances. Until recent years, practically all copper was entirely furnace refined, and by reason of the conditions named the impurities (the most prominent of which was arsenic) were more readily removed from the Lake copper, and a better product obtained than was commercially practicable in the case of copper ores generally. By reason of this fact, and the uniformity of the product of some of the best of the Lake mines, Lake copper acquired and has held a reputation superior to that of Western coppers. By the process of electrolysis, which has, during recent years, been generally employed in the refining of Western coppers, practically absolute purity of product is obtainable, and the production of pure copper is commercially practicable from ores and minerals too arsenical to permit profitably of a high degree of refining by the furnace process alone. As a result of the improvement of this process, much of the Lake copper is now refined electrolytically in whole or in part. The Calumet & Hecla Company refines its highest grade of mineral by the furnace method alone. The other grades are refined by treating a lower grade electrolytically (after first smelting), and mixing the electrolytic product with another grade of mineral not electrolytically treated. By this method the percentage of impurities in the mineral not electrolytically treated is diluted by the purer electrolytic product, the degree of purity being theoretically according to the ratio between the respective degrees of purity and the proportionate amount of the two elements of the mixture. Calumet & Hecla copper, however treated, is of the same grade, is entirely Lake copper, and is sold on the market as best Lake copper (and not as electrolytic), and at one price. The Osceola, Tamarack, and Ahmeek Companies, managed by complainant, mix their minerals with cathodes of Western copper produced by the Boston & Montana Company (one of the constituents of the Amalgamated Copper Company), usually in substantially equal proportions. The resulting product, which is thus practically double the amount of Lake copper used, is sold as "Best Lake," and not as electrolytic (substantially one-half as the property of the Boston & Montana Company), although actually but about one-half Lake. Some of the other Lake coppers are treated electrolytically and sold as Best Lake. Of the 224 million pounds now produced from Lake mineral, the Calumet & Hecla (95 million pounds), Quincy (16 million pounds), Osceola (18½ million pounds), Tamarack (10 million pounds), and Ahmeek (3½ million pounds), are conceded to be Best Lake. The product of seven other mines, producing in the aggregate in 1906 about

24 million pounds, including the Centennial (21¼ million pounds), and the Wolverine (10 million pounds), are fairly shown by the testimony to be capable of being used for all purposes for which Best Lake copper is desired; and no reason is apparent why a large part, if not all, of the remaining Lake product, too arsenical to permit of high refinement by the furnace process alone, cannot be so refined by the use of the electrolytic process.

The production, both of copper generally in the United States as well as at the Lake, has increased steadily year by year, that of the United States having increased from 230 million pounds in 1889 to 913 million pounds in 1906, and that of the Lake region from 80 million pounds in 1889 to 224 million pounds in 1906. By reason of the activity of mining in the Lake district, in the development of both old and new lodes, the production bids fair to increase for some years in the future as rapidly as in the past. Practically all domestic copper, except some of that produced at the Lake, and the bulk of all foreign copper, is electrolytically treated. The object of refining is to obtain purity of product, and the freer it is from arsenic the greater its conductivity. The presence of a small amount of arsenic slightly increases tensile strength. For these reasons copper wire, which consumes about one-half of all the copper used in the United States, is usually made from electrolytic copper, although for some purposes (and perhaps all) certain customers specify Best Lake, which usually, not being entirely electrolytically refined, is apt to carry a little more arsenic than the purely electrolytic. The testimony shows that there is no inherent chemical or physical difference between equally pure furnace refined and electrolytically refined copper, provided the latter is subjected to the same final furnace process, as the testimony indicates it usually is for commercial sale. Electrolytic copper is capable of use for any purpose for which Best Lake is used. Lake copper and electrolytic are sold in direct competition with each other, both in this country and abroad, the Best Lake usually selling, on a normal market, at an average of about one-quarter cent per pound in excess of the best electrolytic. The preference of some purchasers, which results in this difference in price, is probably due, in large part at least, to the long existing reputation of the "Best Lake" for excellence, including uniformity of product, and to the fact that the present high state of electrolytic refining has but lately been reached. Lake copper is not locally consumed or sold. With the improvements in the electrolytic process, and by care in refining, the preference of some consumers for Lake copper is diminishing, and seems likely to disappear in the near future, except so far as it may be based upon the reputation of individual producers. The United States government, which is a large purchaser of copper for various purposes, originally specified Calumet & Hecla alone for cartridge cases. It has lately included Osceola, Tamarack, and Quincy, and has still more lately indicated a willingness to consider the best electrolytic if conforming to tests sustained by samples submitted. The United States government uses for all purposes much less than the amount of the Calumet & Hecla output alone, and in the last five years that com-

pany has sold the government (directly at least) only about one million pounds in the aggregate. It would seem that any attempt to artificially raise the price of Lake copper as against electrolytic would be offset by a larger use of electrolytic.

If the distinction between Lake and electrolytic copper is as sharply defined as complainant claims (and as would seem necessary if the charge of monopoly in Lake copper is to be sustained), in view of the attitude of complainant toward "Lake Copper," as evidenced by his action in causing to be marketed annually over 60 million pounds of copper as "Lake Copper," which is, in fact, to the extent of but about one-half the product of the Lake region, a serious question is raised as to his right to equitable relief against an attempted monopoly in real Lake copper. But it is unnecessary to decide this question, for the conclusion reached, upon consideration of the facts appearing in the record, is that neither Lake copper nor best Lake copper is so far a distinct commodity, and so conspicuously in a class by itself, as to make the control by the Calumet & Hecla Company over the Osceola, Allouez and Centennial Companies directly, immediately, and necessarily tend toward restraint of trade or monopoly in Lake or "best Lake" copper, either generally or against the United States government in particular. The alleged combination not being shown to be made with the intention, or to have the direct, immediate and necessary effect to restrain trade or create monopoly, a violation of the federal law is not, in my opinion, made out.

#### As to the Michigan Statutes.

The only provisions which may plausibly be thought to be violated are subdivision 3 of the act of 1899 (Pub. Acts Mich. 1899, No. 255, p. 409), which denounces all combinations for the purpose of preventing competition in "manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity"; and section 2 of the act of 1905 (Pub. Acts Mich. 1905, No. 329, p. 507), which declares illegal all combinations entered into "for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly" of any pursuit or business. The only material respect in which the Michigan statute differs from the federal law is that the Michigan act of 1899 expressly includes combinations in manufacturing. The conclusions reached with respect to the construction of the federal act necessarily forbid relief under the Michigan statutes. In view of the statutory provisions, both state and federal, it is unnecessary to further consider the question of common-law monopoly.

The conclusions reached require a denial of relief under the bill in the first case. The same considerations forbid relief under the bill in the second case, except as to the excessive land holdings; for the only producing mines which have come under the Calumet & Hecla control, aside from the Osceola, are the Centennial and Allouez; and their control has been taken into account in determining the lawfulness of the Osceola stock purchase.

A question is raised as to the right of complainant to relief against the acts complained of, in view of the object of his purchase and the



acquiescence of his assignors in the transactions with respect to which relief is sought. In the view, however, that is taken of the case upon the merits, it is unnecessary to consider this question.

The provisions of the mining act in force when these suits were begun (Pub. Acts Mich. 1907, No. 162, p. 214), provided that "every corporation organized or existing under this act shall have power to purchase, hold and convey all such real estate as the purposes of the corporation shall require." I am unable to assent to the proposition that the land holdings of corporations in which the Calumet & Hecla Company own a stock interest are to be taken into account in determining whether the statutory limit is exceeded. The Calumet & Hecla Company does not, by the mere fact of its stockholding, own lands held by another corporation. When these suits were begun, the Calumet & Hecla Company held over 65,000 acres of land, and owned in addition the timber on 40,000 acres. About 9,000 acres of timber has since been cut and the land allowed to revert. About 12,000 acres contained no timber. About 32,000 acres (containing pine timber too valuable for use in the mines) has been put upon the market for sale. The testimony is to the effect that the present Calumet & Hecla mining operations require about 30 million feet of large timber per year, and that the 50,000 acres remaining are, in the judgment of the company's officers, sufficient only for the conglomerate mining.

Since these suits were begun, the provision referred to has been so amended as to give a mining corporation "power to purchase, hold and convey all such real estate as the purposes of the corporation shall require." Pub. Acts Mich. 1907, No. 162, p. 214. Passing the question raised as to the right of any one other than the public authorities to attack excessive land holdings, I am unable to say, under the evidence, that the judgment of the officers of the company has been wrongfully exercised, and that the Calumet & Hecla Company does not need the amount of land remaining on hand and not upon the market. In view of the amendment of 1907, the court could not properly, upon this record, order a reduction of land holdings, unless found to exceed the requirements of the corporation; and the fact that this statute was passed since the commencement of the suits could at most only affect the question of costs.

The option taken by the Calumet & Hecla Company upon the so-called "Nipagon lands," in Canada, is attacked as *ultra vires*. The above-cited provisions of the mining law pertaining to the holding of lands impose no limitation as to their location. The permission to purchase stock in other mining companies is expressly extended to "any company organized under this act or any other laws, foreign or domestic" (Pub. Acts Mich. 1905, pp. 153, 154, No. 153); and by 2 Comp. Laws Mich. § 7012, a mining company is expressly authorized to "conduct its mining, smelting or manufacturing business, in whole or in part, at any place or places within the United States, in the territories thereof or in any foreign country," and may conduct such business wholly without the state of Michigan. The Nipagon option is therefore not shown to be *ultra vires*.

The Calumet & Hecla Company is entitled to a decree in each case, dismissing the bill of complaint with costs.

## BIGELOW v. CALUMET &amp; HECLA MINING CO. et al. (two cases).

(Circuit Court of Appeals, Sixth Circuit. February 18, 1909.)

Nos. 1,897, 1,898.

## 1. MINES AND MINERALS (§ 105\*)—MINING CORPORATIONS—POWERS—PURCHASING STOCK IN OTHER CORPORATIONS—MICHIGAN MINING STATUTE.

Pub. Acts Mich. 1905, p. 153, No. 105, which authorizes mining corporations organized under the laws of the state to purchase and hold stock in other mining companies, is within the power to amend the general incorporation law reserved by article 15, § 1, of the state Constitution, and does not so interfere with the contract between a stockholder and the corporation as to require the stockholder's acceptance of it as an amendment of the charter, and, if such acceptance were necessary, user of the power would be sufficient.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 105.\*]

## 2. CORPORATIONS (§ 197\*)—PURCHASING STOCK IN OTHER CORPORATIONS—RIGHTS AS STOCKHOLDERS.

A corporation having statutory power to purchase and hold stock of another corporation has the incidental power to vote the same.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 760; Dec. Dig. § 197.\*]

Acquisition by corporation of stock of other corporation, see note to Anglo-American Land, Mortgage & Agency Co. v. Lombard, 68 C. C. A. 120.]

## 3. MONOPOLIES (§ 9\*)—COMBINATIONS IN RESTRAINT OF TRADE—FEDERAL STATUTE.

The power of Congress to legislate on the subject of contracts and combinations in restraint of trade is derived from its constitutional power to regulate interstate and foreign commerce, and the Sherman anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is to be so construed, and applies only to contracts or combinations which directly, immediately, and necessarily affect commerce among the states or with foreign nations.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 9.\*]

## 4. MONOPOLIES (§ 20\*)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS BY MINING CORPORATIONS.

That one Michigan mining corporation engaged in mining and refining copper wholly within that state, by purchases of stock and obtaining proxies from other stockholders, secured voting control of a majority of the stock of another similar corporation operating adjoining mines, and purposed to use such control to place in its directory a majority from its own board of officers, all of which it had the right to do under the laws of the state, did not directly or necessarily affect interstate or foreign commerce, and such control is not of itself illegal as a combination in restraint of such trade or commerce in violation of the Sherman anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), in the absence of evidence of an unlawful intent to so use it as to bring about the prohibited restraint or monopoly, and not in a lawful way in the interest of an economical management of both companies.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*]

## 5. MONOPOLIES (§ 20\*)—COMBINATIONS IN RESTRAINT OF TRADE—COMBINATIONS BY MINING CORPORATIONS.

Neither "Lake Copper" nor that part classed as "Best Lake" is so far a distinct commercial commodity as to justify the exclusion of Western or electrolytic copper as a factor in determining whether a combination of two corporations, together producing less than one-half of the Lake

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 167 F.—46

copper and about one-ninth of the production of the United States, constitutes a monopoly.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*]

6. MONOPOLIES (§ 20\*)—COMBINATIONS IN RESTRAINT OF TRADE—MICHIGAN STATUTES.

The purchase by one Michigan mining corporation of the stock of another, expressly authorized by statute, and thereby and with the aid of proxies from other stockholders securing control of the latter, *held*, under the evidence, which showed that the two together produced only about one-ninth of the copper of the United States, not in violation of the Michigan statutes prohibiting monopolies and combinations in restraint of competition (Pub. Acts Mich. 1899, p. 409, No. 255, and Pub. Acts Mich. 1905, p. 507, No. 329), nor was the purchase by such corporation of additional lands excessive and unlawful under the laws of the state.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*]

Appeals from the Circuit Court of the United States for the Western District of Michigan.

For opinion below, see 167 Fed. 704.

H. E. Boynton and A. C. Denison, for appellant.

Otto Kirchner and A. F. Rees, for appellees.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

LURTON, Circuit Judge. These cases have been heard together upon the same transcript. The solution of the questions presented by one will substantially determine the other. The first and principal bill is that of Albert S. Bigelow against the Calumet & Hecla Mining Company and the Osceola Consolidated Mining Company. The complainant, Bigelow, is a citizen of Boston, Mass. The defendants are copper mining companies created under the laws of the state of Michigan. The complainant is a large stockholder in and president of the Osceola Consolidated Mining Company. In his character as a stockholder of that company he has filed this bill to enjoin the Calumet & Hecla Company from voting shares of the capital stock of the Osceola Company owned by it, and also to enjoin it from voting certain proxies held in its interest, at the annual stockholders' meeting for the election of a board of directors which was about to occur when the bill was filed.

The bill in the second case was filed by Mr. Bigelow in his character as a small holder of shares of the capital stock of the Calumet & Hecla Company, acquired since the starting of the first suit, for the purpose of questioning the legality of the purchase by that company of some 50,000 acres of additional copper-producing lands in Michigan, and also for the purpose of questioning the power of that company under its charter, as well as under the federal and state legislation against monopolies and illegal restraints of trade and commerce, and to enjoin that corporation from acquiring other mining lands or shares of stock in other mining companies and from exercising the power of voting upon any such shares already acquired.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

An injunction pendente lite was granted under the first bill. The grounds for this action are found in an opinion by Judge Knappen. 155 Fed. 869. No injunction was applied for under the second bill. Upon a final hearing the bills in both cases were dismissed. Pending this appeal the injunction, which operated to preserve the status quo by preventing the election of directors pending this suit, was continued.

The essential facts are these: Both companies are Michigan corporations engaged in mining and refining copper. The properties of the two companies are contiguous and situated in the copper district of the northern peninsula of Michigan. The Calumet & Hecla Company has bought outright 22,671 shares of the capital stock of the Osceola Company, and has obtained proxies, which are held in its interest, in part with options of purchase, in an amount sufficient with its holdings to make a majority of the 100,000 shares which constitute the total capital stock of the Osceola Company. There is no doubt but that the purpose of the acquisition was to enable the Calumet Company to elect a majority of the directors of the Osceola Company from the board of the Calumet Company. This was avowed in circular letters soliciting proxies from the shareholders of the former company. That such company was to continue its operations as an independent company is equally clear. No other course was possible, though one should eliminate the other so far as active competition might result from the control of a majority of the shares and the exercise of the power of selecting directors incident to such stock control.

We need not consider the power at common law of such corporations to own and vote shares in similar corporations, for the reason that in Michigan the Legislature has not deemed such restrictions wise or desirable, for there have been a series of enactments relaxing the common-law rule. Comp. St. Mich. § 7012, Pub. Acts Mich. 1903, pp. 382, 383, No. 233, culminating in the act of 1905, No. 105, Pub. Acts Mich. 1905, pp. 153, 154, which provides that corporations organized under the Michigan mining law or under any other laws for refining, smelting, or manufacturing ores, metals, or minerals may "subscribe for, purchase, own or dispose of stock in any company organized under this act, or under any other laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or minerals." That the latter act does not so seriously interfere with the contract between the company and its shareholders as to require the shareholders' acceptance as an amendment of the charter powers, we think clear. The amendment, while allowing a wide expansion of the business operations of such companies, is not so fundamental as to be beyond the power of the Legislature under the constitutional reservation of the power to alter or amend the general constating act under which corporations may be organized in Michigan. Attorney General v. Looker, 111 Mich. 498, 69 N. W. 929; Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; Louisville Trust Company v. Railroad Co., 75 Fed. 445, 448, 22 C. C. A. 378. User of the

power conferred by the amendment is evidence of acceptance, if acceptance be necessary. *Miller v. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; *Cahill v. Kalamazoo Mutual Ins. Co.*, 2 Doug. (Mich.) 124, 43 Am. Dec. 457. The right to vote stock so lawfully acquired is, of course, an incident to ownership. *Comp. Laws Mich.* § 7002. *Rogers v. Railroad Co.*, 91 Fed. 299, 312, 33 C. C. A. 517; *Taylor v. Southern Pacific R. R. Co.* (C. C.) 122 Fed. 147, 151. There is nothing, therefore, in the laws of Michigan which forbids the holding or voting of these shares owned, or those for which proxies are held in the interest of the Calumet Company, unless such ownership or voting shall result in an illegal monopoly or combination in restraint of trade, either under the federal anti-trust act or the Michigan anti-monopoly act of 1899, p. 409, No. 255, and the Public Acts of Michigan of 1905, p. 507, No. 329. In view of the very broad powers expressly conferred by the state of Michigan to such corporations to buy and hold shares in similar companies, it is very clear that, if the incidental voting powers and the ownership of the shares in question is not an illegal monopoly in restraint of trade, the question of the effect upon interstate commerce aside, it was not forbidden by the laws of Michigan. We shall therefore deal with the case in its aspect under the federal act forbidding restraints and monopolies.

Laying on one side, therefore, many interesting questions which have been discussed by counsel as going to the possibility of relief under these bills; we come to the application of the act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). The relevant sections are the first and second. They are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

We shall assume at the outset that the authoritative decisions of the Supreme Court have so construed this anti-trust act as to give it a broader application than the prohibition of contracts and agreements in restraint of trade at the common law. It is not essential that the restraint shall be unreasonable within the well-understood definition of an unlawful restraint before the statute. Under this act the validity of an alleged combination or contract in restraint of trade, interstate or foreign, is to be determined by the terms of the statute which forbids any such contract or combination without respect to its nature or beneficial results. We need only cite the latest utterance of that court upon the subject. *Loewe v. Law-*

lor, 208 U. S. 274, 297, 28 Sup. Ct. 201, 52 L. Ed. 488; Northern Securities Co. v. United States, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. But the power of Congress to legislate upon the subject, aside from the territories and the District of Columbia, is derived from its power to regulate commerce among the states and with foreign nations. It is therefore well settled that it does not apply to restraints or monopolies as such, but only to those which directly and immediately, or those which necessarily, affect commerce among the states or with foreign nations. If the law were held applicable to contracts or combinations indirectly or remotely affecting such commerce, it would substantially obliterate the distinction between interstate and intrastate commerce, the latter being as exclusively within the regulating power of the state as is the former within the power of Congress. In *Hopkins v. United States*, 171 U. S. 578, 594, 600, 19 Sup. Ct. 40, 45, 46, 43 L. Ed. 290, Mr. Justice Peckham emphasizes this obvious limitation when, speaking for the court, he said:

"There must be some direct and immediate effect upon interstate commerce in order to come within the act."

The same discriminating justice then adds:

"An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation would not be direct. \* \* \* The act must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly restrain it."

This limitation of the act to those contracts and combinations which directly and immediately or necessarily affect commerce among the states is recognized in a long series of opinions. Among them are: *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Addystone Pipe Co. v. United States*, 175 U. S. 211, 242, 20 Sup. Ct. 96, 44 L. Ed. 136; *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; *Loewe v. Lawlor*, 208 U. S. 274, 297, 28 Sup. Ct. 301, 52 L. Ed. 488. The Knight Case, in its last analysis, is but a striking illustration of the rule that the monopoly or agreement to come within the act must directly and immediately affect interstate commerce. Confining the case to its facts, it establishes the proposition that a mere combination between manufacturers only, by which a monopoly of a product results, is not, without other special circumstances, sufficient to justify an active intervention under the act to undo a contract by which such monopoly has been brought about. That the product thus monopolized by such combination of mere manufacturers may ultimately find itself into the stream of interstate commerce is there held not to be such a special circumstance as to constitute the direct and immediate effect upon commerce among the states as to bring the agreement within the act. Subsequent cases have been distinguished from it, but it has never

been overruled. In *Addystone Pipe Co. v. United States*, 175 U. S. 211, 240, 20 Sup. Ct. 96, 107, 44 L. Ed. 136, it was said:

"The direct purpose of the combination in the Knight Case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state was held to be immaterial and not to alter the character of the combination. The various cases which have been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the states as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportations to other states of specific articles were proper subjects for regulation because they did form part of such commerce."

Referring to the facts in the *Addystone Case* as taking it out of the Knight Case, the court said:

"We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants.

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the state in which they were manufactured, for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?"

In *Loewe v. Lawlor*, 208 U. S. 297, 28 Sup. Ct. 305, 52 L. Ed. 488, it was said of the combination involved in the Knight Case that "the purpose of the agreement was not to obstruct or restrain commerce. The object and intention determined its legality." *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, was a case of a combination between fresh meat dealers, dominating a large proportion of the trade in the United States, for the purpose of regulating prices, shipments, and freight rates to the exclusion of competition. The combination was, of course, invalid within the law. The court, in its opinion by Justice Holmes, in dealing with the effect of the combination as a restraint upon commerce among the states, said that restraint of that commerce was—"a direct object; it is that for which the said several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. Knight Co.*, where the subject-matter of the combination was manufactories within a state. However likely monopoly of commerce among the states in the article manufactured was to follow from the agreement, it was not a

necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales."

The specific thing complained of in the case for decision is that one Michigan mining corporation has obtained by purchase or proxy a majority of the capital shares of another Michigan mining corporation, and purposes to exercise its voting power to place in the directory of the latter a majority of its own selection from its own board of officers. The specific relief sought is an injunction against the exercise of the voting power, and a decree compelling a disposition of the shares so held under purchase or proxy. What has the Calumet & Hecla Mining Company done or what does it threaten to do which is a violation of the anti-trust act of Congress? It has the legal right to purchase and vote shares of stock in the Osceola Company under the laws of Michigan. This we have already considered. Of course, if such stock ownership and such stock control is enough to constitute a direct and immediate or necessary restraint upon trade and commerce between the states, the sanction of the state act goes for nothing. This much is settled by the Northern Securities Case, for a state cannot give to a corporation the lawful right to do anything which is a direct restraint of commerce between the states. How, then, does the exercise of the power of stock control by one mining or manufacturing corporation over another in the same state directly and immediately or necessarily operate as a restraint of commerce among the states? Confessedly the products of these two companies are in competition in the markets, and confessedly the greater part of the product of each will, sooner or later, enter into the stream of interstate commerce, for the chief demand for the product is outside the state of production. But that is not enough. There was all this and more in the Knight Case. If, indeed, such stock control results in a monopoly, it is only a monopoly in manufacture in the same state, and we have again the conceded situation in the Knight Case. Unless that monopoly of manufacture in a single state of a product which goes into interstate commerce directly and immediately or necessarily interferes with or restrains that commerce, the monopoly does not come under the act of Congress. But we are unable to conclude upon this record that mere stock control of such a company by another in the same state either directly or necessarily destroys competition there, or, if it did, that it results in any such monopoly as to directly or necessarily and immediately affect commerce among the states.

The Calumet & Hecla Mining Company does not own a majority, nor anything like a majority, of the stock of the Osceola Consolidated Mining Company. If it has the power to cast a majority of votes at a stockholders' meeting, it is because there are enough of the stockholders of the latter company willing to co-operate with it in the selection of a board. But it does not follow, if we assume for the purposes of this case that the evil is the same whether its power of election is due to a combination of shares own-



ed with proxies or by the ownership of a majority of all the stock, that the ownership constitutes a legal control, or that competition is thereby ended. A board elected by the owner of such a majority would not in any legal sense be the control of such majority owner, nor from such ownership could the legal inference be drawn that the Calumet & Hecla Company dominated the management of the Osceola Company. The two companies would still remain separate corporations, each managed presumably in its own interest. *Pullman Co. v. Missouri Pacific Co.*, 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499; *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, 670, 7 Sup. Ct. 1206, 30 L. Ed. 830; *Richmond Construction Co. v. Richmond*, 68 Fed. 105, 15 C. C. A. 289, 34 L. Ed. 625. But if the presumption be, in respect to a question of restraint or monopoly under the act of Congress, that the power to determine the management of a competing corporation through ownership of a majority of shares constitutes a suppression of competition, we come to the inquiry as to whether such presumption is one of fact or law. If one of fact, as it evidently is, it is rebuttable. We quite agree that purpose or motive is of no moment, provided the contract or agreement directly provided for the suppression of competition, or when such a result, as a matter, of law, must necessarily occur. *United States v. Freight Ass'n*, 166 U. S. 291, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 623, 53 C. C. 256. But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, that the court may see that, if not stopped, a prohibited restraint is likely to be created. In *Swift Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, it was said by Mr. Justice Holmes that:

"The statute gives this proceeding against combinations in restraint of commerce among the states, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But when the intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the complete result."

The power of stock control which the Calumet Company has acquired may be exercised only in a legitimate and lawful way in the interest of an economical management of both companies. In that case, it has done nothing directly affecting commerce among the states.

On the other hand, that power may be a mere preparation for the doing of acts which will directly and necessarily interfere with the

freedom of that kind of commerce which it is the purpose of Congress to protect. When this unlawful use of the power shall result in an unlawful restraint, or further steps shall point to results directly affecting such commerce, there may be interference by the courts.

The Calumet & Hecla Mining Company vigorously deny any purpose to either bring about a monopoly, restrain competition, or diminish production, and assert that their only object was to extend their industrial life by the acquirement of an interest in the ore-producing lands of the Osceola Company and the more economical management of their own property by a friendly and mutually advantageous use of the facilities of the two companies. The two properties are in large part contiguous. In a very convincing opinion, the judge who heard the case below states the leading facts which made it desirable and economical that there should be, to a certain extent, a co-operation in future mining operations by the two companies, in order that certain poorer lodes underlying the conglomerate lode of the Calumet Company, which has been worked to a point where exhaustion is in sight, may be worked to the best advantage of both companies. We shall not go into the details. We refer and adopt the conclusion stated by Judge Knappen, who thus sums up the evidence relating to the motive or purpose actuating the Calumet & Hecla Mining Company:

"I am convinced, from a careful consideration of the testimony, that the controlling motive and purpose of the Calumet & Hecla Company in acquiring its interest in the mining properties mentioned was to extend its industrial life, and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negatives a design thereby to reduce the output of any of the companies or artificially to increase or maintain the price of the product, or to stifle competition between the related companies, or to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company, a common management with separate detailed organization being contemplated. The evidence does not indicate that any use of the facilities of the associated companies is contemplated, except upon terms and in manner mutually advantageous."

But it is said that the stock control of the Osceola Company will result in a monopoly. If this be so, and it be only a monopoly in mining and refining copper brought about by the combination of two companies of the same state conducting their operations side by side, it is not enough, under the Knight Case, to bring the agreement within the act, even though the fact be that the product will in large part pass ultimately into interstate commerce. In the Knight Case, the American Sugar Refining Company, if permitted to combine with the four independent refining companies at Philadelphia, would control 98 per cent. of all the sugar refining in the United States. Such a combination undoubtedly brought about a monopoly under the common law. But as it was only a monopoly in manufacture, it was held not to be a restraint of trade among the states, although the great bulk of the product was ultimately destined for commerce among the states, the effect upon such commerce being indirect. There is, in fact, no parallel between the facts of that case and this in respect to the probable results of the two combinations. In this case it is shown that the world's production of copper in

1896 was approximately 1,600 million pounds, of which amount about 900 million pounds was produced in the United States. The production of the copper called "Lake Copper"—that is, copper produced in the Lake Superior region—was about 224 million pounds, or one-fourth of the entire product of the United States and one-eighth of the world's product. The Calumet & Hecla Company produced, of this amount, about 95 million pounds, and the Osceola Company about 18½ million pounds. So far from the "control" of the smaller company by the larger resulting in a monopoly, it is evident that the combined output would be less than one-half of the product of lake copper alone, or about one-ninth of the product of the United States and about one-fifteenth of the product of the world.

But the complainant has very seriously insisted that, in the determination of the question as to whether the stock control of the Osceola Company will result in a monopoly and an unlawful suppression of competition, every class or grade of copper should be eliminated except that particular class or grade made by the Calumet & Hecla Company and the Osceola Company and a few smaller producers, upon the contention that the product of these companies is a distinct commercial commodity, known in the market as "Best" or "Prime Lake Copper," as distinguished from Western or electrolytic copper. The great bulk of the copper of the world is treated electrically. The purpose is to free it from impurities, for the purer it is the greater its conductivity. Arsenic is an ordinary impurity, and the presence of this in small quantities adds, or is supposed to add, to the tensile strength of the copper, for which reason copper having this slight admixture of arsenic is preferred by some makers of copper wire. Hence some manufacturers of wire specify in their purchases of copper "Best" or "Prime Lake Copper," meaning copper not so electrically treated as to entirely eliminate this arsenical impurity. But it is demonstrated that electrolytic copper is capable of being used for every purpose for which "Best Lake Copper" can be used, and that they actively compete with each other in the markets of the world, though, as a rule, the quotations for "Best Lake" are slightly higher than Western or electrolytic copper. There is no material intrinsic difference between the two kinds. The court below, upon a full review of the evidence, expert and nonexpert, reached the conclusion that neither "Lake Copper" nor "Best Lake Copper" is so far a distinct commodity as to justify an elimination of the electrolytic copper as a factor in a case like this. In this we entirely concur.

When all is said which the facts justify, the acquisition of the voting power of a majority of the capital shares of the Osceola Consolidated Mining Company and its proposed exercise by the selection of a board, a majority of which to be composed of the members of the board of the Calumet & Hecla Company, is the main fact upon which the complainant must invoke the prohibition of the act of Congress. That fact is not enough. That the two companies are in a sense competitors, and that the product of their mines will ultimately go into interstate commerce, is far from making out a

case of direct or necessary and immediate interference with that kind of commerce. They do not show that even a monopoly of the product will ever probably ensue, to say nothing of the utter absence of any material evidence indicating that such a monopoly in the product of two contiguous mining companies would directly or necessarily affect commerce among the states. No express agreement is shown by which anything is to be done or left undone from which an unlawful restraint must, or will, probably happen. The case differs from all of the cases appealed to by the learned counsel for appellants in this important particular. In the Addystone Pipe Case, the agreement specifically provided a scheme for the suppression of competition between the parties in the matter of sales of iron pipe in a large number of states through a division of territory and sham bids, the parties agreeing to divide among each other a share in the profits made by the mill to which, by their concerted effort, the particular sale was directed. In *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, was involved an express agreement between manufacturers of tiles and dealers within a given territory by which the plaintiffs were unable, not being members of the combination, to procure titles without paying a great advance over those who were members of the combination. In the case of *Swift & Company v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the agreement involved a combination between packers and dealers in fresh meat throughout the United States for the express purpose of regulating prices, freights, and shipments and sales of live stock. *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, involved a widespread combination among the union labor organizations to prevent the sale of hats anywhere within the United States made by a hat maker at Derby, Conn., until he should unionize his shops. In *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 53 C. C. A. 256, there was an express agreement among 14 coal-mining companies engaged in interstate commerce for the purpose of fixing prices and regulating production and shipments. The cases of *Continental Wall Paper Co. v. Voight*, 148 Fed. 939, 78 C. C. A. 567, and *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, both being decided by this court, were cases which involved systems of contract between producers, wholesale and retail, carrying on business in every state of the Union, for the express purpose of maintaining prices and stifling competition, and were obviously cases which directly affected freedom of commerce among the states.

In the absence of any such express terms of the agreement providing for acts directly affecting interstate commerce, complainants must by facts and circumstances show that the direct and necessary result of what has been done and threatened is to restrain interstate commerce. The burden of showing acts and circumstances which establish the fact that an unlawful result is contemplated and will ensue, unless checked, is upon those asserting the illegality of the contract assailed.

In *Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 184, 26 Sup. Ct. 208, 209, 50 L. Ed. 428, it is cogently said, in respect to the question as to whether a particular combination or agreement will operate to produce an unlawful result under the anti-trust law, that "a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts."

No unlawful object has been shown, and no such facts established, as to convince us that the necessary consequence of the combination complained of will result in any direct, immediate, or necessary restraint of interstate commerce.

Finally, the facts of the case do not bring the conduct of the Calumet & Hecla Mining Company under the condemnation of the Michigan statute against monopolies. The purchase of shares and the acquirement of the additional 50,000 acres of copper-producing lands has the sanction of the express law of Michigan, and, while the power to acquire shares or additional lands may be subject to the condition that such acquisition shall not result in monopoly or the unlawful suppression of competition, there are no such results to be feared from the acts and conduct attributable to the Calumet & Hecla Mining Company as to bring it within the Michigan act.

The decree dismissing the bill and discharging the injunction must be affirmed.

COCHRAN, District Judge. I concur with Judge LURTON'S statement of fact and in the conclusion he has reached, but think best to state the particular ground upon which I have come to that conclusion. The principal ground upon which it is claimed that the decrees of the lower court should be reversed is that the transaction complained of was in violation of the national anti-trust act. It is urged also that it is in violation of the Michigan anti-trust act. The stress of the argument is upon the application of the national act, and I will proceed at once to address myself to the question as to whether it affects the legality of the transaction complained of.

Here, we must first inquire whether this question is an open one. Is or not a consideration thereof foreclosed by any decision of the Supreme Court? I think that it is, and that by the first decision made by that court under that act. I refer to the case of *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. It is practically conceded that this is so, if the authority of that case has not been overthrown or weakened by subsequent decisions. It is earnestly contended that it has been substantially overruled by later decisions of the Supreme Court. The decisions relied on are those in the cases of *Addystone Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488. It is claimed that the decision in the *Addystone Pipe & Steel Company Case* left not much, if any, force in it, and that in the *Swift Case* left nothing of it. But the deci-

sion in the Northern Securities Company Case is claimed to be more in point than either of the others, as its facts fit more closely the facts of the Knight Case, and it is said that these suits were brought on the basis of the decision in that case. It is further claimed that the majority of the court in the case of *United States v. American Tobacco Company* (C. C.) 164 Fed. 700, took the position that the Knight Case is no longer any proper foundation for the point decided in it. In answer to the possible suggestion that in no subsequent case has the Supreme Court expressed any doubt as to the correctness of the decision in that case, and that whenever it has referred thereto it has done so with seeming approval, it is said that the Supreme Court had in mind that the facts of the case were different from what they really were, and that what it so approved was this supposititious case and not the real case. This is shown, it is claimed, by the consideration that the points actually decided in these later cases are in direct conflict with that really decided in the Knight Case.

I think that the majority of the court in the *American Tobacco Company Case* hardly went as far as claimed, but at least two of the three judges constituting that majority did question the correctness of the decision in that case, and did intimate that it was overthrown by the later decisions. Judge Lacombe said that it seemed to him that subsequent decisions of the Supreme Court had modified the opinion in that case, and Judge Coxe that it was interesting to note that the Chief Justice, who wrote the opinion of the court therein, also wrote the unanimous opinion in *Loewe v. Lawlor*, that an examination of numerous decisions since that case leads to the conclusion that there has been constantly a tendency towards a broader and more liberal construction of the statute or wider scope therefor, and that the only distinction between that case and the *Loewe-Lawlor Case* is that in one the acts complained of related to the manufacture and sale of sugar and in the other to the manufacture and sale of hats. Both these judges seem to indicate a preference for the view taken by Justice Harlan in his dissenting opinion. I do not find that Judge Noyes, the other judge of the majority, questioned the authority of that decision to any extent. Judge Ward, who dissented, took the position that that decision had not been affected by any subsequent one and is still in full force. Counsel for appellant attacked that case in the lower court, the same as here, and possibly with some measure of success, as it seems to have been somewhat shy of basing the conclusion reached on the authority thereof.

The vital relation of the Knight Case to this case, and the attack made upon it in the *American Tobacco Company Case* and here, calls for a somewhat extended consideration thereof. The propriety of so doing is helped out by the fact that this seems to be the first case that has arisen since then involving the exact question involved therein. I do not understand that the *American Tobacco Company Case* hinges upon that case, as this one does. Besides, a true conception of what was decided therein and the reasoning upon which it was based is essential to a correct determination of the effect thereon of the later cases which are claimed to have overthrown it.

I may say at the outset that I think that that case not only fits this case, and has not been affected by the decision in any subsequent case, but that it was correctly decided; and, further, that it is not likely that it was incorrectly decided. The conclusion there reached represented not only the views of all the members of the Supreme Court except Justice Harlan, who dissented, and Justice Jackson, who did not sit therein because of illness, but of the Circuit Court of the Eastern District of Pennsylvania, where the case originated, and of the Circuit Court of Appeals for the Third Circuit, where it was first carried on appeal. And though Mr. Justice Jackson did not sit in the case, the conclusion reached accorded with his views as expressed in the case of *In re Greene* (C. C.) 52 Fed. 104, a case of like character, and those courts, in deciding as they did, simply followed in the path which he had theretofore clearly marked out.

In considering this case, I would direct the attention singly to three separate and distinct matters. They are, first, the condition of things before the doing of the thing complained of therein; second, the thing done that was complained of; and, third, the thing sought to have done. The condition of things referred to was this: The American Sugar Refining Company, a New Jersey corporation, in New York, New Jersey, and several other places, was engaged in the business of refining sugar thereat and selling the sugar so refined. The business which it so did was 65 per cent. of the business of that kind done in the United States. The E. C. Knight Company, the Franklin Sugar Company, the Spreckels Sugar Refining Company, and the Delaware Sugar House, each of which was a Pennsylvania corporation and had no connection with the others, owned like plants located at Philadelphia, and were engaged in the business of refining sugar at their respective refineries and selling the sugar so refined. The business done by all four was 33 per cent. of the whole. The business done by the five, therefore, constituted 98 per cent. thereof. The other 2 per cent. was done by a Massachusetts corporation, the Revere, whose plant was located at Boston. Each one of the five corporations was engaged in external commerce. They sold sugar for delivery in other states than where made and sold, and no doubt a great, if not the principal, part of the business done by them was so sold. The facts of the case will not allow this feature thereof to be minimized; and, as I view it, there is no occasion to minimize it.

Then, what was the thing done that was complained of? The American Company purchased the entire capital stock of the other four companies, and gave in exchange therefor shares of its own stock. It thus acquired control of 98 per cent. of the business of making and selling refined sugar in the United States. This control as to 65 per cent. was by virtue of its ownership of its own plant, and as to 33 per cent. by virtue of its ownership of the entire capital stock of the other four companies, enabling it to choose the boards of directors thereof, who would have control of the operation of their plants respectively. And the acquisition of such stock was for the purpose of obtaining such control. This feature of the case, also, is not to be blinked.

And finally, as to the thing sought to have done. It was simply an undoing of what had been done, and an injunction against attempting to do it again. It was held that the nation was not entitled to have this thing done. We are thus brought face to face with the reasoning upon which this conclusion was based. It was not that what had been done was not within the national act. The court went deeper than this. It was that the nation, through Congress, by the national act, had no right to attempt to prevent what had been done from being done, and hence had no right to complain of its being done. Of course, this being so, the presumption was that the nation, through Congress, had not by the national act attempted to prevent what had been done from being done, and hence that it was not within the act. But the court concerned itself with the deeper question—with what was fundamental, and not with what was accidental. And, if I may be permitted to suggest it, I think that the confusion that has arisen as to the correctness and effect of the decision in the Knight Case and the effect thereon of the later decisions is due to the fact that it has been overlooked that concern was there had, not with what the act meant, but with what the nation, through Congress, had power to enact.

How, then, was it made out that the nation had no right, through Congress, by that act, to prevent what had been done from being done, and hence had no right to complain of its being done. It was in this way. What had been done was not external commerce, nor did it relate to or affect directly such commerce, and hence did not come within the commercial provision of the national Constitution, which was the only provision thereof that could be claimed to authorize the nation, through Congress, to prevent what had been done from being done. So far as it was commerce at all or was related to or directly affected commerce, it was internal commerce, and the doing of it was solely within the state's jurisdiction. Mr. Chief Justice Fuller emphasized the importance of respecting the boundary of each government's jurisdiction. It was "vital," he said, that "the delimitation between the two, however sometimes perplexing, should always be recognized and observed." And, further, he said that "acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality."

To complete the line of reasoning upon which the conclusion reached is based, it remains to indicate wherein what had been done was held not to be external commerce and not to relate thereto or affect it directly. It was essential both that it was not such commerce, and that it did not relate thereto or so affect it, in order that what had been done should have been beyond the national jurisdiction. The nation has jurisdiction of what relates to or affects directly external commerce as well as external commerce itself under the commercial provision. It is necessary to complete jurisdiction of such commerce. Jurisdiction of the thing itself would be of but little consequence if jurisdiction did not also cover that which related thereto or affected



it directly. It is only of what is not external commerce and affects it only indirectly that it does not have jurisdiction. There was no room to claim that what had been done was itself external commerce. What had been done was simply the purchase by the one company of the entire capital stock of the other four, and the giving in exchange therefor shares of its own capital stock. If it be a fact that a sale of such stock for delivery in another state than that where the sale was made would have been external commerce, there was no such sale made. The most that can be claimed is that what had been done related to or affected directly such commerce. Did it do so?

Each corporation was a Pennsylvania corporation. The refineries and other property owned by each was internal. The operation of the refineries and manufacture of refined sugar thereat was internal. It was only when the corporations were engaged in selling the sugar so made that things took on an external hue, and then only in case sales for delivery outside of the state were made. Commerce has been likened to a stream, and sugar produced at those refineries did not become a part of external commerce until placed in the stream of external commerce, which would be when sold for delivery on the outside. Sales for delivery within the state were purely internal. Now, the purchase of the stock had no relation to and did not affect in any way the sugar that had been put into the stream of external commerce prior thereto. That was a matter of the past. Nor did it relate to or affect directly the sugar that might be placed therein thereafter. It depended entirely on whether thereafter the refineries were operated, and, if operated, on whether, if any of the sugar thereafter refined thereat were placed in said stream, such purchase would affect it at all. The mere fact that the intent and purpose was to place such sugar therein could not make such purchase relate to or affect directly external commerce. It may be said that it affected it, but only indirectly so. If it can be said that it affected it directly, then, whenever one, under any circumstances, intends and purposes to place property owned by him in the stream of external commerce, such commerce is affected directly, and he and that property pass within the national jurisdiction. But this cannot be. As well said by Mr. Justice Lamar in the case of *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346:

"If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include the productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the states with the power to regulate not only manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."

In the *Knight Case* Mr. Chief Justice Fuller said:

"Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

The purchase of those stocks no more related to or affected directly external commerce than if the American Company, instead of pur-

chasing them, had purchased from those corporations themselves their refineries and other property. Purchase of the capital stock was but an indirect way of acquiring the properties themselves. By the purchase, instead of acquiring the properties of the corporations, they acquired an interest in the corporations that owned them. If the properties of the corporations had been owned and operated, not by the corporations, but by trustees for the benefit of the stockholders, a purchase from the *cestuis que trustent* of their beneficial interests would have had no more relation to or affected no differently external commerce than a purchase from the trustees.

Such, then, is the line of reasoning by which the Supreme Court reached its conclusion in the Knight Case. I have put it in a different and somewhat amplified form in an effort to make it plain, but a reading of Mr. Chief Justice Fuller's opinion will show that I am justified in claiming that such is the reasoning on which that conclusion is based.

Before passing from the consideration of this case, it is to be noted that it was not involved therein whether if, after the purchase, those corporations had entered into an agreement amongst themselves concerning the external commerce to be done by them, such an agreement would have related to and affected directly such commerce and been within the national jurisdiction. What was sought to have done was not the undoing of any such agreement, but the undoing of the purchase of the stock. Nor was it involved therein whether the nation, through its jurisdiction over commerce among the states and with foreign nations, could by appropriate legislation have excluded from such commercial stream any of the sugar that had been manufactured at the refineries of any of the five corporations. These two questions are entirely distinct from that which arose and was decided in that case. That question was whether the one corporation had the right, so far as the national act was concerned, to purchase the capital stock of the other four. It was held that it did, and it seems to me that there is no escape from that conclusion and the reasoning on which it is based.

We come, then, to the question whether this decision has been affected to any extent by the subsequent decisions of the Supreme Court. As heretofore stated, I do not think that it has; and I will now attempt to make this position good. The extended consideration of the Knight Case renders unnecessary any like consideration of the cases, the decisions in which are claimed to have affected that in that case. A very general reference thereto will be sufficient to show that they have in no wise affected it. Take, for instance, the Addystone Pipe & Steel Company and Swift Cases, which are somewhat alike in their essential characteristics. Each of these cases involved an agreement between several independent manufacturers or producers, the one of iron pipe and the other of meat, each of whom was engaged in interstate commerce, which agreement related to and directly affected that commerce so far as they were engaged in it in the way of restraining it, their independency being preserved except so far as affected by that agreement. It was held that the agree-

ment in each case was a combination within the national act, and its further execution was enjoined. In the Swift Case the agreement related to and affected some matters that may be said to have been purely internal as well as to the external commerce of the parties thereto, and the execution of the agreement in those particulars was enjoined as well as in so far as it affected such commerce. The necessities of this case do not require a presentation of the line of reasoning by which Mr. Justice Holmes justifies this part of the decision. That portion thereof in no way concerns the Knight Case.

Then as to the case of *Loewe v. Lawlor*, sometimes referred to as the "Danbury Hat Case." That case involved the question whether a boycott on the part of the United Hatters and affiliated organizations of laborers against the external commerce of the manufacturers of those hats was a combination within the national act. It was held that it was and its continuation was enjoined.

Now, I fail to see how these three cases have any bearing whatever on the Knight Case. A decision that a combination that relates to and affects directly external commerce within the national act is certainly not antagonistic to one that decides that a transaction which does not relate thereto and affects it indirectly only is not within that act. Nor is a decision that an agreement between two or more corporations with reference to the external commerce done by them relates thereto and affects it directly antagonistic to one that decides that a purchase by one competitor of the property by which he carries on such business does not relate to external commerce and affects it indirectly only. Of similar character to these three cases is that of *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

Finally, how is it as to the Northern Securities Company Case? It must be conceded that this case is more like the Knight Case than either of the others. The minority judges in that case, as represented by the dissenting opinion of Mr. Justice White, regarded that the Knight Case required a decision that the transaction there involved was not within the national act. Of course, if this position was correct, then the decision in that case does conflict with that in the Knight Case, and the latter case must be considered to have been overthrown by the former. The likeness between the two cases consists in the fact that in the later case, as in the earlier one, the validity of the purchase of the stock in a corporation was involved. But even here there was a difference. In the earlier case the purchasing corporation was engaged in the same business as that of the corporations whose stock it purchased, and those corporations were competitors of it, whereas in the later case the purchasing corporation was not engaged in the same business as that of the competing corporations whose stock it purchased. It was engaged in no business except that of purchasing and holding that stock. But in this case, as in that, the effect of the purchase was to put the control of the competing corporations in one and the same hand. There was, therefore, nothing in this difference to cause a difference of decision. If one of the competing corporations in the Northern Securities Company Case had purchased the capital stock of the other, we would have thus far

exactly the same case as the Knight Case. And the purchase by the outside corporation of the capital stock of the two competing corporations was, in its legal significance, nowise different from a purchase by one of the two of the capital stock of the other.

But here the likeness between the two cases stops. In a striking particular they are different—so different in this particular as to necessitate, in my judgment, a difference of decision. That particular was this: The property of each of the two competing corporations, to wit, the Great Northern Railway Company and the Northern Pacific Railway Company, was interstate in its character, and the operation thereof was interstate. It follows that the purchase of the stock of the two corporations and combining them in one corporation was an interstate transaction. That transaction related to and affected directly interstate commerce. It did so as much as if the one corporation had purchased the property of the other. If that had been the nature of the transaction, it could not have been contended that it was not interstate in its character. How different this from what we have found to have been the case in the Knight Case. The properties of the four Pennsylvania corporations and their operation were not interstate in their character. They were purely internal to the state of Pennsylvania, and likewise would have been their purchase by the New Jersey corporation. Nowise different was the purchase by it of the capital stock of these corporations. It follows that there was no room to claim in the Northern Securities Company Case that the transaction there involved was not within the national jurisdiction. The question raised was solely as to whether that transaction was within the meaning of the national act. It is true that Mr. Justice White argued strenuously that it was not within that jurisdiction, but, with all due respect, I submit that he was in error here. The basis of his argument that the transaction attacked was not within the national jurisdiction was that the purchase by the Northern Securities Company of the capital stock of the two railway companies was not interstate commerce. That is undoubtedly true. But that circumstance was not sufficient to take the transaction out of such jurisdiction. If, though not itself interstate commerce, it related to and affected directly interstate commerce, then it was within that jurisdiction. That it did so is evident from the fact that it was a purchase of the stock of corporations whose property and the operation thereof was interstate. It was as much interstate as if one of the two competing corporations had purchased the capital stock or the property of the other.

I, therefore, conclude that, to no extent whatever, has the authority of the Knight Case been affected by any of the later decisions of the Supreme Court.

Before quitting this branch of the case, it may be proper to show that the Knight Case fits this case, though, as heretofore stated, it is practically conceded that it does. The Calumet & Hecla Company has not acquired the entire capital stock of the Osceola Company. It has not acquired the ownership of a majority of that stock. It has acquired the ownership of a portion, and the right to vote another

portion, the two together being a majority thereof. The business here involved is that of mining instead of refining sugar. Otherwise there is no difference between that case and this. The property of the Osceola Company and its operation is internal to the state of Michigan, as that of the Pennsylvania corporations was to that state. The differences in detail referred to do not call for a difference of decision. The conclusion must be reached, then, that the transaction complained of herein is not within the national act. If the Calumet & Hecla Company had purchased the property of the Osceola, or if that property had been held by a trustee for the benefit of its stockholders and the Calumet & Hecla Company had purchased the beneficial interests of the *cestuis que trustent*, certainly the transaction would not in either case have been within that act. No more can it be said that a purchase by it of the capital stock, or a majority thereof, or of a portion thereof and the right to vote another portion, the two together constituting a majority, is within it.

It seems to me that the existence of any difficulty in determining how this case ought to be decided, so far as this question is concerned, is due to the manner in which it is approached. If it is approached in an effort to reach a conclusion as to whether the transaction involved is within the meaning of the national act, it may be hard to dispose of it correctly. But if it is approached as the Knight Case was approached by the judges of the different courts who rendered opinions, holding that the transaction attacked therein was not within that act, which was in an effort to reach a conclusion as to whether it was within the national jurisdiction, and consequently whether it could properly have been put within that act, no room for doubt as to how it ought to be decided will be left.

As indicated at the start, it is also claimed that the transaction involved here is within the state act. The claim that it is so is based largely, if not altogether, on the same line of reasoning upon which it is claimed to be within the national act. Indeed, on the one side, it seems to be claimed to be within the state act because it is within the national act, and, on the other hand, that it is not within the state act because it is not within the national act. This, no doubt, is due to the fact that both sides of this case have approached it from the standpoint as to what is the true meaning of both acts, and not from the standpoint as to which jurisdiction—national or state—the transaction complained of is within. So approaching it, it was but natural to feel that the question whether that transaction was within the state act depended on whether it was within the national act. For the language of both acts is substantially similar, though that of the state act is somewhat more verbose. But approaching it from the proper standpoint, as I have claimed it to be, as soon as it is determined that the transaction in question is not within the national act, it is at once realized that it does not necessarily follow that because it is not within the one act it is not within the other. The transaction being within the state jurisdiction, and not within the national, it may well be within the state act, though not within the national. The question, then, as to whether it is within the state act hangs on whether

it is within the words thereof, construed in the light of the circumstance that the state had power to put it there.

So construing these words, how does the matter stand? The Calumet & Hecla Company and the Osceola Company were created and organized, and have ever since continued, to transact business under a general act of the state of Michigan providing for the incorporation of companies for mining, smelting, and manufacturing copper and other metals. By that act, any two or more corporations existing thereunder may consolidate. This court in the case of *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335, 10 C. C. A. 393, held that an act authorizing two corporations to consolidate, also authorizes one to purchase the capital stock of the other, on the principle that the greater includes the less. But this was not the only authority that the Calumet & Hecla Company had to purchase the stock of the Osceola. By an amendment to that general act, approved May 10, 1905 (Pub. Acts 1905, p. 153, No. 105), a company organized thereunder was expressly authorized "to subscribe to, purchase, acquire and own" stock in any company organized thereunder. Neither the provision authorizing a consolidation or purchase of stock has ever been repealed or modified to any extent, unless it has been done by the anti-trust legislation. There are two anti-trust acts in Michigan, one approved June 23, 1899 (Pub. Acts 1899, p. 409, No. 255), and another, declared to be "supplementary to and declaratory of and in addition to" the earlier act, approved June 20, 1905 (Pub. Acts 1905, p. 507, No. 329). The original act was in existence at the time of the approval of said amendment of May 10, 1905, and the supplementary one was approved subsequent to its approval. The one is entitled "An act to prevent trusts, monopolies and combinations," etc., and the other "An act relative to agreements, contracts and combinations in restraint of trade or commerce." It is not necessary to quote from the body of either act. Each contains general language in the line of its title. There is no express reference to the legislation referred to as contained in said general act and the amendment thereto. It is not to be taken that it impliedly has reference thereto. That legislation and those acts can be construed together, and I think that within well-recognized principles they ought to be so construed. So construing them, it is not to be held that what the one expressly authorizes is denied by the other.

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NICKELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,391.

CONSPIRACY (§ 48\*)—TRIAL FOR CRIMINAL OFFENSE—INSTRUCTIONS.

The instructions given on the trial of an indictment for conspiracy to induce perjury on the part of persons applying to enter land under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89, as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545]) by

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

falsely stating that the lands were not being purchased by them on speculation and that they had not made any agreement by which the titles they might acquire should inure to the benefit of any other person, considered, and, as applied to the evidence, *held* correct, as confining the inquiry to the preliminary statements made at the time of the applications.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 48.\*]

Ross, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Oregon.

On rehearing. For former opinion, see 161 Fed. 702, 88 C. C. A. 562.

Martin L. Pipes and Thomas O'Day, for plaintiff in error.

Francis J. Heney, Tracy C. Becker, and John McCourt, U. S. Atty., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This case was heard at a previous term of this court, and a decision rendered February 3, 1908. The case is reported in 161 Fed. 702, 88 C. C. A. 562, where the facts are fully stated. On January 6, 1908, the Supreme Court of the United States rendered a decision in the case of *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, reversing the judgment of the lower court, and remanding the case for a new trial for errors of the trial court in admitting certain testimony and instructing the jury upon the law. The plaintiff in error thereupon filed a petition for a rehearing in the present case, alleging that in the case in the Supreme Court *Williamson* was charged with identically the same offense as the plaintiff in error in this case, and that the law in that case is applicable to the facts in this case. The rehearing was granted, and the case has been considered in the light of the decision of the Supreme Court in the *Williamson* Case.

The charge in the indictment in the *Williamson* Case, as in the indictment now before the court in the present case, is, in substance, that the defendants had entered into an unlawful conspiracy, combination, and confederation on a date and at a place named, within the district where the indictment was found, to commit an offense against the United States; that is to say, to unlawfully, willfully, and corruptly suborn, instigate, and procure a large number of persons to commit the offense of perjury in the said district by taking their oaths before an officer, in cases where a law of the United States should authorize an oath to be administered, that they would declare and depose truly that certain declarations by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true; that is to say, to suborn, instigate, and procure the said persons respectively to come in person before such officer, and, after being duly sworn by and before such officer, to state and subscribe under their oaths that certain public lands of the said United States open to entry and purchase under the acts of Congress approved June 3, 1878,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and August 4, 1892 (Act June 3, 1878, c. 151, 20 Stat. 89; Act Aug. 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545]), and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner required by law, were not being purchased by them on speculation, but were being purchased in good faith to the own and exclusive benefit of those persons respectively, and that they had not directly or indirectly made any agreement or contract, in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they, the said defendants, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and they would have made agreements and contracts with other persons by which the titles which they would acquire from the said United States in such lands would inure to the benefit of persons except themselves; the matters so to be stated, subscribed, and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated, and procured would not believe to be true.

It was provided in section 2 of the timber and stone act of June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), referred to in the indictment:

"That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

In section 3 it was provided:

"That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring



to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver as provided for in case of mining claims in the twelfth section of the act approved May 10th, 1872, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall be issued thereon. \* \* \* Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

To give effect to the provisions of this act by regulations as provided in section 3, the Commissioner of the General Land Office incorporated in a circular issued July 11, 1899, instructions showing the manner of proceeding to obtain title to public lands under the homestead, desert land, and other laws, and in section 11 of the circular it was prescribed as follows:

"The evidence to be furnished to the satisfaction of the register and receiver at the time of entry, as required by the third section of the act, must be taken before the register and receiver, and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by the register and receiver upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. The accuracy of the affiant's information and the bona fides of the entry must be tested by close and sufficient oral examination. The register and receiver will especially direct such examination to ascertain whether the entry is made in good faith for the appropriation of the land for the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has, directly or indirectly, entered into any contract or agreement, in any manner, with any person or persons whomsoever, by which the title that may be acquired by the entry shall inure, in whole or in part, to the benefit of any person or persons, except himself. They will certify to the fact of such oral examination, its sufficiency, and his satisfaction therewith."

In the Williamson Case the Supreme Court held:

"That the particular false swearing to which the indictment related was alone the verified written statement provided for in section 2 of the act to be made on applying to purchase the land, and that the indictment did not embrace a charge concerning a statement or deposition under oath required to be made by the regulation of the Commissioner of the General Land Office, after the publication of the notice, and when the period had arrived for final action by the land office on the application to purchase."

The trial court had admitted evidence of the making of the final proofs, as provided in section 3 of the act of June 3, 1878, and section 11 of the circular of the Commissioner of the General Land Office. These final proofs embraced sworn statements made pursuant to the requirements of the regulations adopted by the Commissioner of the General Land Office, declaring the bona fides of the applicant, and that at that period he had made no contract or agreement to dispose of the land.

The trial court had also instructed the jury that the indictment covered perjury in the matter of final proofs, and that they might convict if satisfied by the evidence beyond a reasonable doubt that the de-

fendants intended that the persons who might be procured or induced to make entries of lands should willfully and deliberately commit perjury in particulars stated at the time of making their depositions, or sworn statements, when they made their final proofs before the United States commissioner, and in effect charged that a sworn statement made at the time of final proof concerning the purpose for which the land was sought to be purchased, etc., would constitute perjury, if the oath so taken, although not expressly embraced in the statute, was required by the regulations of the Commissioner of the General Land Office, because such regulations had the force and effect of law.

The Supreme Court held that an entryman who had made his preliminary sworn statement concerning the bona fides of his application and the absence of any contract or agreement by which the title which he might acquire from the United States would inure to the benefit of any person except himself is not required to make an additional oath to such facts on final proof, and a regulation of the Commissioner of the General Land Office exacting such additional sworn statement at the time of the final hearing is invalid. The court was accordingly of the opinion that error was committed by the trial court in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the land, and that error was also committed in instructing the jury that the evidence covered, or could cover, the procurement of perjury in connection with the final proof, and that the jury might base a conviction thereon.

The indictment in the present case charges Henry W. Miller, Frank E. Kincart, Martin C. Hoge, and plaintiff in error, Charles Nickell, with a conspiracy to suborn a large number of persons to commit the crime of perjury in the entry of timber lands. As before stated, the offense charged is, in substance, the same as in the Williamson Case. The defendants Miller and Kincart pleaded guilty. The defendant Hoge and the plaintiff in error pleaded not guilty, and were tried and convicted. The facts in some important particulars differ materially from the facts in the Williamson Case, and it is with respect to such differences that the questions upon this rehearing are to be considered.

No final proofs were made, and no testimony was introduced tending in any way to show or to give the jury the impression that final proofs had been made by the entrymen in this case. The scheme of the entrymen, Miller and Kincart, was to find a large number of persons to make entries on timber lands in Southern Oregon, and induce such people to pay them large locating fees in cash, which were fixed at first at \$125 each. Subsequently, it was agreed that the fees should be \$60, and the balance to be paid when the entrymen made final proof; later the locating fee was reduced to \$25 each, the balance to be paid upon final proof. These fees were to be divided between Miller and Kincart. The defendant, Nickell, was United States commissioner at Medford, Or., and the proprietor of two newspapers—one at Medford, and the other at Jacksonville. The sworn statements of the entrymen required by the act of June 3, 1878, were to be taken before him, and the notice of the application advertised in his Jacksonville paper. His fee as commissioner was \$2.50 for each sworn statement, and \$10 for advertising each notice of application. These

charges were to be paid by the entrymen. Miller and Kincart applied to Nickell to secure part of the advertising charge. They first wanted \$4 out of each notice, but it was subsequently agreed that they should receive \$2.50. Under this agreement, Nickell testified that 50 or 60 sworn statements were taken before him, and about 40 notices published in his paper. To induce the entrymen to pay the location fees, Kincart was to act as timber "cruiser"—that is to say, he was to select the lands for their timber value—and Miller represented himself as the agent of a company which would furnish the money required to make the entry of the land, and upon the assignment by the entrymen of the receiver's receipt and the execution of a quitclaim deed the company would pay the entrymen for the land upon the basis of 40 cents for 1,000 feet for the timber standing upon such lands. The entrymen agreed to make, and did make, preliminary proofs before the plaintiff in error as United States commissioner, pursuant to this verbal agreement; and there is evidence tending to show that the plaintiff in error knew of this verbal agreement at the time he took the preliminary proofs, and promoted the scheme.

This agreement was the inducement to make the preliminary proofs. It was the moving cause that brought them before the commissioner to take the required oath for such lands, and, notwithstanding, each entryman declared under oath before the commissioner that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever by which the title which he might acquire from the United States should inure, in whole or in part, to the benefit of any person except himself. This was precisely what he had done, and constituted the perjury which the defendants are charged in the indictment with having conspired to procure the entrymen to commit.

But it appears that Miller and Kincart had a blank form of a printed agreement (Exhibit No. 1), which it was proposed to have modified. This form of agreement, modified as proposed (Exhibit No. 2), was taken to Nickell, who carried on a job printing office in connection with his newspapers, and these blank agreements were printed in his office for use with the entrymen. This agreement (Exhibit No. 2), executed by the entryman, and by Miller for a company which he claimed to represent (the Emmetsburg of New Zealand), purported to obligate the company to pay to the entryman 40 cents per thousand fee for the timber on a described quarter section of land for which the entryman was to use his right of entry, and upon final proof he was to convey the land to the company, and also assign the receiver's certificate and execute a quitclaim deed. This form of agreement was executed by the entrymen, and by Miller for the company he claimed to represent, and was introduced in evidence without objection. It was, however, not open to objection. It was executed by the entrymen immediately after making the preliminary proof, and was a part of the transaction. It was an admission in writing that prior to the preliminary proof the entrymen had made the verbal agreement to convey the land upon making final proof and stated the terms of the agreement.

But it is assigned as error that the court instructed the jury in effect that this assignment was illegal in itself, and forbidden by stat-

ute; and that the plaintiff in error, having knowledge of this agreement and acquiescing therein, would become a member of the conspiracy, even though he had no knowledge of any previous oral agreement between Miller and Kincart and the entrymen. It is this general feature of the court's instructions that plaintiff in error contends is contrary to the law of the Williamson Case; but we find no such instructions in the record, and none from which such an inference could properly be drawn. In considering the court's instructions, it must be remembered that no final proof was made in any case. The transaction with the government consisted in making the preliminary proof, and that alone, and the question for the jury to determine was whether, when this preliminary proof was being made, the entrymen at that time had made an agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title he might acquire from the United States should inure, in whole or in part, to the benefit of any person except himself. Manifestly, the written agreement described as "Exhibit No. 2," executed immediately after the preliminary proof had been made, could have no bearing in the case except to show that the preliminary proof had been made in pursuance to an agreement, the terms of which the entryman admitted were contained in Exhibit No. 2. This was clearly stated to the jury by the court in one of its instructions, defining the word "agreement." The court said:

"An agreement, as the word 'agreement' is used, need not, however, be in writing; it need not be of sufficient formality or of a nature to be enforced in a court of law.

"I refer to that, gentlemen, because in this case the question of whether or not Government's Exhibit No. 1 or 2, labeled 'Certificate' in the Emmetsburg of New Zealand, is to be considered by you, not as to whether or not it is an agreement or contract that could be enforced in a court of law—that is not material—but it is material that you determine whether or not there was, as I have defined and am defining it, an agreement or understanding had between the parties, in respect to the conveyance of the land, that the applicant was about to make his sworn statement to enter."

In other words, what consideration were the jurors to give to the alleged verbal agreement made prior to the preliminary proof? They were told in this instruction that the agreement need not be in writing; it need not be of sufficient formality or of a nature to be enforced in a court of law. Then what consideration were the jurors to give to Exhibit No. 2? They were told that whether or not it was an agreement or a contract that could be enforced in a court of law was immaterial—the material question was whether, when the applicant was about to make his sworn statement to enter the land (the preliminary proof), there was an agreement or understanding had between the parties in respect to the conveyance of the land.

But the plaintiff in error refers to the following in the transcript of record:

"There was evidence tending to show that most of the entrymen made a verbal contract with Miller prior to their filing upon the land, agreeing to transfer to Miller's company the land taken by them as soon as final proof was made. All of these persons, however, after filing, signed Exhibit 2. It was admitted also that this land taken by these entrymen was government land subject to entry under the timber and stone act. The making of the verbal agree-

ment, and the signing of Exhibits 1 and 2 herein, was the only evidence offered tending to show any agreement for the sale of this land by the entrymen."

It is contended that it appears from this statement that there were some entrymen who signed contracts who had not made any verbal contract with Miller prior to their filing; that the court did not make to the jury any distinction between the contracts made after and the contracts made before the filings, but permitted the jury to find the defendant guilty upon the theory that the contracts in writing, made after the filing and without prior oral agreement, were illegal and forbidden by the statute. We have seen that the court did clearly make a distinction in defining an "agreement," under the statute, and did not permit the jury to be in error upon that question; and, with respect to the substance of the offense, the indictment charged that the conspiracy was to suborn "a large number, to wit, one hundred, other persons to commit the offense of perjury." It follows that if the proof shows that most of the entrymen—that is to say, any number—made a contract prior to their filing upon land, agreeing to transfer the land upon final proof, the evidence was sufficient to establish the charge made in the indictment, and there was no error in the instruction to the jury as to its scope.

The court instructed the jury that:

"The entryman must always deal in good faith from the initiation of his claim; that is, from the time that he makes his application to purchase, which begins with the making of a sworn statement."

It is objected that under this instruction good faith did not terminate with the initiation of the claim, and that, from other parts of the instruction, good faith consisted, among other things, in not making any contract to convey the entryman's interest in the land until after the receiver's certificate was issued. The instruction quoted is part of a general instruction relating to the acquisition of public lands under the timber and stone act, in which the court instructed the jury that:

"A man cannot lawfully acquire the public lands of the United States, under this timber and stone act, if he has really made an agreement that others shall pay all the expense of his entry, and give him some money for exercising his right, and that, when he may acquire title to the land, he shall convey it to them, or to some one for them. If the agreement to convey exists and is understood between the parties, the law does not tolerate evasion by calling such an agreement a 'certificate' or 'option.' Nor, if the agreement actually exists, can the law be evaded by an endeavor to separate title to the timber upon the land from title to the land itself?"

On the other hand, the jury was instructed that:

"A person qualified under the law has a right to enter lands under the provisions of the timber and stone act, even though he considers, prior to the time of making his sworn statement and his final proof, a sale of it as soon as he can after he makes his final proof and obtains the usual receiver's receipt."

The court further instructed the jury:

"You will understand that the law does not make it obligatory that an entryman who acquires title under the timber and stone act shall keep the land, nor does it control his use or right to dispose of it for any period of time after he shall have complied with the provisions of the law in perfecting the right to

the claim. But the statute does denounce a prior agreement, the acting for another in the purchase from the government of the United States. However, if, when the title passes from the government to the entryman by receiver's receipt after final proof, no one save the purchaser has any claim upon it, or any contract or agreement for it, the law is satisfied. The act does not, in any respect, limit the dominion which the purchaser has over the land after he acquires his final receipt from the government, or restrict in the slightest his power of alienation after that time."

The court further instructed the jury:

"The dominion over the land which the purchaser acquires means the control and right which is his after the issuance of the final receipt by the land officers of the government, and not the right he possesses after filing only his sworn statement in the initiation of his claim."

These instructions were entirely correct as applied to the evidence before the court. Had there been evidence tending to show that the defendants had conspired together to suborn persons to commit perjury with respect to the making of final proofs, as was shown in the Williamson Case, then there might be some basis for a criticism of these instructions on the ground that they were too general; but upon the evidence in this case there is no substantial ground for objection. The court correctly stated the law applicable to the facts before the court, and the jury could not have been misled as to the application of the law to the facts in the case. It follows that, after carefully considering the record in this case in the light of the Williamson Case, we find no error in the proceedings.

The judgment of the Circuit Court is therefore affirmed.

ROSS, Circuit Judge (dissenting). The indictment in this case is in every respect similar to the indictment in the Williamson Case referred to in the foregoing opinion. The same judge presided on the trial of both cases, and the record makes it clear to my mind that the present case was tried and the jury instructed, as in that case, upon the theory that the indictment included a conspiracy not only in making the initial entry of the lands in question, but also in the making of final proof therefor, and that the law prohibited any contract by an entryman, prior to the making of final proof, for the conveyance of his interest in such land to another. The record here shows that evidence was introduced on the part of the government based on that theory, and such, I think, was the plain import of the instructions of the court complained of. As the Supreme Court held in the Williamson Case that such theory, as well as such instructions, were erroneous, I think it necessarily results that there was similar error in the present case. Therefore I dissent from the present judgment.

## GODDARD v. CASUALTY CO. OF AMERICA.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,599.

## 1. INSURANCE (§ 622\*)—ACTIONS ON POLICIES—LIMITATION BY PROVISIONS OF POLICY.

An employer's liability policy of insurance contained a condition that "the company shall not be liable under this policy unless an action to enforce such liability be brought within 60 days from the date of the entry of a final judgment against the assured, after a trial of the issue on the merits in a suit duly instituted within the period limited by the statute of limitations, awarding damages on account of a casualty covered hereby, and then only provided that such action against the company be brought by the assured personally for damages sustained by the assured in paying and satisfying such final judgment." *Held*, that such 60-day limitation, having been voluntarily agreed to, was valid, and, unless waived, was a conclusive bar to an action on the policy, unless commenced within the time limited.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1544-1556; Dec. Dig. § 622.\*]

Conditions in policy as to time for bringing suit, see notes to *Steel v. Phoenix Ins. Co.*, 2 C. C. A. 473; *Rogers v. Home Ins. Co.*, 35 C. C. A. 404.\*]

## 2. INSURANCE (§ 622\*)—ACTION ON POLICY—LIMITATION BY PROVISIONS OF POLICY.

The fact of the appointment of a receiver for the assured did not suspend the running of limitations against an action on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1544-1556; Dec. Dig. § 622.\*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action at law by the plaintiff, A. J. Goddard, as the general receiver of the property of the Duwamish Mill Company, to recover the sum of \$6,000 from the Casualty Company of America on a policy of insurance issued September 20, 1904, to the Duwamish Mill Company against loss or damage by reason of claims brought against it by any of its employes on account of bodily injuries, fatal or nonfatal, suffered while in the factory, shop, or yard in said policy described. During the life of this policy, on October 5, 1904, one Charles Baker was injured while in the employ of the assured. On January 11, 1905, Baker brought suit in the superior court of the county of King, state of Washington, against the assured, for damages for and on account of his said injuries. The defendant in error took sole and exclusive charge and control of the defense to the action. Baker recovered a judgment against the assured for \$6,000, which, on appeal to the superior court of the state, was affirmed, and on October 8, 1906, a final judgment was entered in favor of Baker. Thereafter the said superior court directed the plaintiff in error herein to issue his interest-bearing receiver's certificate in the sum of \$6,764.06 in payment and satisfaction of said judgment, which said certificate the plaintiff in error issued on October 25, 1907, and the same was accepted and received in payment and satisfaction of the judgment, and the judgment was satisfied of record. Thereupon, on the 15th day of November, 1907, the plaintiff in error brought this action against the defendant in error in the Circuit Court of the United States for the Western District of Washington. An amended complaint was filed February 13, 1908, and to this amended complaint the defendant in error interposed a demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the action had not been commenced within the time limited by law and by the contract sued on. The court sustained the demurrer and dismissed the action. The case is here upon writ of error.

Vince H. Faben, C. K. Poe, and S. H. Kelleran, for plaintiff in error.

James A. Kerr, E. S. McCord, and John P. Hartman, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The policy of insurance, as set forth in the complaint, contained this provision:

"The company shall not be liable under this policy unless an action to enforce such liability be brought within 60 days from the date of the entry of a final judgment against the assured, after a trial of the issue on the merits in a suit duly instituted within the period limited by the statute of limitations, awarding damages on account of a casualty covered hereby, and then only provided that such action against the company be brought by the assured personally for damages sustained by the assured in paying and satisfying such final judgment. This clause shall not in any way limit, restrict, or abridge the company's defense to any such action."

The final judgment against the assured was entered on the 8th day of October, 1906. The present action to enforce the liability of the defendant in error was not brought by the assured until November 15, 1907. The action was not brought within 60 days from the date of the entry of the final judgment against the assured, and no reason is alleged in the complaint why the action was not brought in accordance with the terms of the contract, nor is there an allegation of waiver of the condition on the part of the company.

It is contended on the part of the plaintiff in error that the provisions of the policy of insurance respecting the limitation of time for bringing suit are inconsistent, in requiring that the suit shall be brought within 60 days from the date of the entry of final judgment against the assured, and then only for damages sustained by the assured in paying and satisfying such final judgment. It is contended that two distinct limitations are here provided: First, that suit shall be brought within sixty days; and, second, that no suit can be brought until the judgment is paid; and that these two limitations are inconsistent.

It is manifest that this contention is without merit. There is but one limitation provided in the policy against the assured, and a reference to one provided by statute against the person bringing suit against the assured for injuries sustained. The company is not liable except under certain expressly stipulated conditions: (1) The injured party must have brought suit against the assured within the period limited by statute, a trial must have been had upon the issues on the merits, and a final judgment entered against the assured awarding damages for the casualty, and the judgment must have been paid by the assured. (2) An action to enforce the liability of the company must have been brought by the assured within 60 days from the date of the entry of the final judgment against the assured for the damage sustained by the assured in paying and satisfying such final judgment.



The payment of the final judgment is the loss sustained by the assured in damages, which constitute the primary liability of the company for an injury to an employé of the assured. It is in no sense a limitation as to the time, but a condition of liability. The judgment may be paid immediately upon its entry, or it may not be paid until just within the period of 60 days after its entry. In either case the liability of the company attaches, if the suit against it is brought, as provided in the policy, within 60 days from the date of the entry of the final judgment against the assured, and it does not attach if the suit is not so brought, even though the judgment is paid immediately upon its entry.

The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. A condition in an insurance policy, providing that the action is barred unless commenced within a stipulated period, is valid, and, unless waived by the insurer, is a conclusive bar to an action brought after the stipulated period. *Riddlesbarger v. Hartford Insurance Company*, 74 U. S. 386, 19 L. Ed. 257; *Thompson v. Phenix Insurance Company*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Arthur v. Homestead Fire Insurance Company*, 78 N. Y. 462, 34 Am. Rep. 550.

It is further contended that the appointment of a receiver for the property of the assured suspended this period of limitation for bringing suit against the insurance company. No reason is given why the appointment of a receiver should have had that effect in this case, and there is no rule of law with which we are familiar that would have that effect. The authorities cited on behalf of the plaintiff in error do not support the contention. In this view of the case, it is not necessary to determine whether the receiver's certificate, issued and accepted in payment and satisfaction of the judgment, constituted payment and satisfaction of the judgment within the meaning of the policy of insurance.

The judgment of the Circuit Court is affirmed.

## ANARGYROS &amp; CO. v. ANARGYROS.†

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,587.

**1. INJUNCTION (§ 137\*)—PRELIMINARY INJUNCTION—GROUNDS FOR DENIAL—RIGHTS IN DOUBT.**

It is a well-established rule in equity that a preliminary injunction should not be granted in a doubtful case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 309; Dec. Dig. § 137.\*]

**2. TRADE-MARKS AND TRADE-NAMES (§ 95\*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.**

The right of a complainant to a preliminary injunction to restrain alleged infringement of a trade-mark *held* so doubtful on the proofs as to require the denial of such relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.\*]

Appeal from the Circuit Court of the United States for the Northern District of California.

This appeal is from an order granting a preliminary injunction.

The bill alleges, among other things, that prior to March 30, 1900, and for more than 10 years next preceding that date, one S. Anargyros was engaged in the business of manufacturing and selling cigarettes in the city of New York; that all of the cigarettes so manufactured and sold by the said S. Anargyros bore his name, and were packed and inclosed in packages or boxes which were marked with the name "S. Anargyros"; that the said S. Anargyros continued to carry on said business, which was large and lucrative, in the said city, until the month of March, 1900, when he conveyed his entire interest in the business, including the good will of the same, and the trade-name or trade-mark "S. Anargyros," and the exclusive right to the use of the same, to the complainant, and retired therefrom, whereupon the complainant became the legal and equitable owner thereof; that prior and up to the time of such conveyance those cigarettes had become known generally throughout the markets of the world as "Anargyros" cigarettes, and that the name S. Anargyros had become a trade-mark or sign of quality of the said cigarettes so marked, and to indicate the ownership and origin thereof as a product of S. Anargyros, manufacturer, and to distinguish the said cigarettes from those of other manufacturers, and had become and was a valuable and integral part of the boxes, packages, and trade-marks in and under which the said cigarettes had been sold by the said S. Anargyros.

The bill further alleges "that, at or immediately before the time of the completion of the purchase of said business of S. Anargyros by your orator, as aforesaid, the incorporators of your orator conceived that the name 'S. Anargyros' was a valuable and integral part of the packages and boxes in which, and of the trade labels and trade-marks under which, said cigarettes had been sold, and on that account caused the organization of said corporation under the name 'S. Anargyros' as aforesaid; that ever since the said 30th day of March, A. D. 1900, your orator has conducted and carried on said business so acquired from the said S. Anargyros, in said city of New York, state of New York, and has been, and still is, the sole owner and proprietor thereof, and has large capital invested in said business; that during all of such time your orator, as successor of S. Anargyros, has made it

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

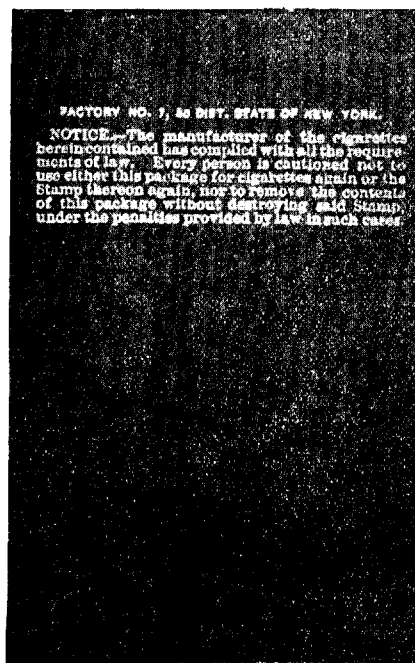
an especial business to manufacture and sell, and during all of said time has manufactured and sold, and is now manufacturing and selling, cigarettes to be distributed and sold, and which are distributed and sold, in most, if not all, of the markets throughout the world, under the trade-name or trade-mark 'S. Anargyros';" that the cigarettes so manufactured and sold under said trade-name or trade-mark by the said S. Anargyros and the complainant are of a superior quality, and have achieved a great and valuable reputation among the cigarette trade and purchasers of cigarettes throughout the world, which is of great value to the complainant, and will continue to be so, if the alleged wrongful imitation, simulation, and infringement of the same by the defendant be restrained and enjoined; that the cigarettes so manufactured and sold by the complainant are marked, packed, and sold under several different labels to distinguish them from others, which several brands are designated by the respective and distinctive names "Egyptian Deities," "Mogul," "Murad," "Turkish Trophies," and "Windsor Castle," in addition to the common trade-name or trade-mark "S. Anargyros," which said last-mentioned trade-name or trade-mark is plainly printed upon each and every cigarette put up and sold under the respective brands, and upon each and every package or box containing the same, and which said respective brands are set out in the bill as follows:



[Originals were printed in various colors.]



[Original was printed in various colors.]



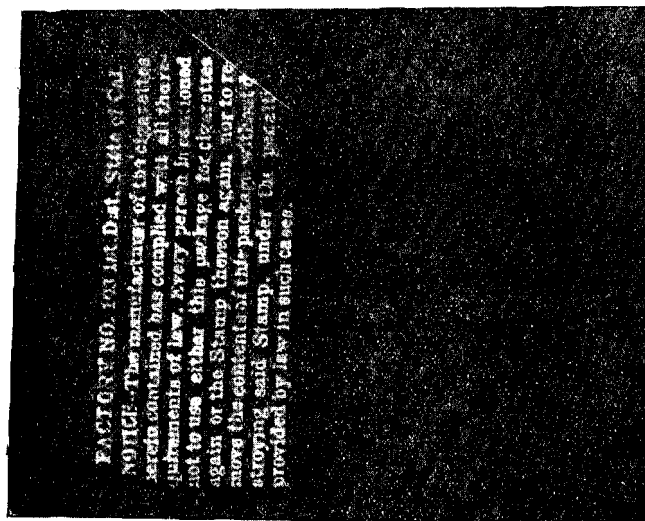
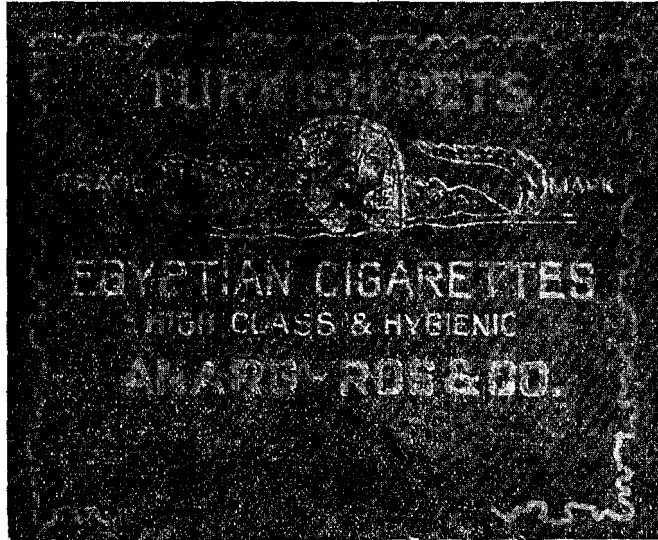
[Originals were printed in various colors.]

The bill further alleges that while the complainant has had the sole and exclusive right to the use of said name "S. Anargyros" as a trade-name or trade-mark, the defendant has manufactured and sold, and is now manufacturing and selling, large quantities of cigarettes, upon each of which, and upon the packages and boxes containing the same, it has placed, and is now placing, in plain and conspicuous letters, the name "Anargyros & Co." in imitation of the name "S. Anargyros," as it has been heretofore used by the complainant and the said S. Anargyros, as already stated; that the defendant has put up, and is putting up and packing, the cigarettes so manufactured and marked by the defendant as aforesaid, in boxes and packages in shape and size similar to the boxes and packages in which the cigarettes manufactured by the complainant are put up and packed, and that the defendant has used, and is now using, upon the packages and boxes in which its cigarettes have been and are being put up and packed, trade-marks and trade labels simulating, imitating, and infringing the aforesaid labels and trade-marks of the complainant; that upon the packages and boxes containing cigarettes of a brand described and designated by the defendant as "Egyptian Nemesis," in simulation and imitation of the complainant's brand "Egyptian Deities," the defendant has caused to be placed the following trade label or trade-mark:



[Original was printed in various colors.]

That upon the packages and boxes containing cigarettes of a brand described and designated by the defendant as "Turkish Pets," in simulation and imitation of the complainant's brand "Turkish Trophies," the defendant has caused to be placed the following trade label or trade-mark:



[Original was printed in colors.]

That the cigarettes so manufactured and sold by the defendant, and having said name "Anargyros & Co." upon them as aforesaid, were and are of a quality very much inferior to those manufactured and sold by the complainant, by all of which acts the complainant alleges it has been greatly damaged.

The bill was verified by the president of the complainant corporation, in which verification it is stated that he knows the contents thereof, and "that the same is true of his own knowledge, except as to matters therein stated on information and belief, and that as to those matters he believes the same to be true."

Accompanying and in support of the bill, the complainant filed the affidavits of George W. Whitaker, E. C. Hull, George W. Little, W. R. Elliott, Jr., R. A. Laherty, Robert Dumphy, and William Quincy.

Whitaker in his affidavit states that he is the vice president of the John Bollman Company, a corporation, which is the distributor of the cigarettes manufactured by the complainant, within the states of California, Oregon, Washington, Arizona, the western portions of Idaho and Nevada, and the Hawaiian Islands; that there is no officer of the complainant residing in the state of California, and that the affiant has been authorized by the complainant to employ counsel to commence suit, and to take any and all steps necessary to the successful prosecution thereof; that, acting under such authority and for that purpose, he procured the affidavits of Hull, Little, Elliott, Laherty, Dumphy, and Quincy, in support of the allegations contained in the bill, and that no officer of the complainant has, nor has the affiant, any personal knowledge of the facts set forth in those affidavits, each of which affidavits he caused to be filed with the bill in support thereof, and of the complainant's application for a restraining order and preliminary injunction.

The affidavit of Hull is to the effect that he is a sales agent of the John Bollman Company, a corporation engaged in the manufacture and sale of cigarettes, and that on or about the 6th day of December, 1907, he called at the cigar stand of one Harris, in San Francisco, and said to Harris, "I see you have a new cigarette," pointing to a lot of "Turkish Pets" cigarettes upon one of the shelves of his stand, which cigarettes are manufactured and sold by the defendant, and that in reply to affiant's remark Harris stated: "Yes; it is an Anargyros cigarette, made by the same people that make 'Turkish Trophies.'"

The affidavit of Little is to the effect that on the 19th day of November, 1907, he called at the cigar stand of one Morris, in the city of Oakland, and asked the attendant for a "package of Anargyros 25-cent cigarettes," and that the said attendant thereupon handed to him a package of "Egyptian Nemesis" cigarettes.

The affidavit of Elliott is to the effect that he was engaged in the retail cigar and cigarette business in San Francisco, and received on consignment a lot of "Turkish Pets" cigarettes from the defendant, and that the defendant's salesman who took the affiant's order therefor informed him that Anargyros, of the defendant company, was formerly a partner of S. Anargyros, and had formerly made "Turkish Trophies" cigarettes; that affiant ordered said cigarettes of the defendant relying on that statement, and upon the fact that the name of the manufacturer of said "Turkish Pets" was similar to that of the manufacturers of "Turkish Trophies"; that the price of "Turkish Pets" cigarettes is much lower than that of "Turkish Trophies," and that affiant intends to sell said "Turkish Pets" in place of and for "Turkish Trophies" cigarettes.

The affidavit of Laherty is to the effect that on the 6th day of December, 1907, he called at the cigar stores of Hermann Keiser, W. R. Elliott, and of Chambers & Wieman, in the city of San Francisco, and laid upon the counter of each of those places a 10-cent piece, at the same time asking the respective attendants in charge for a package of "Anargyros Cigarettes," and that each of the attendants thereupon delivered to the affiant a package of "Turkish Pets" cigarettes.

The affidavit of Dumphy is to the effect that on the 7th day of December, 1907, he called at the cigar stands of Hermann Keiser, and of Lazarus &



Marish, San Francisco, and laid upon the counter of each of those places the sum of 25 cents, at the time asking the attendant in charge for a package of Anargyros cork-tip cigarettes, whereupon the respective attendants delivered to the affiant a package of "Egyptian Nemesis" cigarettes.

The affidavit of Quincy is to the effect that on or about November 18, 1907, he called at the cigar stand of one Morris, in the city of Oakland, and laid upon his counter 25 cents, at the time asking the attendant in charge for a package of "Anargyros Cigarettes," whereupon the attendant took from a shelf a package of "Egyptian Nemesis" cigarettes, and handed them to affiant.

Upon this showing the court below made an order directing the defendant to show cause at a certain time and place why a preliminary injunction should not be granted as prayed for by the complainant, and in the meantime restraining the defendant from the commission of any of the acts complained of, requiring of the complainant the execution of a bond in the sum of \$10,000.

In response to the order to show cause, the defendant filed its verified answer, together with a large number of affidavits. In its answer it admitted, among other things, that for more than 10 years immediately preceding March 30, 1900, S. Anargyros was engaged in the business of manufacturing and selling cigarettes, and carrying on that business in the name of S. Anargyros in the city of New York, and that all of the cigarettes manufactured and sold by him bore his name, and were packed and inclosed in packages and boxes which were marked and bore that name, but denies that the name "S. Anargyros" was used as a sign of quality of the cigarettes so marked, or to indicate the ownership or origin thereof as a product of S. Anargyros, manufacturer, or to distinguish the said cigarettes from those of other manufacturers, and in that behalf the defendant avers that the said name "S. Anargyros" was used as a sign that said cigarettes were made under his personal supervision and from tobacco selected and blended by him personally, and that he was the manufacturer thereof, and in this way as a sign of quality, but that they were distinguished from cigarettes of other manufacturers chiefly by the brand "Egyptian Deities." The answer denies that the name "S. Anargyros" had become a valuable or integral part of the packages, boxes, or trade-marks in or under which the said cigarettes had been sold by the said S. Anargyros, except when said cigarettes were made under his personal supervision, and avers that the mere pecuniary value of the said name "S. Anargyros" was derived solely from his skill, knowledge, and experience in making the cigarettes. The defendant by its answer admits that said S. Anargyros continued to carry on business in the city of New York until the month of March, 1900; admits that in form he conveyed his entire interest in the said business, including the good will thereof, to the complainant, but avers that the complainant is another name under which the American Tobacco Company, a corporation, is doing business, and that said conveyance was in fact a conveyance to the said American Tobacco Company; denies that the name "S. Anargyros" is, or ever was, a trade-name or trade-mark; denies that the said name "S. Anargyros," or the exclusive or any right thereto, was conveyed to the complainant, and denies that it is the legal or equitable or any owner of the said name; denies that the complainant corporation was organized under the name "S. Anargyros" for the reason set out in the bill, and in that behalf "avers that said Anargyros sold his trade-name and trade-mark 'Egyptian Deities' and the right to manufacture the same, to the American Tobacco Company for the sum of four hundred and fifty thousand (\$450,000) dollars, and in consideration of said purchase agreed with said American Tobacco Company that he, S. Anargyros, would retire from the tobacco business; that in order to deceive and mislead the public and induce it to believe that the cigarettes manufactured and sold by it were made under the supervision of said S. Anargyros, are [an] individual," and that he was still engaged in business and competing with the American Tobacco Company, it organized the complainant under the name of S. Anargyros; that the complainant is capitalized at \$650,000, but that only \$450,000 of the stock was issued, all of which was transferred to the American Tobacco Company, and that its officers and stockholders were placed in charge of the said business,

under the name of S. Anargyros, and that it has ever since been, and still is, representing to the public that the said S. Anargyros is an independent manufacturer and its competitor. The answer admits that the name "S. Anargyros" was and is placed upon the packages and boxes containing the cigarettes manufactured and sold by the complainant, and avers that all Turkish and Egyptian cigarettes, and the packages and boxes containing the same, are similarly marked with the name of the manufacturer thereof, and that the name "S. Anargyros" was valuable during the time that the "Egyptian Deities" were made by and under the personal supervision of that individual as indicating that they were made from tobacco selected and blended by him, and that the name "S. Anargyros," ever since the aforesaid conveyance from him, has been used by the American Tobacco Company to deceive and mislead the public into believing that the said S. Anargyros is still selecting and blending the tobacco from which the cigarettes are made, when as a matter of fact the said S. Anargyros has been for more than 10 years last past a resident and citizen of Greece.

The answer denies that any of the cigarettes mentioned in the bill have been at any of the times therein mentioned known throughout the markets of the world, or at any place, as "Anargyros Cigarettes," or by the name "S. Anargyros," although it admits that the last-mentioned name was upon them and each of them. It avers that the said S. Anargyros made, manufactured, and sold "Egyptian Deities" cigarettes under that brand and under no other brand, and that he made and manufactured no other cigarettes. The answer admits that the cigarettes known to the trade and public as "Egyptian Deities," and so marked and sold, were of a superior quality, and achieved a great and valuable reputation throughout the world during the time they were manufactured by the individual S. Anargyros, and that such reputation is of value to the complainant in its business, and admits that the said business has been built up and extended by said reputation, and is dependent for its profitable continuation upon the reputation so attached to the said cigarettes by the use of the name "S. Anargyros," and denies that the said cigarettes were known or sold under any trade or other name than "Egyptian Deities," and denies that the name "S. Anargyros" is a trade-name or trade-mark. It avers that the American Tobacco Company sought to profit by the reputation due solely to the personal qualities of the said S. Anargyros, and has represented, and does still represent, to the public that the cigarettes sold under the brands of the complainant set out in the bill were manufactured by, and under the supervision of, S. Anargyros, when in truth they were not, and are inferior to those made by him. The answer admits the manufacture and sale by the defendant of cigarettes under the brands "Egyptian Nemesis" and "Turkish Pets," upon each of which are printed "Anargyros & Co." but denies that the same are in simulation or imitation of the name "S. Anargyros," or of any part of the complainant's brands.

The answer further alleges that the American Tobacco Company is a corporation capitalized at \$132,000,000, with its offices and principal place of business at No. 111 Fifth avenue, New York City, where the complainant also has its principal place of business; that the American Tobacco Company is a combination of capital, operating under a corporate name, for the purposes of controlling the production, manufacture, sale, and price of tobacco, cigars, and cigarettes in the United States, and of preventing any competition in such production, manufacture, sale, and price, and is seeking to monopolize and is gradually monopolizing the tobacco trade, and the production, manufacture, and sale of tobacco, cigars, and cigarettes in the United States, and is commonly known as the "Tobacco Trust"; that to escape the force of the decisions of the courts relating to trusts, it operates by incorporating its competitor under his trade-name, and acquires all the capital stock, and thereby the control thereof, and then continues to carry on the business under such name, in apparent competition with itself; that in this manner it began about 1891 to acquire control of all competitors in the tobacco, cigar, and cigarette business, for the purpose of securing a monopoly of the said business, and to hinder and restrain the trade and commerce in tobacco, cigars,

and cigarettes among the several states and territories of the United States, and with foreign nations; that in some instances it has paid exorbitant prices for the competitor acquired, and in others it destroyed the value of his business by reducing prices below actual cost; that in nearly every instance it has either before or after purchase incorporated the competitor, absorbed and acquired all its capital stock, or a majority thereof, and, with some of its stockholders or directors as officers of such corporation, carried on the old business under the old name, holding out to the public that the original owner was still carrying on his business independently of the American Tobacco Company; that it concealed and still conceals, its ownership of such controlled companies, and permitted, and still permits, them to advertise and hold themselves out as independent companies, intending thereby to deceive and mislead and defraud, and in fact deceiving, misleading, and defrauding, the public, and thereby effectually crippling existing competitors, and keeping out newcomers; that in this way, and by said means, and for said purposes, besides the business of S. Anargyros it acquired and carried on, and still carries on, under the original names of the businesses acquired, the business good will of the following former independent competitors: John Bollman Company, a corporation; Monopoly Tobacco Works, a corporation; The United Cigar Stores Company, a corporation; Imperial Tobacco Company, a corporation; British-American Tobacco Company, a corporation; American Cigar Company, a corporation; T. L. Vaughn & Co., a corporation; A. J. Reynolds Tobacco Company, a corporation; Blackwell's Durham Tobacco Company, a corporation; Wells-Whitehead Tobacco Company; and about 100 others; that in most of the above-mentioned companies are included several minor formerly independent dealers and competitors; that in nearly every one of the companies above named their officers are officers, directors, or stockholders of the American Tobacco Company; that each and every thereof has a different corporate name under and by which the said American Tobacco Company is doing business in violation of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and in violation of the act of the Legislature of the state of California entitled "An act to define trusts and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in this state," approved March 23, 1907 (St. 1907, p. 984, c. 530); that the present suit was begun, and is being carried on, in the name of the complainant by the said American Tobacco Company, which is supplying the money needed in its prosecution, and the securities on complainant's bond, all in furtherance of its alleged illegal and unlawful purpose, and to rid itself of the competition of the defendant, and for no other purpose; that, when the individual S. Anargyros sold to the said American Tobacco Company his business and plant, that company undertook to organize the complainant, and to adopt the name "S. Anargyros," which organization the defendant alleges is a fraud on the public and the courts; that the said American Tobacco Company selected certain of its stockholders and officers to represent it as stockholders of the complainant corporation, which they did, but that the only money paid in was that contributed by the American Tobacco Company, and that the president of the complainant corporation was, and still is, one of the vice presidents of the American Tobacco Company, and at its request is pressing the present suit.

The affidavit of George Anargyros is to the effect that he is, and ever since its incorporation has been, secretary of the defendant company, which was incorporated under the laws of California by Theodore Eleopoles, Theodore Rongopolous, and the affiant, and that those three incorporators, with John Anargyros, are the only stockholders of the defendant company, each of them owning one-fourth thereof. This affidavit, after setting out the amount of money paid into the defendant's business by its stockholders, the capacity of its plant, the extent of its business, its solvency and ability to answer for any damages the complainant may recover, and the destruction of its busi-

ness necessarily to result from the granting of the injunction sought, sets out that John Anargyros and the affiant were born in Greece, and there learned and pursued for years the trade of making the so-called Turkish and Egyptian cigarettes; that later they came to the United States, and with the individual S. Anargyros, and on their own account, manufactured such cigarettes in the city of New York, until and after the business of S. Anargyros was absorbed, in the manner already stated, by the American Tobacco Company; that after such absorption the affiant was employed for a time by the complainant to superintend the making of the said cigarettes; that the manufacture and sale of Egyptian and Turkish cigarettes is the only trade or business that John Anargyros or the affiant ever followed; that "Turkish" and "Egyptian" are generic names or terms applied to all cigarettes commonly and generally known as Turkish or Egyptian cigarettes, while the different cigarettes are distinguished one from the other by specific names or brands, which names or brands are selected by the manufacturer, and, with a symbol or sign gathered from Egyptian or Turkish history, constitute the trade-name or trade-mark of the particular cigarette; that the defendant manufactures "Egyptian Nemesis," "Turkish Pets," "Shabak," and "Corkers" cigarettes (the first two brands of which have been hereinbefore set out, and which are the only ones resembling the complainant's brands). The affidavit of George Anargyros further states that S. Anargyros never manufactured nor sold, nor superintended the manufacturing or selling of, the "Turkish Trophies," "Murad," "Mogul," nor "Windsor Castle" brands of cigarettes set out in the complainant's bill, on which cigarettes and the boxes containing the same the complainant places the fac simile signature "S. Anargyros"; that the affiant was associated with S. Anargyros prior to the sale of his business to the American Tobacco Company, and was for some time thereafter employed by the complainant; that during all of said times the cigarettes manufactured by the individual S. Anargyros were known to the trade and public only as "Egyptian Deities," and that the other cigarettes manufactured by the complainant were also known to the public and trade only by the respective names "Turkish Trophies," "Murad," "Mogul," and "Windsor Castle"; that the individual S. Anargyros, and later the complainant always advertised and sold the cigarettes by the brands, and never by the name of the manufacturer, and that none of them were ever known or advertised as "Anargyros Cigarettes"; that as late as March, 1906, the complainant advertised in Munsey's Magazine, which is freely circulated throughout the United States, the "Murad" cigarette, without the name "S. Anargyros" appearing in the advertisement, a copy of which advertisement is as follows:

**T**HERE is scarcely a happier interval than that between a good play and a good dinner. The memory of the one and the anticipation and satisfaction of the other suggest

# MURAD CIGARETTES

to those who are most used to and most discriminating in fine smoking. Mild, rich, delicious and distinctive the Murad is the most fitting accompaniment of the most enjoyable occasions.

**10 for 15 Cents**

BY MAIL POSTPAID—If you can't get Murad Cigarettes from your dealer, send 15c. for ten; 75c. for fifty; \$1.50 for one hundred

**ALLAN RAMSAY, 111 Fifth Ave., New York**

**Waldorf Astoria  
NEW YORK**

That at other times and in other magazines it has similarly advertised, and that even at the present time it is advertising, "Murad Cigarettes" in the following magazines: Munsey's, Pearson's, McClure's, Theater, Cosmopolitan, and in other magazines, not as "Anargyros Cigarettes," but as "Murad Cigarettes" in large type, and the words "S. Anargyros, Manufacturer," appear in very small type at the end of the advertisement, as follows:



Unvarying uniformity in their smooth, mild, mellow richness  
has made

# MURAD CIGARETTES

the unanimous choice of experienced smokers, and has firmly  
established them as

**"THE METROPOLITAN STANDARD"**

**10 for 15 cents**

S. ANARGYROS, Manufacturer      111 Fifth Avenue, New York

That at present the complainant is advertising in the place of business of the United Cigar Stores Company, a corporation owned by the stockholders of the complainant, and elsewhere, the "Egyptian Deities," made by the complainant, with large, attractive, and conspicuous signs, as follows:

"Nothing Like it was Ever Seen Before.

DEITIES. 25¢.

After Dinner Size  
Cigarettes."

"DEITIES.

After Dinner Size.

Box of 10

25¢."

That the complainant's name is not attached to nor made any part of the said last-mentioned advertisement, nor of the said cigarettes advertised as "Anargyros Cigarettes."

The affidavit of George Anargyros further states that for years he and the individual S. Anargyros manufactured Turkish and Egyptian cigarettes in the city of New York, every one of which so manufactured was given a name and brand according to the blends of the tobacco used in its manufacture; that the cigarettes so manufactured were advertised, sold, and commonly known to the trade and the public as "Egyptian Deities"; that, in a similar manner, after the purchase by the American Tobacco Company as stated, the complainant made and sold to the public and trade cigarettes only by the brand as "Egyptian Deities," "Turkish Trophies," "Murad," "Mogul," or "Windsor Castle"; that prior to the alleged sale by S. Anargyros to the American Tobacco Company the latter required as a part of the consideration of the purchase price an agreement on the part of the said S. Anargyros never to trade in tobacco thereafter, and that on the completion of the said purchase, and in furtherance of its alleged purpose to secure a monopoly on the production and sale of cigarettes in the United States and elsewhere, the said American Tobacco Company closed the works and business of the said S. Anargyros and moved all property connected with the business formerly carried on by him to its factory, and there began the manufacture of cigarettes under the name of "S. Anargyros," under which name it manufactured, besides "Egyptian Deities," "Turkish Trophies," "Murad," "Mogul," and "Windsor Castle" cigarettes, although the said S. Anargyros never made nor sold any of the said brands except "Egyptian Deities"; that in furtherance of its alleged purpose, and to profit by the personal reputation and skill of the individual S. Anargyros, and to mislead the public into believing that the said individual was still making and superintending the making of its cigarettes, the said American Tobacco Company caused the complainant company to be incorporated, adopting the fac simile signature of S. Anargyros, and that the said American Tobacco Company thereupon began to manufacture, and ever since has manufactured, and still is manufacturing, cigarettes under the name "S. Anargyros," and accompanies each box of the said "Egyptian Deities" with a printed announcement, bearing the fac simile signature "S. Anargyros," in the following words:

"To the patrons of the 'Egyptian Deities' Cigarettes:

"You are hereby respectfully informed that every box of 'Genuine Egyptian Deities' bears the name 'S. Anargyros' printed in black letters diagonally across the top, and also contains this notice with the fac simile signature. Beware of cheap imitations.

"Respectfully,

S. Anargyros, New York.

"N. B. All imitations will be prosecuted by law as heretofore."

And that accompanying every box of "Mogul" cigarettes is the printed announcement, bearing the fac simile signature of S. Anargyros, in the following words: "Mogul Egyptian Cigarettes. A cigarette of exceptional merit, made of the choicest selections of superior Turkish tobacco skillfully blended. S. Anargyros, Manufacturer"—and that similar announcements accompany all cigarettes made by the complainant—all of which are intended to and do deceive the public and customers into believing that such cigarettes are made from tobacco selected by, and skillfully blended by, the individual S. Anargyros, whereas he is not, and never has been, connected with the complainant, and has not and is not selecting or blending the tobacco from which the said cigarettes are made, but that the said S. Anargyros left the United States

more than 10 years ago, during which time he has been, and now is, residing in Greece.

The affidavit of George Anargyros makes the same statements of fact that are set out in the answer, in respect to the acquiring by the American Tobacco Company of the competing businesses of the various corporations and individuals and companies named in the answer, and the operation of such businesses of the acquired companies, corporations, and individuals by the officers and stockholders of the American Tobacco Company, and for the purposes stated in the answer.

The affidavit of T. Francis is to the effect that on the 7th of January, 1908, he visited one of the cigar stores of the United Cigar Stores Company in San Francisco, and saw in the Sutter street window and in the Fillmore street window thereof a large placard, in a conspicuous place, bearing the following inscription:

"Nothing Like it was Ever Seen Before.  
DEITIES. 25¢.  
After Dinner Size  
Cigarettes."

—and that in said store there was also a placard bearing the following inscription:

"DEITIES.  
After Dinner Size.  
Box of 10.  
25¢."

The affidavits of W. W. Wieman and John S. Norris, filed on behalf of the defendant, put in issue the averments of the affidavit of R. A. Laherty filed in support of the bill. The affidavit of M. C. Aros put in issue the matters stated in the affidavit of E. C. Hull filed in support of the bill. The affidavit of Irving J. Mandell put in issue the matters stated in the affidavit of W. R. Elliott, Jr., filed in support of the bill. There were also filed on behalf of the defendant the affidavits of a large number of persons, many of whom were cigarette dealers in and about the city of San Francisco, and many of whom were purchasers of cigarettes, almost all of which affidavits are to the effect that the affiants never knew of any cigarettes known, or called for, as "Anargyros Cigarettes," but that, on the contrary, so far as their knowledge and observation go, the complainant's cigarettes referred to in the bill, are and always have been known, sold and purchased as "Egyptian Deities," "Turkish Trophies," "Murad," "Mogul," and "Windsor Castle" cigarettes, and that it is by similar trade-names that all Egyptian and Turkish cigarettes are known, sold, and purchased.

In reply to the defendant's showing upon the order to show cause, the complainant filed the affidavits of C. H. Schmidt, Thomas J. Devitt, Horace O'Rear, Joseph Michalitschke, Arthur Bachman, and Herbert L. Cook, to the effect that the cigarettes manufactured and sold by the complainant are generally known in the trade as "Anargyros cigarettes, or the products of S. Anargyros, complainant herein, manufacturer," and that the trade-name or trade-mark "S. Anargyros" has become and is recognized as one of the most valuable trade-names or trade-marks in the Turkish cigarette business. The complainant also offered in reply another affidavit of George W. Whitaker, in which that affiant stated, among other things, that shortly after the acquisition by the complainant of the business of S. Anargyros, the affiant was employed by the complainant as superintendent of its factory in New York, and that all of the cigarettes manufactured by the complainant during the time of his employment were made according to the blends originated by the said S. Anargyros, and by him communicated to complainant, and in exact conformity to the methods and practices formerly used by the said S. Anargyros; that the tobaccos used by the complainant in the manufacture of said cigarettes were the same in respect of grade, character, and quality as those formerly used by its predecessor S. Anargyros, and were selected by one Henry Strause, a recognized authority and expert in the selection and blending of cigarette tobacco, who was as experienced and proficient in such matters as the said assignor of the complainant, and that the said Strause continued to give his personal attention to the selection and blending of the tobaccos used by the



complainant in the manufacture of the cigarettes for several years, and until succeeded by other competent and experienced experts.

The last-mentioned affidavit of Whitaker, after referring to certain matters contained in the aforesaid affidavit of George Anargyros, further avers that the complainant invariably stated in its advertisements that the particular brands of cigarettes manufactured by it were manufactured by S. Anargyros, "with this exception, to-wit, that a certain brand of cigarettes manufactured by complainant, and known and designated as 'Murad Cigarettes,' were occasionally advertised under the name 'Allan Ramsay,' that said Allan Ramsay was a distinguished and recognized expert in the selection and blending of cigarette tobaccos, and was the inventor and originator of the blend employed in the manufacture of said last-named brand of cigarettes, and his name for this reason has appeared, and now appears, on each box or package containing said brand of cigarettes, but that the name of complainant appears on each of the same as the manufacturer of said brand of cigarettes, and the name S. Anargyros is, and always has been, imprinted in each cigarette of this brand manufactured by complainant; that the cigarettes manufactured by the complainant are generally known in the trade and among a large percentage of the purchasers thereof as Anargyros cigarettes or the products of S. Anargyros' manufacture, which said trade-mark or trade-name 'S. Anargyros' has become and is recognized as one of the, if not the, most valuable trade-mark or trade-name in the Turkish cigarette business."

Referring to the statement made in the affidavit of George Anargyros respecting the advertisement of the "Egyptian Deities" placed in the windows of the United Cigar Stores Company in San Francisco, the affiant Whitaker, in his reply affidavit, "avers the facts to be that said signs above referred to were prepared and exhibited as aforesaid without knowledge or consent, and that complainant in no manner participated in or authorized the preparation or use of said signs, and in this behalf this affiant says that certain signs of a similar character were prepared and exhibited under the direction and authority of complainant, for the purpose of advertising said brand of 'Egyptian Deities' cigarettes, which were in the form, words and figures following, to wit:



**S. ANARGYROS'**

**FAMOUS CIGARETTES**

**Egyptian  
DEITIES**

**10 FOR 20 CENTS**



Lent & Humphrey and McElroy & Stetson, for appellant.  
R. E. Houghton and Edward F. Houghton, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). Looking at the case as made by the pleadings and affidavits, we think the most that can be fairly claimed for the complainant is that it is a doubtful one. Under such circumstances the preliminary injunction should have been denied, and the temporary restraining order vacated. There was not even an attempt made on behalf of the complainant to show the insolvency of the defendant, but, on the contrary, an affirmative showing on its part of its ability to respond in damages to the complainant in the event of its maintaining the suit. It is, as said by the Supreme Court of Georgia in *Foster v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 286, "a grave matter to petrify, in an instant, a living business by a mere interlocutory order." The well-established rule in equity is that a preliminary injunction should not be granted in a doubtful case.

One of the uncontradicted statements of fact contained in the affidavit of George Anargyros is to the effect that the individual S. Anargyros never made or sold any cigarettes but "Egyptian Deities," and never made any of those after his sale to the complainant; that all the other cigarettes made and sold under the other brands sued upon originated with and were made by the complainant corporation, and that all of them were sold by it to the public as the product of the individual S. Anargyros. "Any one has an unquestionable right," said the Supreme Court in *Medicine Co. v. Wood*, 108 U. S. 222, 2 Sup. Ct. 439 (27 L. Ed. 706), "to affix to articles manufactured by him a mark or device not previously appropriated, to distinguish them from articles of the same general character manufactured or sold by others. He may thus notify the public of the origin of the article, and secure to himself the benefits of any particular excellence it may possess from the manner or materials of its manufacture. His trade-mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded not only as a matter of justice to him, but to prevent imposition upon the public. *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993. The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise, a deception would be practiced upon the public, and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public, and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to sim-

ilar articles, and which his own manufacture does not possess in the estimation of purchasers."

In respect to the "Murad" brand, at least, the statements of the affiant Anargyros find some corroboration in the averments of the bill itself.

While we do not think final disposition of the case should be made in advance of a trial upon the merits, we are of the opinion that upon the showing made the court below should not have granted the preliminary injunction, and should have vacated the restraining order, leaving the rights of the parties to depend upon a trial upon the merits.

The order is reversed, with instructions to vacate the restraining order.

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### MCKINNEY v. BIG HORN BASIN DEVELOPMENT CO.

(Circuit Court of Appeals, Eighth Circuit. January 11, 1909.)

#### 1. WATERS AND WATER COURSES (§ 222\*)—DESERT LANDS—GRANT TO STATES FOR RECLAMATION—VALIDITY OF CONTRACT BY IRRIGATION COMPANY.

Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422, as amended by Act June 11, 1896, § 1, c. 420, 29 Stat. 413, and Act March 3, 1901, c. 853, § 3, 31 Stat. 1188 (U. S. Comp. St. 1901, pp. 1554, 1556, 1557), for the purpose of aiding the public land states in the reclamation of desert lands therein and the sale thereof to actual settlers in tracts not exceeding 160 acres each, authorized the Secretary of the Interior, upon proper application of a state, and the filing of a map and approved plan of irrigation, to contract with it to donate and patent to such state not exceeding 1,000,000 acres as the state shall cause the same to be irrigated, reclaimed, and occupied. The state is authorized to enter into contracts to cause the lands to be irrigated and induce their settlement, to provide for a lien thereon for the actual cost and necessary expense of irrigation, but is required to hold any surplus money derived from their sale, in excess of the cost of reclamation, as a trust fund, and apply the same to the reclamation of other desert lands therein. Rev. St. Wyo. 1899, § 934 et seq., provide for the acceptance of such grant, and vest the selection, management, and disposal of the lands in a State Board of Land Commissioners, and authorize the board to enter into contracts with any person or corporation proposing to reclaim lands, which contracts shall contain complete specifications of the proposed irrigation work, and its estimated cost, and the price and terms per acre at which such works with perpetual water rights shall be sold to settlers, with the price and terms on which the land will be sold by the state to settlers, "provided that such price and terms for irrigation works, water rights and for lands to be disposed of by the state to settlers shall in all cases be reasonable and just." They require the board immediately on the commencement of work by a contractor to give notice by publication in the county in which the land is situated that said land is open for settlement, the price at which it will be sold to settlers by the state, and the contract price at which settlers can purchase perpetual water rights. *Held*, that a contract made by a company which intended to, and afterward did, obtain a license from the board to construct irrigation works covering certain lands, by which it gave to a third person the exclusive right to make contracts with settlers on such lands on its behalf for perpetual water rights, at not less than \$19 nor more than \$30 per acre, in his discretion, and to give him all that was obtained above \$19 per acre, was contrary to the intent of the law and to public policy, and would not be enforced in equity, since it not only violated the requirement of the law that the charge should in all cases

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be just and reasonable, but made it impossible for the board to give the required notice of the price at which such water rights would be sold to settlers, and disenabled the company from performing the function contemplated by the grant from the state by contracting with settlers, leaving such function to be exercised arbitrarily by the other party to the contract.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.\*]

2. CONTRACTS (§ 138\*)—CONTRACT VOID AS AGAINST PUBLIC POLICY—RATIFICATION.

Such contract being void as against public policy, the company could not be estopped to deny its validity by permitting the other party to proceed thereunder.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 690; Dec. Dig. § 138.\*]

3. EQUITY (§ 427\*)—DECREE—NATURE AND EXTENT OF RELIEF.

While, under a general prayer for relief in a bill in equity, complainant may have any relief to which he shows himself entitled, it must be founded on and consistent with the facts set up in the bill, and with some theory of the case on which the bill was based.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1009-1014; Dec. Dig. § 427.\*]

4. SPECIFIC PERFORMANCE (§ 128\*)—DECREE—NATURE OF RELIEF.

The complainant in a suit in equity to enforce specific performance of a void contract cannot recover on a quantum meruit for services performed thereunder, his right of action therefor, if any, being at law, where the parties are entitled to trial by jury.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412, 415; Dec. Dig. § 128.\*]

Appeal from the Circuit Court of the United States for the District of Wyoming.

On the 29th day of July, 1904, S. L. Wiley and F. C. Rutan, as parties of the first part, and George M. McKinney, the appellant, as party of the second part, entered into a written contract to the following effect, in so far as concerns the questions to be decided:

After reciting that the Big Horn Basin Development Company (a corporation created by the laws of the state of Wyoming) was about to enter into a contract with the state of Wyoming for the construction of certain irrigation works, whereby the state was about to grant to the company the right to charge not exceeding \$30 per acre to settlers for water rights, etc., if stipulated that, upon the execution of said contract between the state and the company, the parties of the first part would use their best endeavors to cause a contract to be executed between the company and the party of the second part, whereby the company would grant to the complainant the exclusive privilege and authority of making contracts with settlers upon said lands to furnish water, it being understood that said contracts were to be approved by the company. The price at which said contracts might be made to settlers should be not less than \$19 nor more than \$30 per acre, and the compensation to be received by the complainant for his services should be an amount equal to the difference between the \$19 per acre and the contract price per acre to said settler.

The contract then provides for payments by the settler in annual installments to the company, and for the manner of payment out of the same to the complainant.

It then directs that no contract shall be negotiated by the complainant except upon and until the lands upon which such contracts were to operate shall be selected and designated to the complainant by the company; provided, that the total amount of such lands shall be 250,000 acres, more or less, as may appear by the segregations thereof to the state, and shall be designated to the com-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

plainant in amounts of not less than 25,000 acres at any one time, the complainant agreeing that he would negotiate contracts upon at least 40,000 acres for each and every year after lands to that amount have been designated to him, the company reserving unto itself certain of said lands for town and mill sites and water-power purposes.

It was then provided that, in case of failure by the complainant to negotiate contracts to the amount mentioned, for any one year, at the option of the company, this should operate as a forfeiture of all right of the complainant to further negotiate contracts; and in case any of said lands upon which contracts have been negotiated should revert or the settler lose his rights thereto, or the company should acquire the same, then the right to compensation thereon should cease, and the company, at its option, might permit or require the complainant to recontract said lands as an original contract, the complainant to be compensated therefor as if it were an original sale.

The bill avers that immediately after the delivery of said writing the defendant adopted the same as its agreement, and directed the complainant to set to work in procuring settlers to locate upon said lands, and to enter into contracts for water with which to irrigate the same. That in obedience to said directions the complainant, on or about the 1st day of August, 1904, began work under said contract, and thenceforth, until the happening of things thereafter set forth, devoted his time to the performance of the promises therein mentioned; and that to that end he employed a large number of persons to assist him in the work, they to be compensated at the rate of \$5 per acre in respect of all water contracts negotiated by them; that in the prosecution of his undertaking he made publication in various ways, and issued circulars to invite settlers to deal with him; and that "all of said things were done during the month of August, 1904, and were done at the request and by the direction of the defendant, and with the knowledge, consent, and approval of the defendant, its officers, directors, and stockholders."

It then appears from the allegations of the bill that the Board of Land Commissioners of the state did not enter into a contract with the defendant company until the 24th day of September, 1904, whereby the defendant undertook to construct the canal and reservoir in accordance with the plans referred to in the contract, by which contract the company was granted the exclusive right to procure qualified persons to settle upon and occupy the lands described therein, and to sell and dispose of water rights of the said irrigation system to said settlers at the price of not exceeding \$30 per acre, the state agreeing to allow the entry of and payment for such lands to such settlers at the price of 50 cents per acre.

The bill then sets out that the complainant procured a large number of persons, say 350, qualified to make settlement on the lands, to make written application for contracts for the purchase of 50,000 acres of said lands and water rights, which were delivered to the defendant. That on the 31st day of March, 1905, the complainant had in progress negotiations with several hundred other persons qualified to make locations, and who were ready to enter into contracts therefor, when the defendant instructed him to desist from selling said lands and water rights, and informed him that when it was ready to resume the sale of its lands and water rights it would notify him. That he has from that time thenceforth been ready and willing to proceed with his undertaking under said contract, but that on the 1st day of April, 1906, the defendant informed him that it would not permit him to complete the performance of the contract, and has so continued to refuse; and that the defendant is and for some time past has been itself selling said lands and water rights.

The bill then proceeds to aver that by means of the matters aforesaid "the defendant adopted and assumed the said contract of July 29, 1904, in equity, and is in equity bound and obligated thereby as fully and completely as though said writing had been drawn up in the name of the defendant, and signed, sealed, and delivered to the complainant by it. And the complainant avers that by means of the premises he was and is in equity entitled to the exclusive privilege and authority of making contracts between the defendant and such settlers upon said lands in regard to the furnishing of water for said lands."

It is further asserted that the complainant is entitled to a decree confirming said contract, and to an injunction restraining the defendant from entering in-

to any contract with settlers upon said lands in regard to the furnishing of water, except such contracts as have been negotiated and shall be negotiated and made by the complainant in behalf of the defendant, so long as he shall sell annually the quantity of water rights required by his contract; and that the defendant be required to account to the complainant concerning all contracts for the furnishing of water for said lands made and entered into by the defendant, and for all moneys received by it in respect of such contracts, and to decree the payment of compensation to the complainant in respect of such contracts, at the rates and in the amounts specified in said contract of July 29, 1904; or, as an alternative, that the court make a decree establishing said contract of July 29, 1904, and that the defendant pay to the complainant all of his damages, past, present, and future, resulting from the abrogation and breach of said contract; and that defendant be required to pay to him the sum of \$11 per acre for every acre of water rights so put under contract as aforesaid, amounting to the sum of \$550,000, and damages for the breach of the contract at the rate of \$6 per acre for each and every acre of said land so segregated as aforesaid over and above the said 50,000 acres.

To this bill the defendant demurred, on the ground that the complainant has not, by said bill, made or stated such a case as entitles him in a court of equity to any discovery or relief from or against the defendant touching the matters contained in the bill, or any such matters.

The Circuit Court sustained the demurrer, and the bill was dismissed, "without prejudice to the complainant's right to bring an action at law in such form as he may be advised."

From this decree the complainant has appealed to this court.

The acts of Congress under which the lands in question were ceded by the United States to the state of Wyoming are Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 (U. S. Comp. St. 1901, p. 1554), Act June 11, 1896, c. 420, § 1, 29 Stat. 413 (U. S. Comp. St. 1901, p. 1556), and Act March 3, 1901, c. 853, § 3, 31 Stat. 1188 (U. S. Comp. St. 1901, p. 1557), which merely extends the time for reclamation by the state.

The substance of the congressional enactments is that, to aid the public land states in the reclamation of desert lands therein, and the settlement, cultivation, and sale thereof in small tracts to actual settlers, the Secretary of the Interior was authorized, upon proper application of a state, to contract with it to donate and patent to the state not exceeding 1,000,000 acres in each state, as the state may cause to be irrigated, reclaimed, and occupied, and not less than 20 acres of each 160-acre tract cultivated by actual settlers, within 10 years next after the passage of the act. Before the application of the state is allowed or any contract made or any segregation of any land from the public domain is ordered, the state was required to file a map of the lands proposed to be irrigated, with a plan showing the mode thereof, that it was sufficient to thoroughly irrigate and reclaim said land preparatory to the raising of ordinary agricultural crops, and also showing the source of the water supply to be used for irrigation. The states so contracting were authorized to make all necessary contracts to cause the lands to be reclaimed and to induce their settlement and cultivation, in accordance with and subject to the provisions of the act; the state being prohibited to lease any of said lands, or to use or dispose of them in any way, except to secure their reclamation, cultivation, and settlement. A lien is authorized by the state, and by no other authority, on and against the separate legal subdivisions of lands reclaimed, for the actual cost and necessary expenses of reclamation, and reasonable interest thereon. And when an ample supply of water is furnished to reclaim a particular tract or tracts, then patents should issue to the state for the same, without regard to settlement or cultivation.

Section 4 of the act of August 18, 1894, contained the following provision:

"As fast as any state may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state or its assigns for said lands so reclaimed and settled: Provided, that said states shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any state from the sale of said lands in excess of

the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such state."

The Revised Statutes of Wyoming of 1899 pertinent to this question are as follows:

Section 934 accepts the conditions of section 4 of the act of Congress, together with the grants of land to the state under the provisions of the act.

Section 935 vests the selection, management, and disposal of said lands in the State Board of Land Commissioners, designated "The Board."

Section 940 provides that any person, association, or incorporated company constructing or having constructed ditches, canals, or other irrigation works to reclaim such lands shall file with the board a request for the selection on behalf of the state, by the board, of the lands sought to be reclaimed, which shall be accompanied by a proposal to construct the irrigation works necessary for the complete reclamation of the lands to be selected, the proposals to be prepared in accordance with the rules of the board and the regulations of the Department of the Interior; stating the source of the water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with the rights and franchises attached thereto, etc.

Section 941 provides that the board shall have authority to prescribe that each proposal shall be accompanied by a certified check in an amount to be designated by the board, to be held as a guaranty of the execution of the contract with the state, etc.

Section 942 provides that such person or company making application shall file with the State Engineer application for a permit to appropriate water for purposes of reclamation of the lands described, to be accompanied by maps of the land selected, and the proposed irrigation works, to be prepared in accordance with the regulations prescribed by the State Engineer and the rules of the Department of the Interior.

Section 943 provides for the examination of the proposal by the chief clerk to see that it is in form, and for report by the engineer as to whether the proposed work is feasible, and that the canal or ditch can be supplied without undue diversion of the public waters of the state.

Section 944 directs where the matters aforesaid shall be filed in the local land office.

Section 946 declares that, upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the board to enter into a contract with the parties submitting the proposal, and that such contracts shall contain complete specifications of the location, dimensions, character, and estimated cost of the proposed ditch, canal, or other irrigation work; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; the price and terms upon which the state will dispose of the lands to settlers: Provided, that such price and terms for irrigation works, water rights, and for lands to be disposed of by the State to settlers shall, in all cases, be reasonable and just.

Section 947 declares that no contract shall be made by the board which requires a greater time than five years for the construction of the works, and all contracts must state that the work shall be begun within six months from the date of the contract, etc.; and at least one-tenth of the construction work shall be completed within two years from the date of such contract, and the work shall be diligently and continuously prosecuted.

Section 948 deals with the matter of the failure of the parties having contracts to comply therewith within the prescribed time.

Section 950 provides that immediately upon the withdrawal of any land for the state by the Department of the Interior, and the inauguration of work by the contractor, it shall be the duty of the board, by publication in a newspaper published in the county in which the land is situated, for a given time, "to give notice that said land is open for settlement, the price for which said land will be sold to settlers by the state, and the contract price at which settlers can purchase perpetual water rights."

Section 951 prescribes the qualifications of such settlers, and requires that

the application of the settler must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company, or association who has been authorized by the board to furnish water for the reclamation of said land; and the board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications for entry shall be accompanied by a payment of 25 cents per acre as a partial payment on the land, conditional if the application is allowed, and if the application shall not be allowed the money to be returned to the applicant. The succeeding provisions deal with the work to be done by the settler and the issuing to him of a patent.

Section 956 gives to the person or company furnishing the water for any tract of land a first and prior lien on said water right and land for all deferred payments for said water right.

Charles C. Buell, Charles P. Abbey, T. Blake Kennedy, and Fred A. Dolph, for appellant.

John W. Lacey and Gibson Clark, for appellee.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge (after stating the facts as above). We pass by the suggestion that it might be inferred from the face of the bill that practically all the things done by the appellant were under his written contract with Wiley and Rutan prior to the acceptance by the board of the proposed contract from the appellee; that no written contract, in fact, was ever entered into between the appellant and the appellee, so that the liability of the latter, if any, depends solely upon acts in pais, from which an adoption of the contract sued on is to be inferred; as, in our judgment, the case is disposable upon other grounds quite incontestable.

The underlying purpose of the acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given state was, through the agency of the state government more immediately concerned, to speedily have them reclaimed from an unproductive waste by means of artificial irrigation, whereby they might become susceptible of human sustentation, bringing population and wealth to the state. But Congress did not make the grant to the state of such lands in mass to take effect in presenti. The state was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent therefor should issue. It also imposed the condition that the state should not accord to any one person over 160 acres of said lands. It limited the price of the land to the settler at 50 cents per acre. And to interdict the pernicious evil of speculation, even by the state itself, it provided that any surplus derived from such sales, in excess of the cost of their reclamation, should be held as a trust fund for and be applied to the reclamation of other desert lands in such State.

The state statute intrusted the selection, management, and disposal of the lands to a Board of Commissioners. While contemplating that persons, associations, and corporations might construct ditches and canals for irrigating the lands, they were, on prescribed conditions, to obtain license from the board. As a condition precedent thereto, they should file with the board maps of the lands to be reclaimed, and the



proposal should state the things prescribed by section 940 of the statute (Rev. St. 1899), among which is the estimated cost of the works, the price and terms per acre at which the perpetual water rights were to be sold to settlers on the lands to be reclaimed. As evidencing the state's policy and control over the whole matter, and the reservation of the right to protect the settlers induced to go upon the land, section 946 prescribed that it should be the duty of the board to enter into a contract with the party submitting the proposal, containing complete specifications of the location, dimensions, character, and estimated cost of the proposed ditch or irrigation work, and "the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; the price and terms upon which the State will dispose of the lands to settlers;" with the proviso that such price and terms for irrigation works, water rights, and lands to be disposed of by the state to settlers shall, in all cases, be reasonable and just.

From all of which it is manifest that the scheme and policy of the statute was and is that the person or company contracting to furnish the water supply should make contract with the settler subject to the supervision and control of the Board of Commissioners, charged with the enforcement of the proviso that the water rates to the settler shall be reasonable. Whereas, the contract in question, which the appellant by this suit seeks to have specifically enforced, in its scope and essence, is an attempted evasion of the obligation of the contracting company to the state.

Section 950 of the statute requires that immediately upon the withdrawal of the land for the use of the state, and the inauguration of work by the contractor, the State Board shall give notice by publication, in the manner prescribed, "that said land is open for settlement, the price for which said land will be sold to settlers by the state, and the contract price at which settlers can purchase perpetual water rights." Evidently the statute contemplates that the board would obtain the necessary information of the contract price at which the settlers can purchase perpetual water rights from the contractor, and not otherwise. The bill of complaint alleges that immediately after the making of the contract between the appellant and Wiley and Rutan the appellee "adopted the same, \* \* \* and directed the complainant to set to work at once to procure settlers." As this was nearly two months prior to the appellee entering into any contract with the board authorizing it to deal with the settlers, and as the bill alleges "that all of said things were done (i. e., the procuring of settlers and contracts) during the month of August, 1904," it is manifest that the appellant made contracts with settlers before the required publication of notice could have been lawfully made. And unless the contract in question was not only adopted by the appellee, but the written agreement in its terms was presented to the board for its acceptance and approval, as that of the contractor, no notice of its special terms could have been given by the board in conformity to the statute. And the bill does not in terms aver that this contract was submitted or made known to or accepted by the board, or that notice thereof was ever published by it; thus, clearly enough, again showing that in making this contract and

acting thereunder the appellant was proceeding in utter disregard of the prescriptions of the statute. By the contract in question the settlers were to be placed at his will. The bill avers on its face that the complainant "by means of the premises was and is in equity entitled to the exclusive privilege and authority of making contracts between the defendant and such settlers upon said lands in regard to the furnishing of water for said lands." He was to fix the price arbitrarily at which the settler could secure his complement of land with the water privileges, within the limit of \$30 per acre. The contract arbitrarily fixed the cost to settlers at not less than \$19 per acre, and complainant's compensation should come out of the excess over the \$19 per acre; whereby, in any event, the appellee should receive \$19 per acre, leaving the complainant \$11 per acre for his services, if he could wring it from the settler. So the bill asserts a claim against the appellee for \$11 per acre for the lands claimed to have been put under contract by him, amounting to the sum of \$550,000, and damages for the breach of the contract at the rate of \$6 per acre for each acre of land so segregated over the 50,000 acres. Can it be entertained for a moment that, had the State Board been advised, at the time the application for the contract with it was made, the appellee had such an arrangement with the complainant as disclosed in the bill, the company's application for a contract would have been accepted? The answer must be no, for the reason that the contract was in contravention of the declared legislative policy, in that it disregarded the obligation of the appellee to sell at not exceeding the reasonable cost, and also because it contemplated placing the settler at the will of the complainant as to the cost to be exacted from him.

The audaciousness of the contract which the court is asked to enforce is manifested in the prayer that the appellee be enjoined from making any contract with any settler at any price who may desire to enter upon the land and establish a home, and that the complainant, in effect, by decree of court be substituted as the contracting party with the state, as the sole authorized person to deal with and admit settlers on the lands, and on the terms of his alleged contract. The assertion of such a right flies in the face of a fundamental principle of law, that, where a grant of power under a statute is given for the accomplishment of the state's policy, the due performance of the function by the grantee is the consideration for the public grant; and consequently any contract by the grantee which tends to disable it from performing its entire function by undertaking to transfer to others the discharge thereof, with an effect, different from the grant, is violative of the contract with the state and contrary to public policy. *York & Maryland Railroad Company v. Winans*, 17 How. 30, 15 L. Ed. 27; *Thomas v. Railroad Company*, 101 U. S. 71-83, 25 L. Ed. 950. Every person dealing with such grantee of a privilege or right must take notice of the limitations placed thereon by the creative act.

It is no answer to this to say that after the original contractor, the appellee, had stood by and permitted the appellant to proceed to incur expenses and give his time and labor in execution of the contract, it should now be estopped to deny its accountability under the con-

tract. The answer to this is fully made by Mr. Justice Miller in *Thomas v. Railroad Company*, supra:

"It is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

It is suggested that there is no legal incompatibility between the appellant's rights under the alleged contract and the exercise of the supervisory control of the State Board to see that the cost to the settler is reasonable. If this condition is to be regarded as written into the contract in suit, how can it be the subject of specific performance, which the suit, in legal effect, presents? Such a condition, if on the face of the contract, would disclose such an element of uncertainty as to render it incapable of being specifically enforced by decree of court. It would rest with neither party to say or concede what the reasonable cost would be, the standard to which appellant's compensation must be made to conform, as that ascertainment under the statute in the first instance devolved upon the managing board of the state, over whose action neither the appellant nor the appellee have any control. Moreover, the bill of complaint neither asks this court to determine whether or not the cost made to the settler by the complainant was reasonable, and, if it had, it furnishes no basis for its ascertainment and determination.

Nor can the complainant on this appeal be heard to say, as in the brief of counsel, that there is nothing in the contract which precludes the principal from selling direct to the settler. As already shown, the gravamen of the bill is that the defendant denied the complainant the exclusive right under the contract to make terms with settlers, and he prays, *inter alia*, for an injunction "restraining the defendant from entering into any contract or contracts with settlers upon said lands in regard to the furnishing of water for such settlers for said lands, except such contracts as have been negotiated and shall be negotiated and made for and in behalf of the defendant by the complainant." That was the question raised by the bill which the chancellor heard and passed on below, and it is the question the appeal seeks to have reviewed. While under the general prayer for relief a party may have any relief to which in equity he shows himself to be entitled, it is none the less limited to relief founded on and consistent with the facts set out in the bill. Nor is the party entitled to a decree on a finding of fact different from any theory of the case set up in the bill. *Newham v. Kenton*, 79 Mo., loc. cit. 385, 386; *Reed v. Bott*, 100 Mo., loc. cit. 66, 12 S. W. 347, 14 S. W. 1089; *Harrison v. Nixon*, 9 Pet., loc. cit.

503, 9 L. Ed. 201; Boone v. Chiles, 10 Pet., loc. cit. 209, 9 L. Ed. 388; Phelps v. Elliott (C. C.) 35 Fed., loc. cit. 461.

As a dernier ressort, counsel for the appellant suggest that at least he should be entitled to relief as for compensation for valuable services rendered by him which the appellee refuses to pay. There are two answers to this: First, no such case is presented by the bill, and no such relief is prayed for. A party may not in equity sue for one thing, and, failing in that, recover for another; and, second, if such action were the predicate of the bill, it would put the complainant out of a court of equity, as presenting the action of quantum meruit, fully cognizable at law, in which the parties would be entitled to trial by jury. This bill is predicated upon a specific, written contract, seeking its enforcement, which is of such a character as a court of equity will not countenance.

It results that the decree of the Circuit Court must be affirmed, and it is so ordered.

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LEWIS v. DILLINGHAM.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1909.)

No. 1,871.

ADVERSE POSSESSION (§ 98\*)—EXTENT OF POSSESSION—TEXAS STATUTE.

Under Rev. St. Tex. 1895, arts. 3343-3349, which, as construed by the Supreme Court of the state, gives title by adverse possession to one who has been for 10 years in the continuous, peaceable and adverse possession of land under claim of right, which title, unless the claim is made under some instrument fixing the boundaries, may extend to 160 acres, including the part occupied by him, provided he proves that he claimed such tract and gives its boundaries, it was sufficient to establish the right of a defendant to the benefit of such statute as to 160 acres of a large tract that he had resided thereon continuously for 35 years, during which time he made improvements and fenced and cultivated a portion, where it was shown that he had always claimed 160 acres, which he had caused to be surveyed some 7 or 8 years before suit, and that previous to that time he had claimed by practically the same boundaries.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 542; Dec. Dig. § 98.\*]

Appeal from the Circuit Court of the United States for the Southern District of Texas.

John B. Warren (Clarence C. Wightman and John Hamman, on the brief), for appellant.

Floyd McGown (Denman, Franklin & McGown, on the brief), for appellee.

Before PARDEE and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an appeal from a decree rendered in equity on an intervening petition. The main case was Maryland Trust Company v. Kirby Lumber Company. In that case, Charles Dillingham and F. A. Reichardt, as receivers of the Houston Oil Company of Texas, intervened by petition against George W. Lewis, alleg-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

ing that, as such receivers, they were entitled to have and hold the W. C. Armstrong 1,280-acre survey, situated in Newton county, Tex., except 150 acres thereof, to which they made no claim. As to the remainder of the survey, consisting of 1,130 acres, they asserted title in the Houston Oil Company. It was alleged in the petition that yellow pine timber was growing on the land, which was the subject of a contract involved in the main case. It was also alleged that the defendant was asserting some sort of possessory title to some portion of the 1,130 acres. There was a prayer for an injunction against the defendant, enjoining him from cutting timber on the land, and for a decree quieting title.

The defendant, George W. Lewis, answered the petition, disclaiming any title or interest in, and denying that he was in possession of, any part of said 1,130 acres, except 160 acres thereof, which he described in his answer as follows:

"Survey of one hundred and sixty acres of land made for G. W. Lewis, being a part of the W. C. Armstrong survey, situated in Newton county, Texas, on the waters of Cow creek, a tributary of the Sabine river, and about ten miles S., 8 deg. W., from the town of Newton.

"Beginning at the S. W. corner of said survey from which a pine stump marked X brs. N. 80 deg. E. 8 vrs.

"Thence N. 10 deg. W. 800 vrs. second corner, a pine brs. N. 77 deg. E.  $10\frac{4}{10}$  vrs., another pine brs. S. 65 deg. E. 9 vrs.

"Thence N. 80 deg. E. 1,129 vrs. third corner, a pine brs. W.  $806\frac{1}{2}$  vrs. a black gum brs. S. 50 deg. W.  $7\frac{6}{10}$  vrs.

"Thence S. 10 deg. E. 800 vrs. to the S. boundary line of the aforesaid Armstrong survey, from which a double white oak brs. N. 59 deg. E.  $5\frac{8}{10}$  vrs., a pine brs. N. 8 deg. E.  $4\frac{6}{10}$  vrs.

"Thence S. 80 deg. W. 1129 vrs. with said line to the beginning."

As to this 160 acres, the answer asserted that plaintiffs ought not to have and maintain their suit, because if they ever had a right of action therefor or claim thereto, that this defendant has had and held peaceable and adverse possession thereof for more than 10 years next preceding this suit, and for more than 10 years after plaintiff's right of action accrued, if any they ever had—which is denied—and that the defendant, while so holding said 160 acres for more than 10 years, has used, cultivated, and enjoyed the same. The thing in controversy, as shown by the petition and answer, is the right and title to the 160 acres described in the defendant's plea.

The case being referred to a special master, he reported against the defendant, recommending judgment in favor of the interveners. The defendant duly excepted to the report so far as it denied the defendant's right and title to the 160 acres. The Circuit Court overruled the defendant's exceptions to the report of the special master, and confirmed the same, decreeing that the interveners recover of the defendant, George W. Lewis, the 1,130 acres of the W. C. Armstrong survey—including the 160 acres claimed by him—and quieting the title, and granting a perpetual injunction, etc. At the conclusion of the formal decree, the court added:

"The receiver is authorized and directed to make conveyance to the defendant of the land and improvements under fence, the same being estimated by the master at eleven acres."

The defendant has brought the case here by appeal, and assigns that the court erred in overruling his exceptions to the master's report, and also, in allotting to him only 11 of the 160 acres in dispute.

The record shows that the Houston Oil Company of Texas derails its title to the land in suit from the sovereignty of the soil, and the intervening receivers are therefore entitled to recover, unless their claim is barred by the statute of limitations of 10 years.

The following are the articles of the Revised Statutes of Texas (1895) which relate to the case:

"Art. 3343. Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward.

"Art. 3344. The peaceable and adverse possession contemplated in the preceding article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually inclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be coextensive with the boundaries specified in such instrument."

"Art. 3347. Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims.

"Art. 3348. 'Peaceable possession,' within the meaning of this chapter, is such as is continuous and not interrupted by adverse suit to recover the estate.

"Art. 3349. 'Adverse possession' is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

Construing these statutes, in *Giddings v. Fischer*, 97 Tex. 184, 77 S. W. 209, the court said:

"When a party is in possession of land of which he has held adverse possession of 10 years, and claims under no muniment of title or color of title which fixes the boundaries of his claim, he may under our statute assert title to 160 acres without showing actual occupancy of the whole; provided that the tract so claimed embrace the land of which he has had actual possession, and provided, further, that he describe in his pleading the 160 acres to which he asserts title, and that he prove upon the trial that while occupying a part he claimed the whole."

The right and title of the defendant to the 160 acres claimed by him is dependent on the sufficiency of the evidence to sustain his plea of the statute of limitations of 10 years.

The special master found that the defendant has resided on the land in controversy since 1865; that he has erected on it a house, kitchen, loghouse, smokehouse, and barn, and has inclosed about 11 acres with a fence, and has cultivated it for about 35 years. Both the master's report and the evidence show that he first settled on the land because it was a "good hunting range," and because he wished to make a home there. As found by the master, and as shown by the evidence, he stated to several persons in 1869 or 1870 and in 1886 that he claimed the land as his own—that he owned 160 acres; and that "about sev-

en or eight years ago" he caused the 160 acres in controversy to be surveyed; and that he "assessed 160 acres of the W. C. Armstrong survey for taxation from 1897 to 1906, inclusive." The fact that the defendant had himself put the improvements on the land, and had lived on it and used it as his own for more than a quarter of a century, was proved by the testimony of several witnesses. It was also shown by the defendant's own testimony that he had paid taxes on it "from 1891 to the present time," and, by the tax rolls, that he paid taxes on 160 acres of the W. C. Armstrong survey from 1896 to 1906, inclusive. The evidence, taken as a whole, shows that the possession was that of one claiming to own the land. When he moved on it, there were no improvements; he placed the improvements on it, and used the timber on it for fencing, made a clearing, and cultivated the land every year for 35 years. No one ever claimed the land of him, or in any way interfered with his possession. This all appears from the evidence of several witnesses, and from his own evidence on direct examination. He was skillfully cross-examined, and it was some statements made by him on his cross-examination that led the special master to decide against his claim. He said, in substance, that a man named Mashburn had advised him to "keep quiet" about his claim for the land.

"He told me to just keep still and not do nothing about it. Q. So you did what he told you, then, did you? You kept still about it? A. Yes, sir, I did not say nothing about it."

Referring to this part of the defendant's examination, the special master says in his report that "the defendant, upon the advice of Mashburn, lowered his flag, and did not raise it for several years thereafter." But, taking the defendant's statements as a whole, it appears that his claim to the land was continuous. He lived on it and cultivated it every year. In the same cross-examination, he testified:

"Q. While you were living there, you never made any claim to the whole W. C. Armstrong survey, did you? A. No, sir; just the amount I had run out. Q. Well, you never claimed that until the last few years, did you? A. Yes, sir, for thirty years."

By "keeping quiet" he evidently meant, not that he was not claiming the land openly and adversely, but that he did not begin any litigation about it, for he said:

"Well, I wanted to wait until they tried to dispossess me. I had done set up my claim."

It may be that the defendant was not sufficiently alert mentally to withstand, without some inconsistencies, a skillful cross-examination; but we find nothing in his statements, taken as a whole, that justifies the conclusion of the special master.

The evidence in the record clearly shows an actual entry on the land, and a holding of it by the defendant as an adverse claimant; that he actually and visibly appropriated a portion of the land by cultivating, using, and enjoying the same; that his appropriation of the land was that of one claiming to own it, and his use of it was adverse and hostile to the owner; and that this possession and condition continued for more than 10 years before the beginning of this suit.

When an adverse possessor holds land without any written title or claim describing it, he must show, to bar the action of the true owner, that he claimed certain designated land. To claim 160 acres in a survey of 1,280 acres, without in any way designating which 160 acres was claimed, would not be sufficient. The case depends on the question whether or not the defendant has sufficiently proved that he claimed and adversely held the identical land in controversy. If the fence, instead of embracing only 11 acres, as stated by the master, or 15 acres, as stated by the defendant, had inclosed the entire 160 acres, there would have been no difficulty. Or if the survey had been made more than 10 years before the suit, instead of "7 or 8 years before," the proof of the identity of the 160 acres claimed would have been conclusive. But the evidence, taken as a whole, leaves no substantial doubt that the defendant has proved his plea. On his examination as a witness, he makes it clear that the 160 acres claimed by him were in the southwest corner of the Armstrong survey. It is not denied that the improvements made by him were on this land. Asked to describe the land by stating the lines, he said that the south line of the 160 acres claimed by him was the "dividing line between the Sims head-right and the W. C. Armstrong"; that the west line of his claim was "the dividing line between the Cochran tract and W. C. Armstrong." He was unable to state clearly his north and east lines, but his answers indicate not so much a want of knowledge of these lines as an inability to express himself clearly. His statements, however, are supplemented by other witnesses. The evidence of N. B. Lewis proves that in 1872 he visited the defendant at his house on the land in question, and he describes the lines and boundaries of the land then claimed by the defendant substantially as shown by the survey subsequently made, and his testimony shows that the lines, including the north and east lines, were designated and fixed upon the ground. Without further quoting the evidence, which we have carefully examined, we hold that it is sufficient to prove that the 160 acres claimed by the defendant was that which was afterwards surveyed for him and which is the land in controversy. It includes the improvements made by him, and the house in which he has lived for more than a quarter of a century, and in which he still lives, and is sufficiently identified as the land claimed by him for a period greatly exceeding 10 years. See *Davis v. Receivers of Houston Oil Co.* (Tex. Civ. App.) 111 S. W. 219, and cases there cited.

The part of the decree appealed from, which allotted the defendant only 11 acres, is reversed, and the cause is remanded, with instructions to enter a decree in his favor for the 160 acres described in his plea. The interveners, appellees here, will be taxed with the costs in the Circuit Court and in this court.



## JOSEPH DIXON CRUCIBLE CO. v. PAUL.

(Circuit Court of Appeals, Fifth Circuit. February 16, 1909.)

No. 1,806.

## 1. ASSIGNMENTS (§ 119\*)—RIGHT OF ACTION BY ASSIGNEE—LAW GOVERNING.

When suit is brought by an assignee of a chose in action, the question whether the assignment conferred on him such right of action as he asserts must be decided according to the law of the forum.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 119.\*]

## 2. ASSIGNMENTS (§ 121\*)—ACTIONS—RIGHT OF ASSIGNEE TO SUE IN HIS OWN NAME.

At common law an assignee of a chose in action cannot sue at law thereon in his own name.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 200; Dec. Dig. § 121.\*]

## 3. COURTS (§ 366\*)—FEDERAL COURTS—AUTHORITY OF DECISION OF STATE COURTS.

The construction given to a state statute by the highest judicial tribunal of the state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. § 366.\*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

## 4. ASSIGNMENTS (§ 121\*)—ACTIONS BY ASSIGNEE—FLORIDA STATUTE.

Rev. St. Fla. 1892, § 981, which provides that "any civil action at law may be maintained in the name of the real party in interest. This shall not be deemed to authorize the assignment of a thing in action not arising out of contract," as construed by the Supreme Court of the state, does not authorize an assignee of an existing right of action for trespass or trover to maintain an action thereon in his own name.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 121.\*]

## 5. TROVER AND CONVERSION (§ 16\*)—ACTIONS—TITLE AND RIGHT OF POSSESSION OF PLAINTIFF.

To sustain an action in trover, the plaintiff must have had title to or the right of possession of the property at the time of the conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 119; Dec. Dig. § 16.\*]

In Error to the Circuit Court of the United States for the Southern District of Florida.

Robert L. Anderson, for plaintiff in error.

E. P. Axtell and C. D. Rinehart, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a suit for \$300,000 damages, brought by R. H. Paul, a citizen of Florida, against the Joseph Dixon Crucible Company, a New Jersey corporation. The declaration contains three counts. The first charges that the defendant converted to its own use and wrongfully deprived John Paul of personal property, that is to say, 15,000 sticks of cedar; the second is to the same effect, except that it charges that the conversion was willful and ma-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

licious; the third charges that the defendant company knowingly, willfully, and maliciously converted to its own use and wrongfully deprived John Paul of the use and possession of 9,000 cases of cedar strips intended for use in making lead pencils. In each count it is alleged that John Paul has duly and regularly assigned and transferred "all his right, title, and interest for and on account of said conversion to the plaintiff." The defendant, first by demurrers and later by pleas, presented the defense that the transfer or assignment to the plaintiff by John Paul did not vest in the plaintiff a right of action, or entitle him to institute or maintain an action against the defendant. The further defense was interposed that the declaration shows that the plaintiff had no title or right of possession to the property described at the time of the alleged conversion of the same. The court, in several rulings, decided against these defenses. The case went to trial before the jury on the plea of "not guilty" and other pleas. Evidence was offered by the plaintiff showing that John Paul owned certain lands in Florida on which trespasses were committed by the cutting of cedar timber thereon, and also evidence tending to show that such timber was in part cut, or received when cut, by the defendant company. After these trespasses and conversions were committed on the lands and property of John Paul, he made and signed the following agreement with and transfer to the plaintiff, R. H. Paul:

"This indenture made and entered into this 30th day of December, 1905, by and between John Paul, party of the first part, and R. H. Paul, party of the second part,

"Witnesseth: That the said party of the first part, for and in consideration of the sum of ten dollars and other valuable considerations, receipt whereof is hereby acknowledged, from the said party of the second part, has bargained, sold, transferred and assigned, and by these presents does bargain, sell, transfer and assign unto the said party of the second part, his assigns, all and every right of action which the said party of the first part may be entitled to against the Joseph Dixon Crucible Company and O. Y. Felton, for and on account of trespasses committed on the lands belonging to the said party of the first part, situated in the counties of Lafayette and Taylor, in the state of Florida, and all the right, claim and demand of the said party of the first part against the Joseph Dixon Crucible Company and O. Y. Felton, for the conversion of any timber or other personal property of any kind taken from the lands of the said party of the first part in said counties. \* \* \*

Many witnesses were examined and much evidence was offered by both parties. It is not necessary, however, to state the evidence in full, as, in our opinion, the decision of the case depends on the question indicated by this brief statement.

The learned circuit judge instructed the jury, as he had ruled on the pleadings, that the assignment was effective to vest the right of action in the plaintiff. The following is part of the charge to which the defendant duly excepted:

"The title of the lands from which it is claimed that this cedar was taken has been admitted in open court to be the property of John Paul; the assignment from him to the plaintiff, R. H. Paul, of the right to bring suit to recover his loss, is admitted as presented, which the court instructs you is a sufficient assignment for the plaintiff to recover any damages, if any, that may be found against the defendant in this action."

There was a verdict for the plaintiff for \$4,000, and judgment was entered thereon, and for costs, \$621.60. The defendant company has brought the case to this court, and assigns that the Circuit Court erred in the rulings stated and in the charge.

1. When suit is brought by an assignee of a chose in action, the question as to whether the assignment conferred on him such right of action as he asserts must be decided according to the law of the forum. Accordingly, the Supreme Judicial Court of Massachusetts, in *Foss v. Nutting*, 14 Gray, 484, a suit on two notes made and assigned in New York, "presenting the question in whose name an action upon the contract shall be brought in this commonwealth," held that "the *lex fori* must govern." The cases there cited show that the rule is the same in England in suits by assignees on assignments made in foreign countries.

Chief Justice Marshall, in *Blane v. Drummond*, 1 Brock. 62, Fed. Cas. No. 1,531, a case involving an assignment, held that the right of action must be regulated by the law of the forum.

In *Pritchard v. Norton*, 106 U. S. 124, 130, 1 Sup. Ct. 102, 106 (27 L. Ed. 104), Mr. Justice Matthews, speaking for the Supreme Court, said:

"Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment on which the plaintiff claims is valid at all, or whether it is valid against the defendant, goes to the merits, and must be decided by the law in which the case has its legal seat."

The suit at bar being brought by an assignee in a United States court of law in Florida, the question raised by the defendant whether or not the assignment vests such title in him as to authorize the suit as brought, and to entitle him to judgment in that court, must be determined by the laws of Florida.

2. By the rule of the common law as first administered, things in action were not assignable. The assignee, by assignment, acquired no right that was recognized in a court of law. But the courts of chancery from an early day rejected this conclusion as unjust, and recognized and protected the rights of the assignee. The position taken by the equity courts had its effect on the courts of law, and they began to recognize the equitable rights of the assignee, and permitted them to be enforced at law by action in the name of the assignor. Finally, statutes were enacted in England and in many states of the Union making designated things in action assignable, and in many instances providing that suit on the things assigned might be brought in the name of the assignee. As to what is assignable, it is stated as a general rule that all things in action which survive and pass to the personal representative of a decedent creditor as assets, or continue as liabilities against the representative of a decedent debtor, are assignable, and that things in action which do not thus survive are not assignable. The application of this general rule has led to many conflicting decisions, and the uncertainty of its application is increased by the varying terms of the statutes controlling in different jurisdictions. We have no need now to test the application of

this general rule, because, conceding for the purposes of this judgment (but not deciding the question), that the thing in action in question, the right to sue for the conversion of the cedar cut by the trespassers from the assignor's land, was assignable, we are confronted with the question whether or not the assignment, on the facts proved, vested in the assignee the right to maintain an action of trover in his own name. As we have said, the ancient rule of the common law in no way recognized the assignability of a chose in action, and when, in later years, the common law did recognize the validity of such assignments, it was on the theory that they conferred equitable rights which could only be enforced at law by an action brought in the name of the assignor. This rule, in the absence of statutes changing it or of modification by a settled course of decisions, continues to this day. Accordingly, actions on such assignments, at common law, cannot be maintained in the name of the assignee, but must be brought in the name of the assignor for the use of the assignee. In *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 214, 2 Sup. Ct. 279, 286 (27 L. Ed. 484), Mr. Justice Bradley, speaking for the Supreme Court, said:

"We have lately decided, after full consideration of the authorities, that an assignee of a chose in action on which a complete and adequate remedy exists at law cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271. He must bring an action at law in the name of the assignor to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of cestuis que trust."

The controlling question in *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790, was whether or not, at common law, the assignee of a chose in action could sue at law in his own name, and the court quoted and reaffirmed the statement copied above from *New York Guaranty Co. v. Memphis Water Co.*, and, after citing many common-law authorities, said, by Mr. Justice Harlan:

"The right which the express company acquired by the defendant's subscription to its capital stock was only a chose in action. It passed by the deed of September 20, 1866, to the trustees, Blair, Kelly, and O'Donnell, but subject to the condition that a chose in action is not assignable so as to authorize the assignee to sue at law, in his own name, unless the right to do so is given by a statute, or by settled law, in the jurisdiction where suit is brought. This is the well-established rule of the common law, and the common law touching this subject governs in the District of Columbia."

3. The common law was adopted in Florida in 1829, and, except as changed by statute or modified by judicial decisions, remains in force there.

When this action was brought on January 6, 1906, the following statute was in force, which is relied on as changing the common-law rule:

"Real Parties in Interest.—Any civil action at law may be maintained in the name of the real party in interest. This shall not be deemed to authorize the assignment of a thing in action not arising out of contract. An executor, administrator, trustee of an express trust (including a person with whom or in whose name a contract is made for the benefit of another, or when expressly authorized by statute), may sue without joining with him the person for whose benefit the action is prosecuted." Rev. St. Fla. 1892, § 981.

Subsequently, by a revision which went into effect December 1, 1906, the following was added to section 981:

"By amendment the nominal plaintiff may be stricken out and the case may proceed in the name of the use plaintiff." Gen. St. Fla. 1906, § 1365.

It is not incumbent on us to analyze and construe this statute if we find the question involved here settled by a construction placed on it by the highest court of the state of Florida, "for the construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." *Leffingwell v. Warren*, 2 Black, 599, 605, 17 L. Ed. 261; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 582, 8 Sup. Ct. 974, 31 L. Ed. 795. The application of this rule makes the following excerpt from *Knight v. Empire Land Co.*, 55 Fla. 301, 45 South. 1025, 1028, for the purposes of our decision, a part of the statute:

"But, aside from this, as we have also before stated, our statute does not authorize the assignment of a cause of action arising purely out of a tort, so as to permit the assignee to maintain such action in his own name."

This statement was made by the Supreme Court of Florida January 29, 1908, in an action of trover. And in 1895 the same court, in an action of trespass, announced a principle that would lead to the result that the person damaged by the tort must be the plaintiff:

"Where lands are trespassed upon, a party to be entitled to sue and recover for such trespass must have been the owner, or in possession of the land, at the time of the trespass. If he does not acquire any ownership over, or possession of, the land until after the acts of trespass, then, it is well settled, he cannot recover damages for such trespass. And it behooves the plaintiff in such cases to show that at the time of the alleged trespass he was either the owner of the land trespassed upon, or else in the actual possession thereof." *Yellow River R. R. Co. v. Harris*, 35 Fla. 385, 17 South. 568.

And in *Wright v. Skinner*, 34 Fla. 453, 16 South. 335, which was an action of trover, it was held that a plaintiff who had neither possession nor title to the land could not maintain trover for logs taken therefrom.

These cases all indicate that the statute, the second sentence of which must, to some extent, limit its operation—"this shall not be deemed to authorize the assignment of a thing in action not arising out of contract"—was not intended to confer on an assignee of a chose in action "not arising out of contract" the right to maintain action thereon in his own name. This might well be true, although the assignment in question was not wholly ineffective.

We are confirmed in the view that the foregoing cases show the settled construction placed by the Florida Supreme Court on the statute by the fact that, although it was enacted in 1881, no case has been cited in which it has been held by that court that the assignee of a chose in action "not arising out of contract" can maintain a suit thereon in his own name.

4. These Florida decisions seem to be in harmony with the view taken by the federal Supreme Court.

The principle that, to maintain trover, "the plaintiff is bound to prove a right of possession in himself at the time of the conversion,"

is announced in *United States v. Loughrey*, 172 U. S. 206, 212, 19 Sup. Ct. 153, 43 L. Ed. 420.

There are no words in the assignment made by John Paul to the plaintiff indicating an intention to transfer to him the timber taken from the lands. The thing described as assigned is the right of action on account of trespasses committed on the assignor's lands, and the right, claim, and demand of the assignor for the conversion of the timber. If John Paul had sold the severed timber to the plaintiff and the plaintiff had demanded it of the defendant, it being in the defendant's possession, and the defendant had refused to surrender it to the plaintiff, an action for its conversion might have been maintained. *Tome v. Dubois*, 6 Wall. 548, 554, 18 L. Ed. 943. The right to recover in that case would be based on the refusal to surrender the property to the plaintiff, such refusal being evidence of a conversion then made; but, as the Supreme Court said in the case last cited, in reference to a conversion of the property before the plaintiffs' right accrued:

"They could not rely on those acts with any hope of success, as the plaintiffs, at those dates, had no title to the lumber, which at that time was vested in their vendors."

The judgment must be reversed, and the cause remanded for further proceedings in accordance with the opinion of this court.

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PEROVICH v. PERRY, U. S. Marshal.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,567.

1. EVIDENCE (§ 44\*)—JUDICIAL NOTICE—OFFICERS OF UNITED STATES.

A court of the United States will take judicial notice of the name of the incumbent of a cabinet office.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 66; Dec. Dig. § 44.\*]

2. EVIDENCE (§§ 23, 83\*)—PRESUMPTIONS—OFFICIAL ACTS.

A telegram signed with the surname of the Attorney General of the United States, purporting to state the decision of the President on an application made to him by a convicted prisoner for a commutation of sentence, will be presumed authentic, and is sufficient notice of the President's action, which, as the court will take judicial notice, may properly be taken in such matters through the Department of Justice.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. §§ 23, 83.\*]

Appeal from the District Court of the United States for the Third Division of the District of Alaska.

John F. Dillon, T. C. West, and Leroy Tozier, for appellant.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from a judgment of the United States District Court for the Territory of Alaska, ren-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dered on the 30th day of January, 1908, remanding the appellant to the custody of the appellee as United States marshal, to be dealt with according to law, and dismissing a writ of habeas corpus. The absence of a proper record on appeal would justify a dismissal of the appeal, without considering the question attempted to be raised by the assignments of error.

There is in the record a paper purporting to be "Findings of Fact and Conclusions of Law," but it is unsigned, and therefore has properly no place in the record. There is also an unsigned exception which recites that the—

"plaintiff excepts to each and every conclusion of law reached and held by the court, upon the ground that in neither or any of them is the law correctly stated, and that they, and each of them, are opposed to the law."

In the assignment of errors there are recitals from which it appears that there was a sentence of death pronounced against the appellant on May 29, 1907; that application was made to the President of the United States for commutation of sentence, and that, pending the determination of the application by the President, application was made to the Governor of Alaska for a reprieve, which was granted, and the execution of the sentence was stayed to February 1, 1908, between the hours of 6 o'clock a. m. and 6 o'clock p. m.; that prior to that date the President denied the petition for a commutation of sentence, and the defendant in error was about to execute the sentence of the court when a petition was presented to the court for a writ of habeas corpus.

There is an attempt to raise a question as to the sufficiency of the indictment under which the appellant was tried and convicted; but that question cannot be considered here. The original judgment appears to have been taken to the Supreme Court of the United States upon a writ of error, where it was held "that the defendant was properly convicted, and the judgment of the court was affirmed." *Perovich v. United States*, 205 U. S. 86, 27 Sup. Ct. 456, 51 L. Ed. 722.

It appears that the decision of the President denying the application of commutation of sentence was made known by a telegram signed "Bonaparte." The appellant seeks to raise the question whether this notice of the decision of the President was sufficient in law. The telegram is not in the record, and, as there is no bill of exceptions, this court would be justified in declining to consider this question; but in view of the serious character of the case, the law upon the subject will be stated:

The courts will take notice of whatever is generally known within the limits of their jurisdiction. *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200.

Facts which are so generally known that every well-informed person knows them, or ought to know them, need not be proven, and will be judicially recognized without proof. *Taylor on Evidence*, § 21, *American Notes*, 36.

These rules of evidence are founded upon very ancient legal maxims:

"*Lex non requirit verificari quod apparet curiæ.*" The law does not require that to be verified (or proved) which is apparent to the court. *Baten's Case*, 9 Coke, 54b.

"*Quod constat clare non debet verificari.*" What is clearly apparent need not be proved. *Thornicroft v. Barns*, 10 Mod. 150.

"*Quod constat curiæ opere testium non indiget.*" That which appears to the court needs not the aid of witnesses. 2 Inst. (Coke) 662; *Best on Evidence*, § 252.

The incumbencies of the more important and notorious offices are judicially noticed. *Wigmore on Evidence*, § 2576.

In the case of *Jean Peltier*, 28 Howell's State Trials, p. 530, the defendant was indicted for a libel on Napoleon Bonaparte, First Consul of the French Republic, and was tried in the Court of King's Bench in 1803, before Lord Ellenborough and a jury. In charging the jury, Lord Ellenborough said:

"That Napoleon Bonaparte was the Chief Magistrate and First Consul of France is admitted; and that the relations of peace and friendship subsist between us and the French Republic, and did so at the time of these publications, is also admitted; and, indeed, they were capable of easy proof, if they had not been admitted. Their notoriety seems to render all actual proof very unnecessary."

Section 2 of the act making provision for a civil government for Alaska, and for other purposes, approved June 6, 1900, c. 786, 31 Stat. 321, provides that the Governor of Alaska may—

"grant reprieves for offences committed against the laws of the district or of the United States, until the decision of the President therein shall be made known."

The President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. *Wilcox v. Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264; *Wolsey v. Chapman*, 101 U. S. 755, 770, 25 L. Ed. 915; *Runkle v. United States*, 122 U. S. 543, 557, 7 Sup. Ct. 1141, 30 L. Ed. 1167; 7 Opinions of Attorneys General, 453.

It is generally known that Charles J. Bonaparte was the Attorney General of the United States and the head of the Department of Justice at the time the decision of the President was made known in this case, and that through that department the decision of the President in a pardon case would, in the regular course of business, be promulgated.

In the absence of the telegram from the record, it will be presumed that it contained all the usual evidences of authenticity, and that it contained sufficient information to enable the court to ascertain therefrom that the President had denied the application of the plaintiff in error for a commutation of sentence.

The judgment of the court below is affirmed.



BULL et al. v. NEW YORK & PORTO RICO S. S. CO. et al.

NEW YORK & PORTO RICO S. S. CO. et al. v. BULL et al.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

Nos. 40, 41.

1. SHIPPING (§ 54\*)—CHARTERS—LIABILITY OF CHARTERER FOR INJURY TO VESSEL.

A charterer, charged with the duty of discharging the vessel, undertook to unload boilers weighing some 17 tons each, for which the vessel had no sufficient tackle, by using the mast to support the boom upon which the weights were swung. An attempt was made to reinforce it by preventer stays, but by reason of their insufficiency the mast buckled and broke. *Held*, that the charterer was liable for the damage done to the vessel, and was not relieved from such liability by the employment of the master and mate to take charge of the work.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 220; Dec. Dig. § 54.\*]

2. ADMIRALTY (§ 119\*)—APPEAL—DISPOSITION OF CAUSE—FAILURE OF PARTY TO INTRODUCE EVIDENCE.

It is the well-settled practice in the admiralty courts for both parties to put in their evidence before the case is submitted to the court for decision; and where a motion to dismiss the libel, made by respondent at the close of libellant's evidence, is sustained, and the decree is reversed on appeal, the case will not be sent back for a new trial, but a decree will be directed for libellant.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 776; Dec. Dig. § 119.\*]

Appeals from the District Court of the United States for the Southern District of New York.

The second of these appeals is from a decree for \$1,914.02 entered in the District Court in favor of charterers of the steamship *Mae* on claims for hire paid and not earned, coal in bunkers, etc. No reason for disturbing it is found in the record. The first appeal is from a decree of the same court dismissing a libel by owners against charterers to recover for damages sustained by reason of alleged improper use by charterers of one of the masts of the said steamship to discharge certain steam boilers, weighing some 17 tons apiece, in the open roadstead at Paitillas.

J. Parker Kirlin, for appellants.

Wallace, Butler & Brown (Frederick M. Brown, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The general scheme and plan of the charter party was the same as that of the well-known "government form" charter, except that it contained no provision limiting the ropes, falls, slings, and blocks, which the shipowners are bound to provide, to such as are appropriate for handling weights up to two tons, and did contain the following provision:

"(21) That the charterers shall not be responsible for losses incurred by reason of the default or neglect of the pilot, master, or crew in the navigation or management of the ship including damages by collision; but no claim to be made against owners for loss of cargo."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The boilers were loaded in New York from lighters, being lifted aboard by a special derrick lighter provided by charterers, all without use of any of the ship's appliances. Evidently anticipating that the ship's tackle would be insufficient for the task of handling these unusual weights, the charterers had the vessel call at San Juan, Porto Rico, for the sole purpose of taking on board extra blocks, falls, ropes, slings, and other tackle including a special boom. Although they had a stevedore there who was skilled in handling such heavy packages, they did not ship him, and when they arrived at destination undertook to conduct operations with the captain in charge, to whom they paid an extra gratuity for undertaking the job. No derrick having been shipped, the mast was used for that purpose, and efforts were made to reinforce it with extra preventer stays. Partly because rope instead of wire stays were used, partly because they were not scientifically placed to resist strains, whose directions varied as the boom swung outboard, the shackle to which the regular shrouds were attached elongated and carried away, and the mast buckled, broke, and fell overboard.

An examination of the record fails to satisfy us that there was any defect or unseaworthiness in the shackle or the mast. Without reinforcement they could not handle such an exceptional weight, increased greatly by its position at the end of the boom. But no one anticipated or expected that they could, as was evidenced by the efforts made to secure them before the work of hoisting out was begun. That work was the work of the charterers, and called for the exercise of good judgment and great care. They cannot be relieved from a failure to exercise either by reason of the circumstance that they got the master and mate to take charge of the job. The trial judge, who decided the case orally at the close of the testimony, evidently was of this opinion, but felt that he was constrained by a former decision of this court in the case of *The Acanthus* (*Worrall v. Davis Coal Co.*, 122 Fed. 436, 58 C. C. A. 418) to hold that the captain was acting as agent of the owner in arranging the apparatus to be used in landing the boilers.

That case, however, does not, as we understand it, go to that extent. It was a peculiar one. The vessel was being loaded at Daiquiri with iron ore, which was discharged from a skeleton iron pier provided with chutes, from which large pieces of jagged rock tumbled from a considerable height into the hatches. It was a method ill-adapted to vessels with 'tween-decks, as there was a constant tendency of flying pieces to strike the 'tween-deck and its hatch combings in passing down into the lower hold. It was perfectly practicable, however, to protect the exposed parts by old chains and planks with dunnage at the bottom of the hold. It was assumed in the *Acanthus* Case that there was plenty of such material on board, and if the supply was scant the master had learned on his first voyage (the claim arose on the second voyage) just what was needed, and under the terms of the charter could have procured what was required, and charged the cost to charterers. Instead of doing anything which mere common good judgment and prudence would dictate to protect the vessel while the charterers were loading her, he stood idly by and let the hatch combings and adjacent parts of

the deck be battered to pieces. We declined to hold that under the circumstances the master of the *Acanthus* was relieved from his duty to his owners to do what he could to protect the vessel from rough usage and injury in receiving cargo, which was being put aboard in the only way possible at Daiquiri—a way perfectly well known to both parties. We do not find the cases parallel, and think the decree should be reversed, with costs of this appeal.

The ruling was made upon a motion to dismiss the libel as against New York & Porto Rico Company, upon libellant's testimony only; counsel stating that he wished to reserve his right to offer proofs if the motion should be overruled. Since the motion was not overruled, nothing was saved by the reservation. It is well-settled practice in the admiralty courts, certainly in this jurisdiction, for both parties to put in their evidence before submitting the case to the court for its decision. We have no intention of sanctioning the common-law practice of sending causes back for a new trial, only to see them reappear again with a longer record, more or less modified from what was first presented.

The cause is therefore remanded, with instructions to enter a decree for libelants, with costs, with an order of reference to ascertain the amount of their damages, against which, when found, the amount of the decree in the other case may be offset.

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#### THE MARGARETHA.

(Circuit Court of Appeals, Second Circuit. January 13, 1909.)

No. 81.

1. ADMIRALTY (§ 28\*)—LIABILITY OF VESSEL—FAILURE TO ENTER UPON CHARTER.

A vessel is not liable in rem for failure to enter upon a charter.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 279; Dec. Dig. § 28.\*]

2. SHIPPING (§ 35\*)—CHARTER—AUTHORITY TO MAKE CHARTER.

Cablegrams between the owner of a tank steamer and his agents construed, and held to authorize the latter to charter the vessel to carry a cargo of merchandise, and to render the owner liable in damages for refusal to fulfill the charter, although he was under a mistake as to the nature of the cargo.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 35.\*]

Appeal from the District Court of the United States for the Eastern District of New York.

Ullo, Ruebsamen & Yuzzolino (Lorenzo Ullo, of counsel), for appellant.

Wheeler, Cortis & Haight (Charles S. Haight, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. This is a libel against the steamship *Margaretha*, in rem, and against Giacomo Calo, her owner, in personam, to recover damages for refusal to load a cargo of naval stores from Savannah to Bristol at 13 shillings per ton under charter party dated August 19, 1905. The charter party not having been entered upon, there was no right against the steamship in rem (*The Monte A* [D. C.] 12 Fed. 331); but by an order entered on stipulation of the parties, which is not printed in the record, security given to release the vessel is to stand as if given by the respondent to release property covered by foreign attachment in an action in personam.

The defense is that the owner never authorized the charter to be made. The vessel was offered to the libelants by Bennett, Walsh & Co., of this city, for a cargo of naval stores—i. e., barrels of rosin, tar, or turpentine—from Savannah to Bristol. Bennett, Walsh & Co. derived their authority to sign by cable from Rob M. Sloman, Jr., of Hamburg, who derived his authority by cable from the owner, Giacomo Calo, of Tunis, Africa. The vessel is a tank steamer, having 14 tanks for liquid cargo in bulk, 7 on each side, and a hold forward for general merchandise. She was capable, however, of loading naval stores into her tanks, though at a greater expenditure of time and money, because of the small size of the hatches, which were intended for liquid cargo. The charter being at a rate of freight per ton, this difference would fall upon the owner. It is quite clear that the owner did not intend to authorize a charter for solid cargo in the tanks, but the District Judge held that the cables he received from Sloman did not justify his conclusion that the cargo offered for the tanks was to be liquid. He had been negotiating for a cargo of oil in tanks and general merchandise in the forward hold to the Mediterranean, which fell through. The subsequent cables which resulted in the charter under consideration tell their own story:

August 14th.

Bennett to Sloman: *Margaretha* the order quoted is now filled Mediterranean port, offer your firm subject to reply by 3 p. m. today, Savannah to Bristol 13/- full cargo naval stores to load and discharge as fast as steamer can receive and deliver, 2½% address commission.

August 14th.

Sloman to Calo: Mediterranean order gone I have an offer for *Margaretha* subject to answer New York three o'clock today Savannah Bristol 13/- full cargo loading and discharging as fast as the steamer can 5% total commissions telegraph instantly whether you entertain this business.

August 14th.

Bennett to Sloman: *Margaretha* we repeat offer.

August 15th.

Calo to Sloman: 13/- too low if you can increase offer I prefer Mediterranean.

August 15th.

Sloman to Bennett: *Margaretha* your rate is too low impossible to work business at your figures owners prefer Mediterranean.

August 18th.

Calo to Sloman: *Margaretha* free in August would accept Savannah Bristol if better impossible 13/- full cargo including hold for merchandise. Urgent answer.

August 18th.

Sloman to Bennett: Margaretha owners say if you cannot do better accept Savannah to Bristol 13/-.

August 18th.

Bennett to Sloman: Margaretha we confirm charter answer if all is in order.

August 19th.

Sloman to Bennett: Margaretha will telegraph as soon as we hear from owners.

August 19th.

Calo to Sloman: Failing freight Savannah offer freight possibly petroleum for Mediterranean.

August 19th.

Sloman to Calo: New York telegraphs we have chartered Margaretha 13/- Savannah Bristol full cargo merchandise impossible better nothing offering petroleum telegraph instantly that everything in order.

August 19th.

Calo to Sloman: Agreed I give orders to Margaretha presently New York to sail to Savannah advise charterers to negotiate directly with the captain telegraph me urgently name of charterers.

As soon as the owner learned that solid cargo was to go into the tanks he repudiated the charter entirely. It is said that his cable of August 18th, by expressly mentioning merchandise for the forward hold, plainly showed Sloman that he was expecting liquid cargo in the tanks. If the use of the words "merchandise in the forward hold" was intended to express this distinction, the owner should have perceived from Sloman's answer, "Full cargo merchandise \* \* \* nothing offering petroleum," that the whole cargo was to be merchandise and none of it oil. The agency to charter was special, and the burden lay upon the libelants to prove the authority of Bennett, Walsh & Co. and of Rob M. Sloman to sign the charter party for Calo. But we agree with the District Judge that they have done so by the cables. They show that Calo authorized the charter party to be signed for the cargo offered by the libelants, and, although he was laboring under a mistake as to its character, it was a mistake which greater care and attention on his part would have prevented. Everybody concerned was acting in good faith, and the decree is affirmed, with interest and costs.

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#### HAMILTON et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1900.)

No. 126 (5,108).

#### 1. CUSTOMS DUTIES (§ 36\*)—CLASSIFICATION—LACE PAPER—"PAPER"—"MANUFACTURES OF PAPER."

Plain paper was stamped by a single operation into shapes with lace-like effects, which are known as tops or dollies, and are used for placing on the tops of packages of candy, fruit, etc., or under finger bowls. Plain paper might have been used for the same purpose, except that it would not have been so pleasing. *Held* that, as the improvement of the original material had not interfered with its distinguishing characteristics,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it was dutiable as "paper," rather than as "manufactures of paper," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, pars. 403, 407, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 36.\*

For other definitions, see Words and Phrases, vol. 5, p. 4362; vol. 6, pp. 5160-5161.]

**2. CUSTOMS DUTIES (§ 36\*)—"PRINTED MATTER."**

Paper used for box tops and similar purposes was printed with trade-marks and business names and addresses, and in some instances with floral or other decorative designs. *Held*, that the authorities would justify its classification as "printed matter," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 36.\*

For other definitions, see Words and Phrases, vol. 6, pp. 5563-5564; vol. 8, p. 7763.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court affirming a decision of the Board of General Appraisers (G. A. 6,674, T. D. 28,479), which approved the action of the collector of the port of New York in assessing certain importations as manufactures of paper under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626).

William B. Dungan (Everit Brown, of counsel), for appellants.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The relevant paragraphs are:

"402. Paper hangings and paper for screens or fireboards, and all other paper not specially provided for in this act, twenty-five per centum ad valorem.

"403. Books of all kinds, including blank books and pamphlets, and engravings bound or unbound, photographs, etchings, maps, charts, music in books or sheets, and printed matter, all the foregoing not specially provided for in this act, twenty-five per centum ad valorem."

"407. Manufactures of paper, or of which paper is the component material of chief value, not specially provided for in this act, thirty-five per centum ad valorem."

The importations are apparently the same as those before the Circuit Court in *United States v. Hensel*, 152 Fed. 578, a decision which was not appealed. As shown by the samples, the articles are paper. All of them have been stamped from plain paper, by a single operation, at one and the same time, into shape with lace-like effects. They are used for placing on the tops of boxes or baskets of candy, raisins, fruit, or the like, to improve their appearance, or for putting under finger bowls; and hence they are called "tops" or "doilies." The plain paper might just as well be used for the same purpose, only it would not be so attractive. Except for the pleasing effect, it has been in no wise changed. It is still paper. It has not been made into an article having another use, as it would if manufactured into an envelope, a bag, or a box. In *De Jonge v. Magone*, 159 U. S. 562, 16 Sup. Ct.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

119, 40 L. Ed. 260, paragraph 392 of the tariff act of 1883 (Act March 3, 1883, c. 121, § 6, Schedule M, 22 Stat. 510) was under consideration. It provided, as does paragraph 402, *supra*, for "paper hangings and paper for screens and fireboards, \* \* \* and all other paper, not specially provided for." The court held that it covered paper that had been coated, colored, and embossed to imitate leather, and also paper which had been coated with flock to imitate velvet, saying:

"While, directly speaking, the products in question might be termed manufactures of the particular variety of paper stock employed as their basis, yet the resultant product of such manufacture was a higher and better grade of paper."

The same principle has found expression in numerous other cases, where the original material has been improved without interfering with its distinguishing characteristics. *Murphy v. United States* (C. C. A.) 162 Fed. 871; *United States v. Pierce*, 147 Fed. 199, 77 C. C. A. 425; *United States v. Knipscher and M. S. D. Company* (C. C.) 152 Fed. 590; *Brauss & Co. v. United States* (C. C.) 120 Fed. 1017; *Tilge v. United States* (C. C.) 115 Fed. 254. There is no reason to suppose that Congress used the words "all other paper" in paragraph 402, *supra* in association with "paper hangings and paper for screens," with any different meaning from that given to it when used in paragraph 392 of the act of 1883 in a like association; and we are of the opinion that the articles in suit are covered by the phrase.

Some of the articles have been printed with the trade-marks, name, and address of the manufacturer, and in some instances with floral or other decorative designs. It is contended by the importer that they are "printed matter," under paragraph 403, *supra*. The authorities warrant such classification. *Arthur v. Moller*, 97 U. S. 365, 24 L. Ed. 1046; *Bonte v. Seeberger* (C. C.) 31 Fed. 884. But the question is academic, since paragraphs 402 and 403 impose the same rate of duty. The government relies upon *Kraut v. United States* (C. C.) 134 Fed. 701, affirmed by this court 142 Fed. 1037, 71 C. C. A. 684. The articles in that case were not merely paper. They had been manufactured into a distinct article—bags—for use as such, and were dutiable as manufactures of paper; the printing on them being merely incidental.

The decision is reversed.

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#### B. F. DRACKENFELD & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 133 (4,992).

CUSTOMS DUTIES (§ 36\*)—CLASSIFICATION—DUPLEX PAPER—"PAPER"—"MANUFACTURES OF PAPER."

So-called duplex lithographic transfer paper, which is used in transferring decalcomania designs to pottery, and is produced by pasting together two sheets of paper, one coated with a gummy substance and the other uncoated, is "paper," rather than "manufactures of paper," under Tariff

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Act July 24, 1897, c. 11, § 1, Schedule M, pars. 403, 407, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 115-120; Dec. Dig. § 36.\*

For other definitions, see Words and Phrases, vol. 5, p. 4362; vol. 6, pp. 5160-5161.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York, affirming a decision of the Board of General Appraisers, which approved the action of the collector of the port of New York in classifying certain importations for duty as manufactures of paper, under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626).

The following is the opinion of the court below:

PLATT, District Judge (orally). The merchandise in question is invoiced and known as "duplex litho transfer paper." It was assessed for duty at 35 per cent. ad valorem under paragraph 407 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]); the importers in their protest claiming the same properly dutiable at 25 per cent. ad valorem under paragraph 402 of said act. Other claims were set forth in the protest, but were not insisted upon by counsel upon argument. Said paragraphs are as follows:

"407. Manufactures of paper, or of which paper is the component material of chief value, not specially provided for in this act, thirty-five per centum ad valorem."

"402. Paper hangings and paper for screens or fireboards, and all other paper not specially provided for in this act, twenty-five per centum ad valorem. \* \* \*"

Counsel for the importers relies chiefly upon *De Jonge v. Magone*, 159 U. S. 562, 16 Sup. Ct. 119, 40 L. Ed. 260, as decisive of the question herein. In the record the parties hereto stipulated "that the merchandise covered by protest 229,768 [which is the protest in question herein] consists of duplex transfer paper manufactured of two sheets of paper pasted together, one coated with a gummy substance, and the other uncoated," etc. It would seem that we have a different article here from that involved in the *De Jonge* Case. It has gone beyond it, and has become a distinct article in itself, as the result of the process of manufacture it has undergone.

The decision of the Board of General Appraisers is affirmed.

Comstock & Washburn (Albert H. Washburn, of counsel), for appellants.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The relevant paragraphs are 402, covering "paper hangings and paper screens or fireboards, and all other paper not specially provided for," and 407, "manufactures of paper, or of which paper is the component material of chief value." The article in question consists of so-called "duplex lithographic transfer paper," produced by pasting together two sheets of paper; one coated with a gummy substance, and the other uncoated. It is used in the manufacture of ceramic decalcomanias; the designs being printed on the gum-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



my side and transferred to pottery ware. It is bought and sold as "duplex litho transfer paper."

What we have said in the opinion in *Hamilton v. United States* (handed down herewith) 167 Fed. 796, applies with equal force to this transfer paper. It is still paper, and is as much within the classification of paragraph 402 as was the coated, colored, and embossed paper of *De Jonge v. Magone*, 159 U. S. 562, 16 Sup. Ct. 119, 40 L. Ed. 260, within paragraph 392 of the act of 1883 (Act March 3, 1883, c. 121, § 6, Schedule M, 22 Stat. 510). The Board of General Appraisers was of the same opinion, but felt constrained by the decision of the Circuit Court, Northern District of California, in *Stratton v. Olcovich*, T. D. 26,339, to classify it as a manufacture of paper. We have examined the citation, which contains no argument, and which we find unpersuasive.

The decision is reversed.

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UNITED STATES v. BERLINGER, BROWN & MEYER.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 142 (4,855).

CUSTOMS DUTIES (§ 26\*)—CLASSIFICATION—MILLINERY ARTICLES—ADVANCED—MANUFACTURED "ARTICLES IN PART OF METAL"—"FEATHERS ADVANCED OR MANUFACTURED."

Millinery articles, made almost wholly of feathers, but containing a small quantity of wire, which was an important feature of their construction, are dutiable as "articles in part of metal," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), rather than as "feathers advanced or manufactured," under Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 59; Dec. Dig. § 26.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

There was no opinion below; the court affirming a decision of the Board of United States General Appraisers (G. A. 6,537, T. D. 27,-888), which had reversed the assessment of duty by the collector of customs at the port of New York. The opinion of the Board of General Appraisers reads as follows:

MCCLELLAND, General Appraiser. The merchandise which is the subject of these protests was assessed for duty at the rate of 50 per cent. ad valorem under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675). Various claims are made for rates of duty other than that assessed. The exhibits are described as "wings," "sweeps," "pompons," "hats," and "birds." All of them are made principally of feathers, which concededly have been advanced by various processes beyond the crude state; but wire is also a component in the construction of all of the articles, cotton and buckram being components in some of them. The question at issue is whether duty was properly assessed on the merchandise as feathers, dressed, colored, or otherwise advanced or manufactured in any manner.

The evidence shows that each article is artificially constructed; and it is contended on behalf of protestants that, since the only provisions for feathers

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the existing tariff act are contained in paragraph 425, and these being only for feathers crude, manufactured, or ornamental, it was an unwarranted stretch of these provisions to classify thereunder articles made of feathers and other materials, even though feathers be in fact the component thereof of chief value. In *G. A. 6,467* (T. D. 27,673) the board recently passed upon a similar question involving the classification of feather boas, which were made by stringing feathers upon a cord, and the conclusion in that case was that, since the boas were made of dressed feathers and cord, the feathers being the component material of chief value, there being no special provision for manufactures of feathers, they were properly dutiable at the rate of 50 per cent. ad valorem, as provided in paragraph 425, under the application of the provision of section 7 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1694]), which reads: "And on articles not enumerated, manufactured of two or more materials, duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material of chief value."

This case, however, presents a different situation. Like the boas, these articles are manufactures in chief value of feathers and not specially provided for; but it is not to be overlooked that metal wire plays an important part in their construction. The respective shapes of the articles are due almost, if not entirely, to the use of such wire, and this forces us to consider whether, in the absence of any more specific provision, such merchandise is not provided for in paragraph 193, Schedule C, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), which reads as follows: "Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem."

The merchandise is certainly not directly dutiable under paragraph 425, and we are of the opinion that neither of the provisions of section 7 may be invoked to make it so, since metal is a component part in the manufacture thereof. *Hamano v. U. S.* (D. C.) 1 *Estee's Hawaiian Rep.* 344, T. D. 24,946.

One of the claims made is that the merchandise is dutiable at the rate of 45 per cent. ad valorem under the provisions of said paragraph 193, and to that extent the protests are sustained. They are overruled in all other respects, and the decisions of the collector are modified accordingly.

J. Osgood Nichols, Asst. U. S. Atty.

Kammerlohr & Duffy (John Giblon Duffy, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decision of Circuit Court affirmed.

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## Burr v. United States.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 144 (4,523).

### CUSTOMS DUTIES (§ 43\*)—CLASSIFICATION—FLORAL WATERS—"WASTE."

Floral waters are dutiable as unenumerated manufactured articles, under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), rather than as "waste," under section 1, Schedule N, par. 463, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1679).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 147; Dec. Dig. § 43.\*]

For other definitions, see Words and Phrases, vol. 8. p. 7408.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 167 F.—51

Appeal from the Circuit Court of the United States for the Southern District of New York.

The case relates to importations by E. H. Burr at the port of New York. The Circuit Court affirmed, without written opinion, a decision by the Board of United States General Appraisers (G. A. 6,436, T. D. 27,600), which reads as follows:

McCLELLAND, General Appraiser. The merchandise to which these protests relate is invoiced as "rose water," "orange flower water," "eau de roses," and "water of roses." The appraiser returned the same as a "medicinal preparation," and duty was assessed thereon at the rate of 25 per cent. ad valorem, under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1631). Protestant makes various claims for duty other than that assessed, and among them that the merchandise is an unenumerated manufactured article, and therefore subject to duty at the rate of 20 per cent. ad valorem, under section 6 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).

From the record before us we are satisfied that the merchandise is similar to that which was the subject of Abstract 8,898 (T. D. 26,857), wherein it was held that the merchandise was liable to duty at the rate of 25 per cent. ad valorem under the provisions of paragraph 68. Said decision was appealed to the United States Circuit Court (Euler v. U. S. [No. 4,149] 147 Fed. 765, T. D. 27,428), and the decision of the board was reversed; it being held that the merchandise was an unenumerated manufactured article, and subject to duty at the rate of 20 per cent. ad valorem, under said section 6.

Following the ruling of the court, we sustain the claim for duty at the rate of 20 per cent. ad valorem, and the decision of the collector is reversed accordingly.

The importer, being dissatisfied with the aforesaid ruling of the board, contended that the merchandise in dispute should have been classified as "waste," under Schedule N, par. 463 of said act (30 Stat. 194 [U. S. Comp. St. 1901, p. 1679]). This contention was overruled by the Circuit Court, whereupon the importer appealed to the present court.

Comstock & Washburn (Albert H. Washburn, of counsel), for appellant.

D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decision of Circuit Court affirmed.

#### ECKSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 106 (4,335).

#### 1. CUSTOMS DUTIES (§ 44\*)—CLASSIFICATION—ARTIFICIAL HORSEHAIR—SIMILITUDE.

Artificial horsehair is dutiable as cotton yarn by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 302, 30 Stat. 175 (U. S. Comp. St. 1901, p. 1655), rather than as "silk yarn" by similitude, under Schedule L, par. 385, 30 Stat. 185 (U. S. Comp. St. 1901, p. 1668).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. CUSTOMS DUTIES (§ 44\*)—SIMILITUDE—RESEMBLANCE IN USE AND MATERIAL.**

Within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), artificial horsehair resembles cotton yarn in material, because each is composed almost entirely of cellulose, and in use, because both are largely used in making braids, etc.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 44.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision below (160 Fed. 287) affirmed a decision by the Board of United States General Appraisers (G. A. 6,387, T. D. 27,442), which had affirmed the assessment of duty by the collector of customs at the port of New York.

Comstock & Washburn (Albert H. Washburn, of counsel), for appellant.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The merchandise in question is artificial horsehair. It is made out of cotton waste, just as artificial silk is; and the process of manufacture is the same, namely, the cotton waste is chemically dissolved, and the solution forced through fine apertures solidifying into filaments when they reach the air, which are then grouped or twisted together into artificial silk. In making horsehair the solution is forced into water first, where the filaments are grouped together into one single thread before they solidify. It is conceded that artificial horsehair is not enumerated in the tariff act, not being silk yarn under Act July 24, 1897, c. 11, § 1, Schedule L, par. 385, 30 Stat. 185 (U. S. Comp. St. 1901, p. 1668) nor cotton yarn under paragraph 302. The government has classified it under the basket clause (section 6) as a manufactured article not enumerated or provided for in the act, whereas the importer contends it should be classified under section 7 as a nonenumerated article similar to cotton yarn.

We have held in *Hardt von Bernuth & Co. v. United States*, 146 Fed. 61, 76 C. C. A. 638, that artificial silk should be so classified. The judge of the Circuit Court affirmed the government's classification, distinguishing that case on the ground that artificial silk was found to be a yarn, whereas artificial horsehair, being solid, and not composed of twisted or spun filaments, is not a yarn. Admitting that this is so, still artificial horsehair is like cotton yarn in material, each being composed almost entirely of cellulose, and like it in use, being largely used as glazed cotton is in making hat braids, shoe laces, binding braids, tapes, and imitation horsehair. We think these resemblances establish its similitude to cotton yarn, even if the texture of the two articles is different. It is no ground for abandoning the tests of similitude established by Congress that their application may result in artificial horsehair, colored, bleached, or dyed, etc., always paying the lowest duties under paragraph 302, while artificial silk and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cotton yarn pay duties increasing according to the number of threads of which they are composed. *United States v. Wing & Evans*, 167 Fed. 317.

The judgment is reversed.,

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SCHMID v. DOHAN.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 113.

**1. APPEAL AND ERROR (§ 1008\*) — REVIEW — QUESTIONS OF FACT—CONCLUSIVENESS OF FINDINGS.**

Where an action at law is tried by a Circuit Court without a jury by stipulation, a general finding is conclusive in the appellate court on all questions of fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.\*]

**2. LIMITATION OF ACTIONS (§ 95\*) — ACTION BY PRINCIPAL FOR ACCOUNTING — LIMITATION.**

Where imported merchandise is sold by the importer "in bond, actual duty" and all refunds of duties belonging to the purchaser, the importer becomes his agent for their collection; and, since the purchaser cannot recover them from his agent without demand, limitation does not begin to run against an action for their recovery until he has knowledge that they have been collected by the importer.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 95.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court in favor of defendant in error, who was plaintiff below.

Einstein, Townsend & Guiterman (B. F. Einstein, of counsel), for plaintiff in error.

Howard T. Walden, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The action was brought to recover certain sums of money which had been recovered by Schmid from the government for excess of customs duties paid on various importations of tobacco. At the time such duties were collected the government classified the tobacco in a manner which the courts subsequently held not to be in conformity with Tariff Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626). Having preserved his rights by timely protests, the importer eventually recovered the amount improperly exacted from him.

The several lots of tobacco with which this suit is concerned were sold from time to time by Schmid to Dohan, and the main point in issue at the trial was as to the terms of sale. The defendant contends that they were sold at the "long price," which means that the price paid was for the goods with duty paid on them. It is conceded that on

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such a sale any refunds of duty subsequently obtained would belong to the importer. Plaintiff contends that the terms were "in bond, actual duty," in which case all refunds of duty would go to the purchaser. The cause was tried by the court without a jury, and the record contains no agreed statement of facts and no special finding of facts. The practice in such cases is indicated in *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373:

"\* \* \* The rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the court upon a writ of error, \* \* \* and, when the finding is special, the review may extend to the sufficiency of the facts found to support the judgment; \* \* \* but, if there be no special findings, there can be no inquiry as to whether the judgment is thus supported. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury. \* \* \* No mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, can be deemed a special finding of facts."

There are seven assignments of error. The first is to allowing the plaintiff, when examined as a witness, to testify that he first knew of defendant getting any refunds from the government for excess of tobacco duties about January 26, 1900. The question being objected to, plaintiff's counsel stated that to one of the claims the statute of limitations was set up as a bar, and he wished to show that his client had no knowledge of the transaction. Thereupon the court stated that the objection was overruled without passing on the point of law, saying: "You can raise that point afterwards." To which disposition of the question exception was reserved. Even if it was error to admit the testimony, the error is manifestly harmless. Subsequently, at the close of plaintiff's case, defendant's counsel asked for a dismissal of the complaint so far as lot 109 is concerned, on the ground that claim for it is barred by the statute of limitations. The court denied the motion "at the present time," saying that it would "take it into consideration on the whole case." No exception was reserved, and we do not find in the record any further reference to the matter or any exception taken. Under these circumstances there seems to be nothing to which the sixth assignment of error would apply. It alleges error in allowing plaintiff to recover on lot 109, against which defendant had pleaded the statute of limitations. But, if the point be sufficiently presented, there is no merit in it. The case is not like *Wood v. Young*, 141 N. Y. 211, 36 N. E. 193, cited on the brief. Under "actual duty" terms of sale, the importer became the agent of the purchaser, to make protest in due form, to retain lawyers, and to prosecute the claim before Boards of Appraisers and in the courts, being entitled to reimburse himself out of the proceeds. Demand was a necessary prerequisite to recovery, and the plaintiff was in no position to make demand till he learned the facts. The remaining assignments aver that it was error to hold that the several sales were upon agreement to pay "actual duty." There being no special findings, we must accept the general finding as conclusive upon all questions of fact. There is nothing, therefore, presented by these assignments.

The judgment is affirmed.

## JACKSON &amp; S. TRACTION CO. v. GREEN.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 128.

## STREET RAILROADS (§ 57\*)—ACTION ON INTEREST COUPONS—EVIDENCE OF PAYMENT.

Evidence considered, and held not to sustain the defense of payment in an action on coupons from street railroad bonds.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 141; Dec. Dig. § 57.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error from a judgment in favor of defendant in error, who was plaintiff below. The action was brought upon \$10,000 of coupons on bonds of the defendant company, and verdict was directed in plaintiff's favor.

Griggs, Baldwin & Pierce (Franklin Pierce, of counsel), for plaintiff in error.

Rumsey, Sheppard & Ingalls (John S. Sheppard, Jr., and Russel R. Vaughn, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The uncontradicted testimony, in connection with the averments of the answer shows that in the spring of 1901 defendant corporation issued 400 5 per cent. bonds, with coupons attached, and turned them over to one Boland and his associates. Boland had bought the railroad property at receiver's sale and turned it over to defendant. The syndicate consisted of Boland, Cochen, Lewis, McCarthy, Flynn, and another, and the answer admits that they "owned the bonds." They hypothecated the bonds, apparently soon after their issue, with the North American Trust Company as security for a loan of about \$300,000 made upon a note signed by three or four members of the syndicate. We do not understand that it is contended that Boland and his associates were not bona fide holders of the bonds, for value, without notice, and before maturity. Certainly the answer and testimony, taken together, fully establish that proposition. Moreover, it is indisputable upon the proof that long before the coupons in question fell due the trust company were bona fide holders for value of bonds and coupons. The plaintiff having at the trial presented and put in evidence these very coupons, then in his possession, was prima facie entitled to recover, and we find no evidence in the record to controvert his ownership of them, nor to show that he was himself a party to any fraud or illegality affecting the bonds or coupons. The answer admitted that payment had been duly demanded. Under these circumstances he was entitled to a verdict, unless some defense to his claim was established.

The only defense set up in the answer is "payment." It is alleged that on October 8, 1901, after the coupons were due and payable, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

still undetached from the bonds, and while bonds and coupons were owned by Boland and his associates, who were also owners of practically all the stock, they agreed with defendant for a valuable consideration that the net earnings of the defendant then on hand, amounting to \$33,336.95, should be transferred to the surplus account, and that therefrom there should be an 8 per cent. dividend on the stock, and that said money so paid out as a dividend should also be a payment of the coupons, and said coupons should thereupon become and remain the property of defendant. Of course no such agreement could operate to impair the title of the trust company, which held the coupons as well as the bonds, as collateral, and which was under no obligation to part with coupons, even though interest on the note was paid. The trust company, however, elected to give up the coupons without being paid for them, more than a month after they were due (November 7, 1901), detached them from the bonds, and turned them over to Flynn, who acted for the syndicate, and who had paid interest on the note. It is not unusual to allow a person who has pledged bonds as collateral and who keeps his interest charges paid up to take the coupons as they fall due.

The only testimony offered in support of the defense pleaded in the answer is the following: The minute book of the board of directors showed that at a meeting held October 8, 1901, Boland and two other directors being present, the secretary reported that the net earnings amounted to \$33,336.95 up to October 1st, and suggested that this amount be transferred to the surplus account, also a dividend of 8 per cent. on the capital stock be paid out of the surplus, and that Mr. Boland moved that such a disposition be made, which was carried unanimously. The capital stock was 3,000 shares (of which Boland held all but 4), and an 8 per cent. dividend on it would amount to \$24,000 only. The secretary testified that the dividend was paid as directed, but that he did not know whether it was turned back by the stockholders for further development purposes. Boland, who was president of the company, being called as a witness, testified:

"We made only this issue of bonds, and it was with the understanding that as long as these bonds had to be hypothecated, that the company was earning its dividends, that the coupons should be cut from time to time as they matured, and that the surplus of the earnings of the road should remain in the company for construction."

This was struck out—it was not responsive to any question—and defendant reserved an exception. Flynn testified that he took the coupons off to secure the payment of the interest on the loan, and that subsequently a new loan on the same collateral was secured from Coler & Co., and the trust company loan taken up. The court excluded certain records of the board of directors touching the issue of the stock and bonds. The resolution directed a delivery of the whole series of bonds to the president, to be used by him in paying off the holders of bonds of a former issue and for the completion of the railway to Michigan Center and Grass Lake. Exception was reserved to the exclusion, but the evidence has manifestly nothing to do with the defense of payment. Boland, when asked if he had a conversation with Flynn about the coupons, said that he had "the only



one he could remember"; but, when it appeared that such conversation antedated, not only the delivery of the bonds, but even the execution of the mortgage, the court quite properly excluded it. He also said that he had "a conversation with reference to what should be done with the coupons" with McCarthy; "nothing further than that they should be cut off." The court refused to allow Boland to testify what he did with the money received from the trust company, and exception was reserved. The court also refused to allow two of the firm of Coler & Co. to testify as to what Flynn and McCarthy said to them in November, 1901, about the coupons, and exception was reserved. It is apparent from the above statement that no evidence was put in or offered which tended to support the averments of payment in the answer.

We find no weight in defendant's contention that the bonds and coupons are nonnegotiable. Moreover, no such defense was pleaded.

The judgment is affirmed.

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In re GOLDBERG.

(Circuit Court of Appeals, Second Circuit. January 12, 1909.)

No. 123.

**BANKRUPTCY (§ 461\*)—APPEAL—TIME FOR TAKING.**

The 10 days allowed for an appeal from a judgment making an adjudication of bankruptcy by Bankr. Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), cannot be extended by means of a motion to vacate the judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 920; Dec. Dig. § 461.\*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

Samuel J. Rawak, for petitioner.

Walter T. Kohn, for the State Bank.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

**PER CURIAM.** This is a petition by the bankrupt to revise an order of the District Court, Southern District of New York. On March 6, 1907, petitioner was adjudicated a bankrupt. He did not appeal, and the time limited by the statute (Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) for taking an appeal expired in March, 1907. A year later, March 23, 1908, he moved the District Court to vacate the order of adjudication; his application was denied. This is merely an attempt indirectly to extend the time within which to review the adjudication of bankruptcy. That cannot be done. Matter of Berkebile, 144 Fed. 577, 75 C. C. A. 333.

Order affirmed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## HAMMOND LUMBER CO. v. SAILORS' UNION OF THE PACIFIC et al.

(Circuit Court, N. D. California. January 20, 1909.)

No. 13,919.

## 1. CONTEMPT (§ 40\*)—NATURE OF PROCEEDINGS TO PUNISH—EVIDENCE—"CRIMINAL PROCEEDING."

A proceeding against members of labor unions to punish them for contempt for prosecuting a criminal conspiracy to violate an injunction, granted by the court in a civil suit, restraining them from interfering with the business or employes of the complainant therein, is a criminal proceeding within the meaning of Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), which provides that no discovery or evidence obtained from a party or witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court of the United States in any criminal proceeding.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 124; Dec. Dig. § 40.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1751-1753; vol. 8, p. 7623.]

## 2. CRIMINAL LAW (§ 42\*)—EVIDENCE—JUDICIAL ADMISSIONS.

To entitle a party in a criminal proceeding against him in a federal court to invoke the protection of Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), providing that no discovery or evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court of the United States in any criminal proceeding, to exclude testimony given by him in another court in obedience to a subpoena, it is not necessary that he should have claimed the privilege of the statute when such testimony was given, and when he may have had no reason to suppose that an attempt would ever be made to use it against him. It is sufficient if he claim the exemption at the time the evidence thus obtained is first sought to be so used contrary to the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 45; Dec. Dig. § 42.\*]

## Proceeding to Punish for Contempt.

See, also, 149 Fed. 577.

This is a proceeding to have punished for contempt the respondents hereinafter named, for the alleged violation of certain injunctive orders heretofore granted in the above-entitled cause. The material facts are these:

On July 9, 1906, the complainant filed its bill in this court against the Sailors' Union of the Pacific, Pacific Coast Marine Firemen's Union, Marine Cooks' and Stewards' Association, Andrew Furuseth, Walter McArthur, and a large number of other individuals named therein as defendants, setting up that complainant was engaged in the coast shipping and sea-carrying trade for passengers and freight between the port of San Francisco and other ports of California, and in such business owned and employed certain vessels, with a large amount of capital invested therein and in said trade; that the defendants Sailors' Union of the Pacific, Pacific Coast Marine Firemen's Union, and Marine Cooks' and Stewards' Association were each and all corporations composed of large membership, with their principal offices or headquarters at the port of San Francisco, the members of which were all seafaring men following divers occupations as such; and that said defendant corporations, with the individual defendants named in the bill, had confederated, colluded, and conspired together for the purpose of injuring, obstructing, and interfering with the business of complainant, and preventing complainant from peaceably pursuing the same, and had by violence, intimidation, and other unlawful means, taken and had in pursuance of said conspiracy, interfered to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prevent complainant from securing crews to man its ships, or laborers to load or discharge them, to such an extent as to greatly interrupt, demoralize, and destroy complainant's ability to conduct its said business, and to its great and irreparable injury and damage. A number of specific acts of a violent and unlawful character alleged to have been committed by members of the defendant unions, in boarding complainant's vessels and assaulting and intimidating its employes, are then set forth, and it is alleged that the defendants threaten to and will continue to commit acts of like character against complainant and its employes, and will destroy its ability to carry on its business unless restrained by this court. The bill prayed for an injunction to restrain defendants from the commission of further acts of the character complained of. Upon this bill a subpoena was duly issued and served on the two defendants, Sailors' Union of the Pacific and Pacific Coast Marine Firemen's Union, and those defendants alone appeared and made answer thereto. Subsequently, a temporary restraining order was granted by the court, with an order to show cause why an injunction pendente lite should not issue. These orders were served on the defendants, Sailors' Union of the Pacific, the Pacific Coast Marine Firemen's Union, and the Marine Cooks' and Stewards' Association, and in due course those defendants appeared in response thereto. None of the individual defendants were served with these orders, nor did they appear in answer to the same. Thereafter a hearing was had on the order to show cause, and the court granted an injunction pendente lite, which, like its previous restraining order, ran against all the defendants named in the bill, and in substance enjoined and restrained them, their servants, agents, and all persons acting by or under their authority or direction, from in any manner unlawfully interfering with the business of the complainant, and specifically from interfering by violence, threats, intimidation, or other unlawful means with the crews of complainant's vessels, or otherwise molesting them or the other employes of complainant, or in any wise unlawfully interfering with or obstructing complainant's vessels in the conduct of their legitimate business, either in the bay of San Francisco or elsewhere within the jurisdiction of the court. This writ was served on the defendants Sailors' Union of the Pacific, Pacific Coast Marine Firemen's Union, Marine Cooks' and Stewards' Association, and on Andrew Furuseth individually, but on none of the other individual defendants named in the bill. Thereafter the complainant filed in the case the petition on which the present proceeding is based, wherein, after reciting the filing of the bill and issuance of the said injunctive orders, it is set forth in substance that the conspiracy alleged in the bill was inspired by a strike theretofore inaugurated by the defendant unions against the complainant and other shipowners, and in progress at the filing of the bill, growing out of a controversy between the members of said unions and the shipowners on the subject of wages; and that, for the purpose of carrying out said conspiracy and the prosecution of said strike, a committee had been formed by the defendant unions, styled a "strike committee" or "emergency committee," composed of Andrew Furuseth, the secretary of the defendant Sailors' Union of the Pacific, as chairman and chief executive head of such committee, John Carney, secretary of the defendant Pacific Coast Firemen's Union, Eugene Steidel, secretary of the defendant Marine Cooks' and Stewards' Union, and Walter McArthur, E. A. Erickson, John Keane, Harry Lundborg, Edward Anderson, C. C. Simonsen, and John Doe Fulton, all members of one or the other of said defendant unions; that this committee was given absolute control and management of said strike, with full power to adopt and put in execution any and all such measures or means as it might deem desirable or expedient to enforce the demands of said unions and to carry out the purposes of such alleged conspiracy; that the committee had authorized and directed all the acts and things complained of in the bill, and all acts and measures set forth in said petition; that it had employed steam launches and manned them with strikers from the membership of said unions to patrol the bay of San Francisco as pickets in behalf of said unions, with instructions to visit complainant's vessels and those of other shipowners, and to interfere with, frighten, and intimidate the sailors and other employes thereon and deter them from continuing in such service, and, where necessary, to employ force to board said

vessels and take men therefrom, and to prevent said vessels from taking on or discharging freight or securing the necessary crews to handle them or their cargoes, and generally to harass and impede complainant and said other shipowners in the prosecution of their business; that the committee had detailed members of said unions in large numbers with instructions to picket and patrol the various wharves and the entire water front of the city of San Francisco for like purposes of interfering with said vessels and their employes, to intimidate and deter the latter from service thereon, and to assault, beat, and maim them, if necessary, to prevent them from remaining in such employment. It is alleged in substance that these instructions of the committee were fully carried out, and that a general course of unlawful and violent interference with the vessels of complainant and others and intimidation of their employes was indulged in and pursued by such pickets both on the waters of the bay and the harbor front, and such course of conduct continued without let, hindrance, or interruption alike after the issuance and service of the injunctive orders as before, and all with the full knowledge on the part of the members of said committee and of said unions of the existence of such restraining orders. A large number of specific acts against complainant and such other owners are alleged, some committed during the existence of the temporary restraining order and others after the service of the temporary injunction, many of them accompanied by personal violence and some with bloodshed, through the employment of deadly weapons, and all of them characterized by the use of profane and obscene language and opprobrious epithets applied to the employes on said vessels, and, as to this complainant, wholly in derogation and violation of the terms of said injunctive orders.

Upon this petition the complainant asked an attachment against Andrew Furuseth, Walter McArthur, and the other individuals composing said strike committee, and that they and each of them be arrested and brought before the court for contempt in violating the orders of the court as therein alleged, and that they be punished therefor. A citation having been issued and served on the respondents, they appeared and filed separate answers, denying specifically all the acts alleged in the petition, and pleading not guilty to the charge of contempt. Thereupon the matter was referred to an examiner to take the testimony, and, the evidence having been duly returned, the matter has now been submitted to the court for its consideration.

J. Webster Dorsey and Henry Ach, for petitioner.

H. W. Hutton, for respondents.

VAN FLEET, District Judge (after stating the facts as above). A number of questions have been argued, and the case in all its aspects presented with marked ability and earnestness. The pivotal question, however, by reason of its bearing on the admissibility of certain evidence offered by the petitioner before the examiner, is whether this proceeding, as it affects the rights of the respondents, is to be regarded on the one hand as criminal and punitive in character, in which the public is interested, or, on the other, as purely civil and remedial, concerning alone the parties to the controversy. This question subordinates all others, and in the view I take renders the latter largely, if not wholly, immaterial.

It will be observed that the petition upon which the citation is based proceeds upon the theory, not that the respondents here sought to be held personally committed the acts charged as violative of the orders in question, but that those acts were committed by members of the defendant unions, as the result of an unlawful conspiracy and combination formed for that purpose; that the respondents were parties to that conspiracy, and, in their capacity as members of the executive

or strike committee referred to in the petition, had control and direction of all acts and proceedings done and taken in pursuance thereof; and that the acts complained of were thus committed at their instigation and upon their procurement. The evidence in its general course follows this theory; and it will subserve every present purpose to say with reference thereto that it was quite sufficient to show a most flagrant and persistent violation of the orders in question by members of the defendant unions in the commission of many specific acts substantially as charged, and affecting the rights of the complainant, with a full knowledge on the part of those engaged therein of the existence of those orders. The evidence was not sufficient, however, in its general features, to establish the existence of a conspiracy on the part of these respondents or connect them with the commission of any of the specific acts complained of—and more especially if, by reason of the nature of the proceeding, the same degree of certainty in proof is to be required as obtains in establishing guilt of a criminal offense—the evidence in that respect being very general, vague, and largely hearsay in character. This want being recognized and appreciated by petitioner, to bridge the gap, it produced and offered before the examiner a deposition of the respondent Andrew Furuseth, theretofore taken before a notary public in the case of the California & Oregon Coast Steamship Company v. Sailors' Union of the Pacific, a civil action brought to obtain an injunction, then pending in the superior court of the city and county of San Francisco. This deposition was given by Furuseth in obedience to a subpoena duces tecum served upon him requiring him to appear before the notary at a given time and place and to produce certain minute books and records in his possession as secretary of the said Sailors' Union of the Pacific, the defendant therein, and there testify as a witness. In obedience to the mandate of the subpoena, Furuseth appeared before the notary, produced the required records, and was examined as a witness, and there gave evidence with reference to the proceedings of the defendant unions and their strike committee in the conduct of the strike, which, while not materially implicating the other respondents, does tend, when taken in connection with the other evidence produced before the examiner, to sustain the petitioner's theory as to the responsibility of the respondent Furuseth for the general course of the defendant unions during the strike, and complained of as violative of the injunction. In brief, while not connecting him directly with any of the specific acts of violence alleged, this deposition tends to show that as the chief executive officer of the Sailors' Union, and as head of the strike committee, it was his brain that conceived and formulated the general method pursued by the unions in the strike; that he chiefly had to do with furnishing the boats and pickets for the patrolling of the water front, and which, from the manner this work was carried out by the strikers and their sympathizers, led to the most, if not all, of the violence complained of.

It is on this evidence that petitioner chiefly relies to connect the respondents with the specific acts charged—or, speaking more exactly, to connect the respondent Furuseth with those acts—for, while petitioner does not in terms concede the insufficiency of the evidence as

to the other respondents, I think from the course of counsel's argument it must be held to do so tacitly. Indeed, it is very clearly manifest from the attitude of petitioner's counsel, as disclosed both by the record and on the argument, that it is the conviction and punishment of the respondent Furuseth that is the main, if not the only, object sought. From the nature of the deposition, therefore, it becomes material to the rights of the respondent Furuseth to determine whether the evidence thus obtained may be considered.

It was objected before the examiner, and is now insisted, that this proceeding is distinctly criminal in character, initiated for the purpose of procuring the punishment of the respondents upon a charge which constitutes a substantive public offense, and that the offered evidence is therefore incompetent and inadmissible, under section 860 of the Revised Statutes (U. S. Comp. St. 1901, p. 661), which provides:

"No pleading of a party nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture."

In response to this objection the complainant contends, on the other hand, that the proceeding is strictly civil in character, partaking of the nature of the main suit or action out of which it arises, and is prosecuted solely for the purpose of protecting and enforcing the private rights of complainant which the injunction was sought to protect; that the relief asked against respondents is in no proper sense punitive in its nature, but coercive and remedial only, and that consequently section 860 of the Revised Statutes has no application, and cannot be invoked to exclude the offered evidence. Which of these two contentions is correct, thus presents the crux of the controversy.

The power to punish for contempt is universally recognized as one inherent in the very nature and purpose of courts of justice; it is co-eval with their power to administer justice, and, while it may be in some respects limited, cannot be entirely taken away. It subserves at once the double office of protecting the dignity and authority of the tribunal and aiding in the enforcement of civil remedies, and may be exerted in either civil or criminal cases, or independently of either, and either solely for the preservation of the court's authority, or in aid of the rights of the litigant, or for both those purposes combined.

By reason of this twofold attribute, proceedings in contempt are regarded as being in their nature anomalous—that is, possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of judicial power; and this has led to their being aptly styled *sui generis*. That they are largely of a criminal nature, by reason of the power being one to convict and punish for wrong committed, is universally conceded; and yet that in some respects they partake, by reason of the ends subserved, of the nature of a civil remedy, is likewise recognized. This dual characteristic has given rise to many and bitter controversies in the courts, the difficulty being, in most cases, to determine when a particular proceed-

ing assumes the criminal rather than the civil aspect, or when of both; and if the latter, which feature must control. The question has arisen in a great many cases—much the larger number in the state courts—and the industry of counsel in the present case is evidenced by the fact that few, if any, of the numerous adjudications bearing on the subject, state or federal, have escaped reference in the very voluminous briefs on file. While I have given them consideration, it will not be necessary or expedient to discuss in detail the many citations from the state courts. They are not harmonious, indeed in many instances irreconcilable, while in others the results reached are so manifestly influenced if not dictated by local statutory provisions as to render them of little value in seeking an answer to our present inquiry. Moreover, the question is, I think, very definitely concluded and set at rest by the principles to be deduced from the decisions of the Supreme Court of the United States, to which source this court must in any case first turn for inspiration and guidance. While the cases arising in that court, with one exception, as with most of those cited from the other federal courts and the state courts, have all involved more directly the question as to the power to review judgments convicting of contempt, yet in the consideration of that phase of the subject the court has necessarily gone fully into the nature, character, and purpose of proceedings to punish for contempt, and, while approaching the subject from a slightly different point of view to that here presented, has announced principles which must in my judgment control in the determination of the present question.

An examination of these cases will disclose that that court has from the first declared, and since consistently maintained, that contempt proceedings, while not to be regarded as in any sense a substitute for the ordinary criminal laws of the country (*Ex parte Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092), yet, by reason of the very nature of the power involved, they are in their essential characteristics to be deemed primarily criminal and punitive; that while they possess in a sense and for certain purposes a civil and remedial aspect, growing out of the fact that they may be invoked to coerce or aid in the enforcement of a private right or remedy, this aspect can only arise in any instance out of the nature and purpose of the punishment adjudicated, and then only to affect the question of how the judgment awarding such punishment may be reviewed. In other words, the result of those cases is that where the punishment imposed, whether against a party to the suit or a stranger, is wholly or primarily to protect and vindicate the dignity and power of the court, either by fine payable to the government, or by imprisonment, or both, it is deemed a judgment in a criminal case and subject to review only in the manner provided for review of judgments in criminal cases; but where the punishment is by fine directed to be paid to a party in the nature of damages for the wrong inflicted, or by imprisonment as a coercive measure to enforce the performance of some act for the benefit of the party, or in aid of the final judgment or decree rendered in his behalf, in such case the contempt judgment will, if made before final decree, be treated as in the nature of an interlocutory order, or,

if made after final decree, as remedial in nature, and will be reviewed only on appeal from the final decree, or in such other mode as is appropriate to the review of judgments in civil cases. And certain it is, as will furthermore be seen, that the contention of complainant, that the nature of the contempt proceeding in any case necessarily partakes of the nature of the original action or proceeding out of which it arises, is wholly unfounded. The fact that a contempt has arisen in a civil action, such as this, in no way tends to characterize the nature of the proceeding for its correction. While it is true that it would be hard to imagine a contempt of a civil aspect arising in a criminal case, it is equally true that acts of contempt of a criminal aspect do—and most frequently—arise in actions of a purely civil character. Let us turn to the cases with these principles in mind:

The earliest one arising in the Supreme Court was that of *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391, where an application was made to that court for a writ of habeas corpus to bring up the petitioner adjudged in contempt in refusing to answer a question put to him on the trial of an indictment in the court below. The application for petitioner's discharge was refused, the court holding that it had no power under the law as it then existed to review criminal cases on appeal by any direct method, and could not, therefore, undertake to do so indirectly; and it is said:

"If this were an application for a habeas corpus after judgment on an indictment for an offense within the jurisdiction of the Circuit Court, it could hardly be maintained that this court could revise such a judgment or the proceedings which led to it, or set it aside and discharge the prisoner. There is in principle no distinction between that case and the present; for, when a court commits a party for a contempt, their adjudication is a conviction, and their commitment in consequence is execution, and so the law was settled upon full deliberation in the case of *Brass Crosby*, Lord Mayor of London, 3 Wilson, 188."

The next case to come before the court was that of *New Orleans v. Steamship Company*, 20 Wall. 387, 22 L. Ed. 354, where a suit was brought in the Circuit Court of the United States for an injunction restraining the city of New Orleans from interfering with complainant's possession of certain premises. The injunction was granted, and pending its existence the mayor of the city obtained an injunction from a state court restraining the complainant from rebuilding an inclosure of the premises which the city authorities had destroyed. At this time the mayor was not a party to the suit in the Circuit Court, but was subsequently made such by supplemental bill. A final decree was entered against the defendants in the Circuit Court, and as a part thereof the mayor was adjudged guilty of contempt in suing out the injunction in the state court, and was subjected to a fine therefor. Thereupon the case was taken to the United States Supreme Court on appeal from the final decree, where, among other things, the validity of the punishment of the mayor for contempt was challenged. With respect to that feature of the decree, the court said:

"The fine of three hundred dollars imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an in-



dictment for perjury committed in a deposition read at a hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion."

The case of *In re Chiles*, 22 Wall. 157, 22 L. Ed. 819, arose out of an original suit in the Supreme Court of the United States brought by the state of Texas to restrain Chiles and another from asserting title to certain bonds claimed to be the property of the state, in which a final decree went in favor of the complainant granting the injunction prayed. Thereafter, notwithstanding the existence of the injunction, Chiles set up a new claim of title to the bonds not embraced in his answer in the suit. A rule being granted that he show cause why he should not be adjudged in contempt for this renewed assertion of title, he was found guilty and adjudged to pay a fine; the court holding that, although the newly asserted title was not pleaded in his answer, it was concluded by the decree, and its assertion an act of contempt; and, speaking of the nature of proceedings to punish for contempt, it is there said:

"Section 725 of the Revised Statutes (U. S. Comp. St. 1901, p. 583) declares that the courts of the United States shall have power to punish by fine and imprisonment for contempts of their authority. And among the cases specially enumerated are 'disobedience or resistance by any officer of the court, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.' Such has always been the power of the courts, both of common law and equity. The exercise of this power has a twofold aspect, namely, first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.

"In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it."

In *Hayes v. Fischer*, 102 U. S. 121, 26 L. Ed. 95, the defendant was fined for contempt in violating an interlocutory injunction in a patent case, the amount of the fine being ordered paid to the complainant in reimbursement for the damage suffered by the violation of the injunction. In dismissing a writ of error sued out to review the judgment in contempt, it is said:

"If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than 50 years ago in *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391, and the rule then established was followed as late as *New Orleans v. Steamship Company*, 20 Wall. 387, 22 L. Ed. 354. It follows that we have no jurisdiction."

*Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853, was another case where the defendants were found guilty before final decree of violating a preliminary injunction in a patent suit. By one order the defendants were required to pay to the complainant \$250 "as a fine for said violation"; and by a subsequent order to pay a

fine of \$1,182 to the complainant for "damages and costs"—\$682 of this sum as profits made by defendants as a result of the violation of the injunction, and \$500 as the expenses of complainant in the contempt proceeding. It was held that these orders, although made as a result of contempt proceedings, were purely remedial and compensatory, and, having been made before final decree, could only be reviewed on appeal from the latter. The court said:

"We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case differs, therefore, from that of *Ex parte Kearney*, 7 Wheat. 39, 5 L. Ed. 391. That was an application to this court for a writ of habeas corpus where a person was imprisoned by the Circuit Court of the District of Columbia for a contempt in refusing, as a witness, to answer a question on the trial of an indictment. The application was denied on the ground that this court had no appellate jurisdiction in a criminal case.

"So the fact in the present case that, though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to him his expenses, distinguishes the case from that of *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354."

In *O'Neal v. United States*, 190 U. S. 36, 23 Sup. Ct. 776, 47 L. Ed. 945, O'Neal was found guilty and fined by the District Court for a contempt committed in interfering with and assaulting a trustee in bankruptcy. He sued out a writ of error direct to the Supreme Court, contending that the facts stated in the affidavit did not constitute a contempt, and that the District Court, therefore, had no jurisdiction. The writ was dismissed, the Supreme Court saying:

"That, while proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error."

The case of *In re Debs*, *supra*, arose out of the great Chicago railroad strike of 1894. Debs and his associates, having been convicted of contempt of the United States Circuit Court and imprisoned for the violation of an injunction issued by that court in a suit by the United States against the contemnors and others to restrain them from interference with the movement of trains on certain railroads engaged in the transmission of the mails and the transaction of interstate commerce, applied to the Supreme Court for a writ of error to have the judgment reviewed, and also for a writ of habeas corpus to discharge them from custody; claiming, in the first place, that the suit was one which the United States could not maintain for want of interest, and, in the second place, that the acts complained of, and for a commission of which they were adjudged in contempt, were crimes and misdemeanors under the law, over which a court of equity had no jurisdiction, but for a conviction of which they were entitled to a jury trial. These contentions were overruled; the writ of error was denied without an opinion (159 U. S. 251, 15 Sup. Ct. 1039), but, as stated in the subsequent case of the *Christensen Engineering Company*, 194 U. S. 458, 460, 24 Sup. Ct. 729, 730, 48 L. Ed. 1072, it was denied be-

cause there was in the contempt judgment "nothing of a remedial or compensatory nature. No fine was imposed, but only a sentence of imprisonment. This court had no jurisdiction of a writ of error in such a case." The writ of habeas corpus was likewise denied, and, in summing up their conclusions after a very elaborate discussion of the objections made, it is said with reference to the powers of a court of equity in such a case:

"\* \* \* That, while it may be competent for the government (through the executive branch, and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and, if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of facts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that, it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Rev. St., which grants power 'to punish, by fine or imprisonment, \* \* \* disobedience, \* \* \* by any party \* \* \* or other person, to any lawful writ, process, order, rule, decree, or command,' and enter the order of punishment complained of; and, finally, that, the Circuit Court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on habeas corpus in this or any other court. [Citations.]"

Some expressions in this case are seized upon by counsel for complainant here as being at variance with the principles announced in preceding decisions of that court as to the nature and purpose of contempt proceedings, and as tending to sustain the view now urged by them. But a consideration of the language of the court, in the light of the questions there under discussion, will show that this is a misapprehension, and that nothing that is there said is in any wise out of harmony with its previous declarations. The court was simply answering the objections there made. This is further emphasized by the later decisions of the court, in which the Debs Case is referred to in a manner to indicate no purpose on the part of the court by anything there said to mark a departure from its previous rulings. This is made quite clear from a comparatively recent case, in which the subject received very full consideration at the hands of the same distinguished member of the court who wrote the opinion in the Debs Case—that of *Bessette v. Conkey Company*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997.

In the latter case, like the present, an injunction had issued restraining interference with complainant's business. Bessette was not a party

to the suit, but was convicted of contempt in having violated the injunction with knowledge of its existence, and fined \$250. He appealed to the Circuit Court of Appeals, and that court certified the question to the Supreme Court as to whether it had jurisdiction to review the judgment. It was held that by virtue of the provisions of the act of March 3, 1891, c. 517, 30 Stat. 826 (U. S. Comp. St. 1901, p. 547), creating the Circuit Courts of Appeals, and giving those courts jurisdiction to review criminal cases other than capital or those otherwise infamous, they were empowered to review judgments in contempt cases because of their criminal nature, but that such review must be by writ of error, as in other criminal cases, and not by appeal. In the course of its reasoning, it is there said by the court:

"A contempt proceeding is *sui generis*. It is criminal in its nature in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions."

And after a discussion and review of all the cases previously decided by it bearing upon the subject, including that of *Ex parte Debs*, it is said:

"The thought underlying the denial by this court of the right of review by writ of error or appeal has not been that there was something in contempt proceedings which rendered them not properly open to review, but that they were of a criminal nature, and no provision had been made for a review of criminal cases."

And, after holding that the Circuit Court of Appeals act gave a right of review of such judgments not theretofore afforded, it is said:

"As, therefore, the ground upon which a review by this court of a final decision in contempt cases was denied no longer exists, the decisions themselves cease to have controlling authority, and whether the Circuit Courts of Appeals have authority to review proceedings in contempt in the District and Circuit Courts depends upon the question whether such proceedings are criminal cases. That they are criminal in their nature has been constantly affirmed. The orders imposing punishment are final. Why, then, should they not be reviewed as final decisions in other criminal cases?"

This case is likewise relied on by complainant to sustain its contention that the present proceeding is civil and remedial rather than criminal; its reliance being based largely upon a quotation, made by the court in the course of its reasoning, from an opinion of Judge Sanborn in *Re Nevitt*, 117 Fed. 448, 54 C. C. A. 622, where it is said:

"Proceedings for contempts are of two classes: Those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. [Citations.] A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is com-

mitted until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings."

But complainant would give to this language a complexion which it will not bear. It must be read in the light of the facts to which it was being applied. Judge Sanborn, like the Supreme Court in employing the quotation, was discussing the effect of a judgment in contempt rather than the nature of the proceeding, and a judgment which, under all the authorities, was purely coercive and remedial in character. There the judges of a county court in Missouri had been adjudged by the United States Circuit Court guilty of contempt in refusing to obey a mandate of that court directing them to levy a certain tax which it was yet within their power to do, and they were adjudged to be imprisoned until they complied with the mandate. They sued out a petition before the Circuit Court of Appeals praying a stay of proceedings until they could apply to the President for their release by pardon. It was in discussing the nature of the contempt judgment, and whether it was one from the effect of which the executive had power to relieve the petitioners, that Judge Sanborn used the language quoted. What was there said is not inappropriate to the facts of that case, although it may not have been wholly necessary to say so much. I am inclined to think that the language was something too broad in its attempted classification of contempt proceedings, and more especially in the somewhat sweeping statement that "a criminal contempt involves no element of personal injury." This was apparently the opinion of the Supreme Court, where, in commenting upon the classification given by Judge Sanborn, it is said:

"It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit, in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party."

Moreover, that the Supreme Court did not apprehend the language of Judge Sanborn as having the effect ascribed to it by complainant, nor intend by its adoption to recede from its previous rulings on the subject, is manifest from the reiteration therein, as we have seen, in the most sweeping and general terms, of their previous declarations as to the nature and character of such proceedings.

In the still later case of *Matter of Christensen Engineering Company*, *supra*, where, in a patent case, the defendant was adjudged guilty of contempt in violating a preliminary injunction, and ordered to pay a fine of \$1,000—one-half to the United States, and the other to the complainant—and the Circuit Court of Appeals dismissed a writ of error sued out to review the judgment on the ground that the judgment was civil and remedial and not criminal, the Chief Justice, after referring to *Bessette v. Conkey Company* and other previous rulings, including the *Debs Case*, says:

"These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.

"In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such it dominates the proceeding and fixes its character. Considered in that aspect, the writ of error was justified, and the Circuit Court of Appeals should have taken jurisdiction."

In *Doyle v. London Guarantee Company*, 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641, which is the latest case called to my attention from the Supreme Court touching upon the question under consideration, the *Bessette* and *Christensen* Cases are reviewed and fully considered, and the principles therein announced reaffirmed.

The conclusion from these cases would seem to be obvious that a proceeding to punish for contempt must be held to be a criminal proceeding within the terms and meaning, as it clearly is within the spirit, of section 860 of the Revised Statutes above quoted; and this equally whether the proceeding be initiated primarily to vindicate the court's authority, or solely as a coercive or remedial measure to enforce the rights of the litigant, or for both those purposes combined. This must be so, since it necessarily results from the nature of the power to punish for contempt, as interpreted by those cases, that, whatever the primary purpose of such a proceeding may be, it is always within the power of the court to make its judgment in part at least punitive or vindicatory in character. In other words, even in a case where the sole purpose sought by initiating the proceeding is to secure the coercive and remedial action of the court against a party, the court may nevertheless, in its discretion, add a punishment by way of fine or imprisonment for the failure of the contemner to obey its mandate. Take, for instance, a case where the judgment sought was as purely coercive and remedial as that in the *Nevitt* Case, may it be doubted that it was within the power of the Circuit Court to have added a punitive feature to its judgment by imposing a fine or definite term of imprisonment upon the contumacious officers? I think no one may deny this (see *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207), and therefore it would seem that, for the purpose of invoking the protection of such a right as that given by section 860, the proceeding must always be regarded, from its inception to the point of judgment, as criminal, or at least potentially so, since, until the judgment is given, it cannot be known what its character will be. It is the judgment, therefore, which must eventually in any case determine the character of the proceeding; and this leads to the conclusion that logically, perhaps, instead of characterizing contempt proceedings as criminal or remedial, according to the circumstances, it is contempt judgments that should be so classified. For the purposes for which the question was being considered in the cases adverted to, however, this distinction was not material.

That the proceeding is criminal, in the sense and for the purpose here considered, was expressly held by the Supreme Court of California in the case of *Ex parte Gould*, 99 Cal. 360, 33 Pac. 1112, 21

L. R. A. 751, 37 Am. St. Rep. 57. Gould was charged with contempt in having violated an injunction issued in a civil suit brought to restrain him and others from carrying on hydraulic mining. Upon the hearing of that charge, the trial court directed him to be sworn as a witness, to which he objected on the ground that he could not be compelled to be a witness against himself, for the reason that the proceeding was criminal in nature. This objection was overruled, and the court ordered him to be sworn; whereupon, acting on the advice of counsel, he refused to take the oath, for which refusal he was adjudged in contempt, and ordered imprisoned until he should purge himself by consenting to testify. The Supreme Court discharged him on habeas corpus, holding that the lower court was not authorized to require him to be sworn, and in its opinion said:

"Article 1, § 13, of the Constitution of this state, declares that: 'No person shall be compelled, in any criminal case, to be a witness against himself.' Section 1323 of the Penal Code provides that 'a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself.'"

"Contempt of court is a public offense, and by section 166 of the Penal Code is expressly declared to constitute a misdemeanor, and the refusal of a witness to be sworn is an offense committed in the presence of the court. It is none the less a criminal offense that the statute authorizes it to be punished by indictment, or information, as well as by the summary proceedings provided in sections 1209-1222 of the Code of Civil Procedure. By these provisions the procedure for the investigation of the charge is analogous to the criminal procedure, and the judgment against the person guilty of the offense is visited with fine, or imprisonment, or both—the essential elements of a judgment for a criminal offense. 'Contempt of court is a specific criminal offense. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial, the adjudication against an offender is a conviction, and the commitment in consequence is execution.' William's Case, 26 Pa. 19, 67 Am. Dec. 374."

In the case of *In re Jose* (C. C.) 63 Fed. 951, Judge Hanford of this circuit took the same view that such proceedings, being criminal in nature, the rules of procedure obtaining in criminal cases apply to the trial of one charged with a contempt of court, and in the course of his reasoning said:

"Accusations for contempt must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused, and every element of the offense, including a criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts; otherwise, the defendant is entitled to go acquit."

There are a number of other cases in both the state and federal courts sustaining the same view, and, while the contention of petitioner is not without support in some of the cases from the state courts, in view of the principles announced by the cases above referred to from the Supreme Court, that contention cannot prevail here.

But conceding, for the sake of argument, that there may be cases where the circumstances alleged and the relief sought are so essentially and entirely civil and remedial as to involve no element of a criminal aspect, and where the court would not be warranted in imposing by its judgment anything in the nature of punishment, the present proceeding very clearly, under the principles announced by the Supreme Court, is not such a case. The facts alleged in this pe-

tion constitute no basis for a judgment of a coercive or remedial character; nor is such the nature of the relief asked. Petitioner is not seeking to require the respondents to perform some act which it is yet within their power to perform; nor is there anything alleged or shown as a foundation for a merely compensatory fine, assuming that such a judgment is ever proper. See *Worden v. Searls*, supra.

The gravamen of the charge against respondents is entering upon and prosecuting a criminal conspiracy "of such a character and in such a manner" (to employ the language of the *Bessette Case*) "as to indicate a contempt of the court rather than a disregard of the rights of the adverse party"; a conspiracy so broad in its scope and effect as to involve a violation of the rights, not only of the petitioner, but of many others engaged in the same business, and that by distinctly criminal means. The wrongs complained of are then as much, if not more, of a public than of a private nature; and the prayer of the petition is that the respondents be found guilty and punished therefor. Under such a state of facts it is manifest that, if convicted, the only judgment that could be visited upon the respondents would be one of a punitive nature, either a fine or imprisonment, or both—a judgment that would operate as a deterrent to future acts only. There is nothing civil or remedial in such a judgment. The case, therefore, is distinctly criminal in aspect; in this respect, precisely similar to that of *Ex parte Debs*.

There is still another respect in which, if necessary to so hold, I am of the opinion that the proceeding would, in any event, under the doctrine of *Bessette v. Conkey Co.* and the cases there referred to, have to be held criminal in nature as it affects these respondents. This arises on the contention of respondents that they are not parties to the main suit out of which the present proceeding grows, by reason of the fact that, while they are named as defendants in the bill, they were not served with process thereunder nor appeared therein, the service of the subpoena being had upon the defendant unions alone; and that, therefore, while amenable to punishment for a violation of the injunction if committed with knowledge of its existence, they were never brought within the jurisdiction of the court in the original case. The doctrine of the *Bessette Case* is that contempt proceedings are always to be regarded as criminal in respect to one not a party to the suit, since no coercive or remedial relief can be had against a stranger, but only a judgment punishing him for a violation of the injunction committed with knowledge of its existence.

Petitioner contends that the service on the unions was, under section 338 of the Code of Civil Procedure of this state, a sufficient service upon all the individual members thereof to bring them within the jurisdiction of the court. I am doubtful if this section has any application to such a case; but in view of the conclusion reached above, it is not necessary to definitely determine this question.

There is but one other question which requires notice. It is contended by petitioner that the protection of section 860 is not available to the respondent *Furuseth*, because his deposition was given without objection, and without claiming the privilege of the statute; that the



section, like the fifth amendment to the Constitution, exempting one from being a witness against himself, must be construed as applying only where the witness has given his evidence under compulsion, after claiming its protection. The language of the section will not bear this construction; nor has such been the interpretation given it by the courts. While it is conceived in the same spirit as the provision of the Constitution, it is much narrower and more specific. It has by its terms application alike to the pleading of a party or to a "discovery or evidence obtained from a party or witness by means of a judicial proceeding." The pleading or evidence of a party is thus put in the same category with the evidence obtained from a witness, and in the very nature of things the rule of compulsion applied to the exemption in the Constitution cannot be applied here, except such compelling force as is involved or implied from the necessity of a party to appear in defense of his rights, or a witness to answer a subpoena or other process requiring him to appear and testify. The discovery or evidence may have been obtained in a proceeding, and under circumstances such as to give rise to no cause for claiming the exemption afforded by the statute, nor any apprehension that the evidence was to be used in a criminal proceeding, or where, indeed, the proceeding was such as to afford no opportunity or right to interpose the objection. *United States v. McCarthy* (C. C.) 18 Fed. 87. It would seem, therefore, that so long as the exemption is claimed, as here, at the time the evidence thus obtained is first sought to be used, contrary to the statute, it is interposed in time.

Of course, the statute would not protect one against a discovery made or evidence given voluntarily, and without necessity; but here the evidence was obtained in obedience to a subpoena, requiring the witness to attend and testify, and the evidence given under such circumstances cannot be said to have been given voluntarily, within the meaning of such a statute; and this I take to be the effect of *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112. There the party had voluntarily filed in the case an affidavit as to certain facts, which was subsequently admitted in evidence, over his objection, to contradict statements made by him upon the stand. It was held that section 860 did not protect him against such use of his voluntary statement, and the court said:

"Discovery or evidence obtained from a party or witness by means of a judicial proceeding' includes only facts or papers which the party or witness is compelled by subpoena, interrogatory, or other judicial process to disclose, whether he will or no; and is inapplicable to testimony voluntarily given, or to documents voluntarily produced."

See, also, *Counselman v. Hitchcock*, 142 U. S. 549, 12 Sup. Ct. 195, 35 L. Ed. 1110; *Johnson v. Donaldson* (C. C.) 3 Fed. 22; *Ex parte Irvine* (C. C.) 74 Fed. 954; *United States v. Bell* (C. C.) 81 Fed. 830-850; *United States v. Kimball* (C. C.) 117 Fed. 156; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Lees v. United States*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150.

In *Boyd v. United States*, *supra*, speaking of the constitutional provision, to which this statute is akin, Mr. Justice Bradley said:

"Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be, 'Obsta principiis.'"

It is in this spirit that the provision of the statute under consideration should be construed, and, so construed, it must be held that the use of the deposition of the respondent Furuseth in this proceeding is within its prohibition.

In the argument of petitioner's counsel the idea finds expression, more by implication, perhaps, than in terms, that it will be a failure of justice and reproach to the law, if the respondents are to escape punishment for the grievous wrongs complained of through an objection so largely in the nature of a technicality. As intimated, this is more in the nature of a suggestion than an argument; but it does not address itself to my kindly consideration, and may be answered without difficulty. In the first place, the right invoked under the statute in question is substantial rather than technical, being founded upon a principle as old as the common law itself, and which, as we have seen, finds expression in the Constitution—that a man shall not be compelled to furnish evidence against himself. But if it were otherwise, and the objection more purely technical, it is a right given by the statute, and I know of no principle which would justify the court in denying respondents its benefit. Being a part of the law, the court is as much bound to observe it while it remains on the statute book as any other rule made for its guidance, however substantial and elementary. The function of the court is to apply the law, not to make it; to enforce it, rather than break it. The wisdom of the ages has demonstrated the necessity of surrounding the administration of justice with certain fixed rules and limitations, to avoid the personal equation of the mere will or desire of the individual—which always tends to wrong and oppression. These rules are prescribed for the protection of society itself, and, not infrequently, serve to protect it against itself. They are for the benefit of every man who comes before the court—the guilty and the innocent alike; for it is only by their impartial application that the question of guilt or innocence may be safely reached in any case, and the defendant justly said to have had a fair trial. These rules are not, therefore, to be ignored, for, if they may be disregarded to-day for a good end, they may be as readily disregarded to-morrow for a bad one. There is but one course open to a court, and that, to apply the prescribed rules of law undeviatingly as it finds them; and the judge who, in the supposed interest of justice in a particular case, undertakes to set them at naught, abdicates his sworn judicial function and becomes the abettor of the mob—the only tribunal that may presume to administer its justice untrammelled by the restraint of law.

It follows from the conclusions above expressed that the offered deposition must be excluded; and this leaves the record without suf-

ficient evidence to warrant the conviction of the respondents, or any of them.

As a result, the rule must be discharged, and the petition dismissed; and it is so ordered.

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MOORE v. SAWYER et al.

(Circuit Court, E. D. Oklahoma. January 5, 1909.)

**1. INFANTS (§ 99\*)—AVOIDANCE OF CONTRACTS BY INFANTS—BURDEN OF PROOF.**

A party who pleads infancy as a ground for avoidance of a contract or instrument has the burden of proof to establish it by clear evidence; the presumption being in favor of the competency of parties.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 294; Dec. Dig. § 99.\*]

**2. INDIANS (§ 16\*)—LEASE OF OIL LANDS—FRAUD—ADEQUACY OF CONSIDERATION.**

An oil lease given by an allottee of the Creek Indian nation *held* valid, although at the time it was executed the lessor was confined in the penitentiary and had never seen the land, and was not aware nor informed of the fact that valuable oil wells had been drilled within two miles of the property; it appearing that the terms of the lease were not inequitable nor the consideration inadequate as compared with other leases on land in the vicinity made at about the same time, and in view of the approval of the lease by the Secretary of the Interior upon the report of agents who visited and examined the land.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.\*]

**3. MINES AND MINERALS (§ 55\*)—OIL AND GAS LEASE—CONSTRUCTION OF INSTRUMENT.**

An instrument in terms granting all the oil, gas, coal, and asphaltum under certain described land, but which was denominated a lease, had a definite term of 15 years, and provided, in addition to a cash payment of \$50, for the payment of a royalty on all oil produced, *held* not a conveyance in fee of the mineral in place, but merely a lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 160; Dec. Dig. § 55.\*]

**4. INDIANS (§ 16\*)—LANDS—POWER OF ALIENATION—LEASE.**

The supplemental agreement with the Creek Tribe of Indians, ratified by the Indians June 30, 1902 (Act June 30, 1902, c. 1323, 32 Stat. 500), provides in section 16 that "lands allotted to citizens shall not in any manner whatever \* \* \* be alienated by the allottee or his heirs" before the expiration of a certain time, except with the approval of the Secretary of the Interior. Section 17 provides that allottees may lease or rent their allotments under certain terms and conditions. *Held*, that the restriction against alienation applied to renting or leasing, and that the provision of Act April 21, 1904, c. 1402, 33 Stat. 204, that "all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, thereby removed," removed all restrictions as to leasing by allottees within its scope.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. § 16.\*]

**5. MINES AND MINERALS (§ 74\*)—OIL LEASES—RIGHTS OF BONA FIDE ASSIGNEE.**

Any equities in favor of a lessor in an oil lease arising out of suppression of facts when the lease was made or failure to pay a bonus provided for therein, and the receipt of which was acknowledged, *does*

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<sup>1</sup>For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not affect the validity of the lease in the hands of assignees who took it for value in good faith and without any knowledge of such facts.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. § 74.\*]

6. INDIANS (§ 15\*)—LANDS—ALIENATION—FRAUD AND INADEQUACY OF CONSIDERATION.

Complainant, who was an allottee of land in Indian Territory, was confined in the penitentiary in Kansas at the time the allotment was made, and had never seen the land. At a time when valuable oil wells had been drilled within a mile and a half of the land and there was considerable excitement in the locality, defendant, who was interested in a company which was about to drill on adjoining land, purchased 80 acres from complainant for \$1,150. Complainant was not informed of the oil development, but, on the contrary, was told by defendant's agent, who was also at the time acting for him in an effort to secure a pardon, and who had seen the land, that \$800 was a fair valuation therefor. *Held* that, in view of the situation of complainant, the suppression of facts and positive misinformation as to the value of the land, and the inadequacy of the price paid, the deed should be canceled for fraud on repayment by complainant of the price paid with interest.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 38; Dec. Dig. § 15.\*]

7. DEEDS (§ 70\*)—FRAUD—CANCELLATION.

A complainant *held* entitled to the cancellation for fraud of a quitclaim deed to land worth \$25,000 which he was induced to execute for a consideration of \$120 by misrepresentation and in the belief that it was an entirely different instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165, 173; Dec. Dig. § 70.\*]

8. VENDOR AND PURCHASER (§ 235\*)—BONA FIDE PURCHASER—CONSIDERATION.

A defendant purchased a tract of land worth \$25,000, and with the value of which he was acquainted, for \$1,200, receiving a warranty deed therefor. He made no inquiry as to the grantor's title, which was in fact through a quitclaim deed obtained by him by fraud and for a recited consideration of \$120. *Held*, that defendant was charged with notice of the facts which a reasonable inquiry would have disclosed, and was not a bona fide purchaser, but took subject to the equities of the original grantor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 572; Dec. Dig. § 235.\*]

9. MINES AND MINERALS (§ 74\*)—OIL LEASES—PRIORITY BETWEEN DIFFERENT LESSEES.

An assignee of a second oil lease on Indian land, who took the assignment of the lease with knowledge that a prior lease was outstanding, in reliance on the records of the office of the Indian agent, which showed that the prior lease had been forwarded to the Land Department for cancellation at the request of the parties, *held* not a bona fide purchaser entitled to preference over the prior lessee, where such prior lease was not in fact canceled but was approved by the Secretary of the Interior, the request for cancellation having been through a mistake, which fact would have been disclosed to the assignee of the second lease if he had made inquiry of the parties.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. § 74.\*]

In Equity. On final hearing.

Bailey & Kistler, Barry Miller, and T. L. Camp, for complainant.  
Zevely, Givens & Smith, O'Hare & McCain, Harkless, Cryslar &

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Histed, Hutchings, Murphey & German, Wrightsman, Diggs & Bush, A. L. Beaty, Carroll & Walker, and Kenneth S. Murchison, for respondents.

CAMPBELL, District Judge. The complainant, Zeke Moore, is a member of the Creek Tribe or Nation of Indians. He is a negro, having no Indian blood, but by virtue of his enrollment as a citizen of said nation was entitled to and had allotted to him, prior to the dates of the various transactions involved in this controversy, 160 acres of the lands of the Creek Nation. At the time of such allotment, and at the times the various alleged deeds and leases, hereinafter mentioned were executed, he was confined in the United States penitentiary at Leavenworth, Kan., serving a sentence for the crime of larceny, imposed pursuant to a conviction in the United States Court for the Western District of Indian Territory. The land in question is located in what is now known as the "Glenn Pool District," which first began to attract attention as an oil field in 1905 or the early part of 1906, and has since developed into one of the richest fields in the state of Oklahoma.

By an act of Congress, entitled "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes" (Act June 30, 1902, c. 1323, §§ 16, 17, 32 Stat. 503, 504), it was provided:

"Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. \* \* \*

"Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is re-enacted to read as follows:

"Creek citizens may rent their allotments, for strictly nonmineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

This agreement was ratified by the Creek Council on July 26, 1902. The President's proclamation was issued August 8, 1902. It will therefore be seen that the five-year restriction period imposed by the statute did not expire until July 26, or August 8, 1907, accordingly as the approval of the agreement provided for in the acts shall be considered as of the date of the ratification of the agreement by the Creek Council or the date of the President's proclamation.

By the Indian appropriation act, approved April 21, 1904 (Act April 21, 1904, c. 1402, 33 Stat. 204), Congress further provided that:

"All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."

The Creek Nation, being one of the Five Civilized Tribes, comes within the provisions of the act just quoted.

Out of his said allotment, the complainant, Moore, selected as his homestead the southwest quarter of the northeast quarter of section 8, township 17 N., range 12 E., in the Indian Territory, for which patent was executed to him by the Creek Nation, through its principal chief, on May 14, 1906, and approved by the Secretary of the Interior on June 8th of the same year. On the same dates, respectively, there was likewise executed and approved a patent conveying to him, as his surplus allotment, the remainder of the 160 acres previously selected, to wit, the west half of the northwest quarter and the southeast quarter of the northwest quarter of said section 8, containing 120 acres.

On April 12, 1906, complainant executed to Royal S. Litchfield, one of the defendants herein, an oil and gas mining lease covering the homestead, and that portion of his surplus allotment described as the west half of the northwest quarter of said section 8 (which we shall designate as the west 80), in all 120 acres. This lease was executed on the form provided for use at that time pursuant to rules and regulations promulgated by the Secretary of the Interior, covering leases of Creek Indian lands, and extended for a period of 15 years; and, in consideration of the royalties and other stipulations contained, purported to demise, grant, and let to the said Litchfield, for the said term, all of the oil deposits and natural gas in or under said land, with the right to prospect therefor, and other rights usually incident to such leases. At the time of the execution of this lease, the regulations prescribed by the Secretary of the Interior provided that oil and gas leases requiring his approval, together with certain accompanying papers, should be filed with the United States Indian agent at Muskogee, and by him transmitted through the proper channels for the Secretary's approval. This lease appears to have been filed with the Indian agent on April 16, 1906, and was finally approved by Jesse E. Wilson, Assistant Secretary of the Interior, on January 9, 1907. It appears from the evidence that immediately upon the approval of said lease said Litchfield began to sink wells on the portion of the land comprising the homestead, and before the filing of this suit had expended a large sum of money upon said land, and had brought in a number of producing wells thereon. After the approval of said lease, the lessee paid to the lessor, Moore, the complainant, the sum of \$120, the bonus agreed upon, and has from time to time paid the stipulated royalties.

On June 1, 1906, the complainant, Moore, executed to the United States Loan & Trust Company an instrument styled a "lease," covering the 120 acres above described, wherein it is provided:

"That in consideration of the sum of fifty dollars, in cash, lawful money of the United States, this day in hand paid by said party of the second part to the said party of the first part, the receipt of which is hereby acknowledged, the said Zeka Moore (single) party of the first part hereby grants

unto said party of the second part, all the oil, gas, coal and asphaltum in and under the following described premises, together with the right to enter thereon at all times for the purpose of prospecting, operating, mining or drilling for oil, gas, coal and asphaltum, and to erect and maintain all buildings and structures, and lay all pipes or other means of transportation necessary for production and transportation of all oil, gas, coal or asphaltum, taken from said premises. Excepting and reserving, however, to the first party the one-tenth part of all oil produced or saved from said premises, to be delivered in the pipe lines to which said second party may connect all wells, namely:

"All that certain tract of land lying and being within the Creek Nation, and within the Indian Territory, to-wit: The west half of the north west quarter and the south west quarter of the north east quarter of section eight (8), township seventeen (17) north, range twelve (12) east. Containing 120 acres, more or less.

"To have and to hold the above premises for and during the term of fifteen years from this date and as much longer as oil, gas, coal, or asphaltum is found or produced thereon or the rental paid according to the terms of this lease, on the following conditions: \* \* \*"

On the date of its execution, this instrument was acknowledged by the said Moore before W. H. Bond, United States Commissioner for the District of Kansas. On November 19, 1906, the said loan and trust company assigned to Usher Carson all its interest under said lease. On November 20th, the said Carson assigned seven-eighths of the interest in said lease claimed by him to J. R. Sharp, one of the defendants herein; and on January 12, 1907, assigned his remaining one-eighth interest therein to J. W. Sloan, one of the defendants herein.

On July 26, 1906, the complainant, Moore, executed to the defendant Sawyer a general warranty deed to the west 80, in consideration of the sum of \$1,150. On the same date this deed was acknowledged at the United States penitentiary at Fort Leavenworth, Kan., before W. H. Bond, the United States Commissioner for the District of Kansas, and was recorded in the recording district wherein the land was situated in said Indian Territory, on August 1, 1906. On December 17, 1906, as appears from a certificate appended to said deed, said instrument was again acknowledged by said Moore, before W. H. Bond, a notary public within and for Leavenworth county, state of Kansas. Again, on January 28, 1907, the said Moore appeared before George F. Sharritt, clerk of the United States Circuit Court for the district of Kansas, and acknowledged the execution of said deed. On January 29, 1907, said deed was again recorded in the recording district in said Indian Territory wherein the land was situated.

On July 30, 1906, the defendant Fred L. Sawyer and his wife, Cora M. Sawyer, conveyed by warranty deed to defendant Royal S. Litchfield their undivided one-half interest in the land described in the last-mentioned deed, which was duly acknowledged, and on August 20, 1906, duly recorded in the proper recording district in the Indian Territory. On August 25, 1906, the defendant Litchfield and his wife, Mary H. Litchfield, reconveyed said undivided one-half interest in said land to the defendant Sawyer by warranty deed, duly acknowledged, and on March 22, 1907, recorded in the proper recording district in the Indian Territory.

On December 14, 1906, at the solicitation of W. F. Moffatt, Moore, the complainant herein, signed an instrument styled a "quitclaim deed,"

purporting to convey to one G. R. McCullough all of his right, title, interest, claim, and demand in and to the said west 80.

Thereafter, on December 28, 1906, said McCullough and his wife executed to the defendant O. M. Lancaster an instrument purporting to be a general warranty deed, conveying to said Lancaster the land described in the so-called "quitclaim deed," above referred to. This instrument was duly acknowledged, and on December 29, 1906, recorded in the recording district in Indian Territory wherein the land was situated.

As heretofore stated, at the time of the execution by said Moore of all the instruments referred to, he was a prisoner in the penitentiary, and all the transactions were had with him at the penitentiary. He had never seen the land himself, and was not at liberty to go and examine it, to ascertain its probable value, had he desired to do so. Shortly after acquiring the interest of Carson in the loan and trust company lease, the defendants Sharp & Sloan proceeded to erect a rig and drill for oil on the west 80. Thereupon, in January, 1907, defendant Sawyer instituted suit against them in the United States Court for the Indian Territory at Sapulpa, to enjoin them from interfering with his possession of said land under his warranty deed from Moore. Subsequently, by amendment filed February 4, 1907, other parties claiming interest in the land were made parties defendant, so that it became a suit by Sawyer against J. R. Sharp, J. W. Sloan, J. Usher Carson, Zeke Moore, the United States Loan & Trust Company, G. R. McCullough, O. M. Lancaster, and Royal S. Litchfield, the object of which was to establish Sawyer's title to the land and set aside and annul the instruments under which the various defendants were claiming interest adverse to his, and remove such clouds from his title. Subsequently, on April 22, 1907, Moore, the complainant, commenced his action against the defendants herein and certain others, as to whom the action has since been dismissed, to recover possession of the land, to enjoin defendants from interfering with his possession, for the appointment of a receiver pendente lite, and an accounting for oil extracted from the land. The basis for this suit as originally filed was the alleged fraud and misrepresentation practiced upon him by the defendants in the procurement of the various deeds and leases referred to. By an amendment filed later, by leave of court, he also alleged that at the time of the procurement of the Litchfield lease, the loan and trust company lease, and the Sawyer deed, he was a minor, and that he had not ratified said contracts since becoming of age, and expressly repudiated the same. Subsequently these two suits were consolidated in the present action. Amended complaint has been filed by complainant, and the various defendants have responded by answers and cross-bills.

We will first consider the question of minority, as involved in this case. The burden is upon the plaintiff to establish that, at the time of entering into said contracts, he was in fact a minor.

"The presumption of infancy is never indulged. The one who sets up infancy, either as a ground of affirmative relief or by way of defense, has the burden of proving it." *Enc. of Evidence*, vol. 7, p. 262.

"When nothing appears to the contrary, persons entering into an agreement



are presumed to be adults and competent to contract, and hence one who relies upon his infancy to defeat his act, contract, etc., has the burden of proving such infancy." 22 Cyc. 690.

"Where a party sets up infancy, and it appears at the time of the transaction sought to be avoided that he was near the age of majority, the burden is upon him to clearly show his infancy at the time of the transaction." Davis v. Coan, 14 La. 257.

I have carefully reviewed the volume of testimony offered on the question of minority, and have thoroughly considered the same, and I find that the complainant has failed to establish by a preponderance of the evidence the fact that he was a minor as alleged in his complaint. As I view the record, he has failed to discharge the burden which the law places upon him of overcoming the presumption of majority under which he labors. The testimony as to his age is largely circumstantial and very conflicting. While a negro, it appears that he has had sufficient educational advantages to enable him to read and write readily; his conduct and demeanor upon the stand impressed me as that of a person of more than the ordinary intelligence of one of his race. At various times recited in the record he made statements regarding his age, which, if true, establish his majority at the times in controversy beyond question. In arriving at this conclusion, I have not considered the testimony offered involving records of the Pension Department or records of the Dawes Commission, based upon statements appearing to have been made by others than the complainant himself.

Were the various deeds and leases secured from complainant by such misrepresentation or fraud as entitles him to the relief sought or any relief in the premises?

First in point of time is the lease to Litchfield. This, as has been stated, was taken upon a departmental form prescribed by the Secretary of the Interior, evidently upon the theory that the approval of the Secretary was necessary to its ultimate validity. It covered the homestead, consisting of 40 acres, as well as 80 acres of the surplus allotment. Clearly, as to that portion comprising the homestead the approval of the Secretary was essential. In contradistinction to departmental leases, requiring the approval of the Secretary, there is another class of leases, commonly known as "commercial leases." These are leases taken without the Secretary's approval from allottees from whose lands the restrictions upon alienation have been removed. We shall hereafter consider the question of the validity of a commercial lease as to lands, other than homesteads, of adult citizens not of Indian blood. But, however that may be, the Secretary's approval as to that portion outside of the homestead, even if unnecessary, would not in any way militate against the validity of the lease. This lease was procured through the agency of one J. B. Tomlinson, acting for Litchfield. It appears that in the spring of 1906, about the time this lease was procured, a number of oil wells were brought in on that portion of the field about two miles east of the land in controversy, which proved to be large producers, and, while no development was at that time made in the immediate vicinity of the land in controversy, its proximity to the proven field made it a desirable

venture for oil producers. Thereupon the said Tomlinson called upon the complainant at the penitentiary for the purpose of securing an oil lease from him for his client, Litchfield. After more or less parley, the complainant, some time in March, 1906, executed a lease to Litchfield for a bonus of \$120, to be paid when the lease was approved by the Indian agent, and a royalty of 10 per cent. of all oil produced, as well as a stipulated sum per acre as advance royalty pending the development of the property. The first lease having been drawn upon improper forms, a second lease was prepared on the approved departmental forms for the Creek Nation, and executed in lieu of the first lease, on April 12, 1906. Complainant says that Tomlinson first said he wanted the land for grazing purposes, but that, on the 12th, the day he finally got the lease in controversy, he said no doubt some mineral or something might be found. Tomlinson testifies that he told complainant he knew nothing about the land, had never seen it, or been in the neighborhood of it, but that Mr. Litchfield told him he was informed it was rough and not worth much for agricultural purposes; that complainant said he knew the land, and had filed upon it because he thought there would be oil under it; that finally complainant agreed to give the lease, if, after conferring with one Bradley, in whom he appeared to have confidence, it appeared to be advisable to do so; that Bradley came, and, after a conference with him, the lease was executed. Witness Smith, a guard at the penitentiary, testifies that about April 1, 1906, he was present when Tomlinson and complainant had a conversation regarding the lease, in which Tomlinson said he wanted to lease the land for grazing purposes, and that it was good for that purpose only, and that, in response to complainant's question, he said there was no oil or mineral on the land; that no lease was consummated at this time, but that, after complainant had been sent back to his work, Tomlinson told witness it was a very valuable piece of land, but that complainant did not know this, because he had never seen the land. It is clear that on April 12th, when complainant executed the lease in controversy, he knew that it was an oil lease; he could read and write, and he did read the lease over, and, from letters subsequently written, at his instance, to Tomlinson, it is clear that he quite fully understood its terms and the conditions with regard to the payments of bonus, etc. It is not clear, however, that he was fully informed as to the proximity of this land to proven oil territory, and if it appeared from the evidence that the terms of this lease at the time it was taken, as compared with similar leases on other lands in that locality, were unfair and did not secure to complainant a reasonable consideration for the lease, in view of all the conditions then existing, the court, in consideration of the manifest disadvantage under which complainant was placed, would be impelled to set it aside. But it appears that this lease was only one of a number of similar leases made at that time in this locality. It does not appear that the consideration for which this lease was given was less than that of other similar leases about that time, and there is evidence tending to show that such other leases were based upon a consideration not greatly differing from this one. Then there is this further consideration: The

law had provided that certain of these leases should not be valid unless approved by the Secretary of the Interior. At least a portion of the land included in the lease was of the character which could only be leased with the Secretary's approval. After passing through the usual channels, this lease was approved by the Assistant Secretary, which, for the purposes of this case, may be considered as of the same force as the approval of the Secretary himself. It must be presumed that this approval was not made until after a careful and impartial examination of the matter had convinced the Secretary that the consideration and terms of the lease were fair. It is in evidence that Mr. Mossman and Mr. Creager, connected with the Indian agent's office, personally visited the land and examined it for the purpose of making a report to the Secretary thereon; that the report was made, and that thereupon the lease was approved. Of course, in April 1906, it was not known whether oil would be discovered under this land or not, although its proximity to oil territory made it a desirable venture. As said in *Pickering v. Lomax*, 145 U. S. 316, 12 Sup. Ct. 860, 36 L. Ed. 716:

"The object of the proviso was not to prevent the alienation of lands in toto, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the President, before affixing his approval, satisfied himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained."

As it does not appear that at the time this lease was executed its terms were inequitable or the consideration inadequate, in view of the conditions as they then existed, and in view of its approval by the Secretary of the Interior, I find that complainant's prayer that it be canceled and set aside should be denied.

Next in point of time is the lease to the United States Loan & Trust Company, which, by the various mesne assignments heretofore recited, finally passed to the defendants Sharp & Sloan. This lease, in addition to covering the west 80, also covers the 40 acres comprising the homestead, and as to the latter tract, never having been approved by the Secretary of the Interior, is invalid, and, so far as the homestead is concerned, should be canceled. But as to the 80 acres not homestead, the question is first presented whether as to that also the approval of the Secretary was necessary, or whether, since the passage of the act of Congress of April 21, 1904, above recited, removing all restrictions upon the alienation as to adult allottees not of Indian blood, except as to homesteads, such allottees may lease their surplus lands without the Secretary's approval. The contention of counsel for Sharp & Sloan that this was a conveyance in fee of the oil in place, and therefore an alienation, has not been overlooked. It is true that in the case of *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213, involving a Kansas contract, the Circuit Court of Appeals for this circuit say that the instrument styled a "lease" that is under consideration is more in the nature of a grant in present of all the oil and gas in the lands described, following decisions of the Supreme Court of that state, but also add that, because of the designation given to the instrument by the parties, it will be treated as a lease. The instrument here

considered is termed a "lease," has a definite term of 15 years, and provides for an annual royalty or rental. The concluding paragraph in the instrument is as follows:

"It is further expressly agreed between all the parties hereto that the party of the second part shall have the right to hold said lease for the term above mentioned if said rental is promptly paid when due; and the said sum of fifty dollars, this day received by the said party of the first part from the said party of the second part, is the consideration for the right of the party of the second part to pay said rental and hold said lease during said term or until said development or developments as above provided are completed."

Applying to this instrument the ordinary rules of construction, and considering all its parts with a view to harmonizing them and arriving at the real intention of the parties, it is, in my opinion, simply a lease, the \$50 mentioned being a bonus paid or agreed to be paid to induce its execution.

Counsel have presented very elaborate and ingenuous briefs upon the proposition that the act of April 21, 1904, removing restrictions upon alienation, did not affect the matter of leasing, on the theory that leasing is not in any sense an alienation. The question is, What did Congress intend? and if that intent can be determined from a consideration of the legislation itself and the circumstances under which it arose, then we need not consume the time and labor incident to examining decisions of other states, where, under different circumstances, the technical terms involved have been variously construed. By section 16 of the supplemental agreement, above quoted, Congress restricted the alienation of lands for certain periods. Note the language:

"Lands allotted to citizens shall not \* \* \* be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs, \* \* \*" etc.

This is the only section of the act placing restrictions upon the disposition of their lands by allottees. Then follows section 17, providing that citizens may rent their allotments under certain terms and conditions. This express permission to rent clearly implies that but for such permission the right to rent or lease would not exist. But why would it otherwise not exist? Clearly, only because of the sweeping restriction upon alienation contained in the preceding section. By the act of April 21, 1904, this restriction as to adult allottees not of Indian blood was removed except as to homesteads. It follows that if the restrictions imposed by section 16 comprehended renting or leasing, making the permissive clause of section 17 necessary, then the repeal of section 16 by the act of April 21, 1904, gave those affected by the act the same right to lease as to otherwise alienate. Such, in my opinion, is a fair and reasonable construction of the legislation. In my opinion, freedom to rent or lease their allotments without restriction was extended to all allottees of the Five Civilized Tribes affected by the act of April 21, 1904, to the same extent as said act removed from them the restrictions upon disposition otherwise. Such is the interpretation now placed upon this act by the Secretary of the Interior, and this de-

partmental construction, while not controlling, is entitled to great weight. *Brown v. U. S.*, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; *Farrell v. U. S.*, 110 Fed. 942, 49 C. C. A. 183. The act approved May 27, 1908 (Act May 27, 1908, c. 199, 35 Stat. 312), entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes," is the last expression of Congress on the subject of alienation and leasing, and a careful study of that act confirms the conclusion that Congress in its use of the term "alienation" intended it to include the leasing of lands, treating a lease as a species of alienation. This is the construction given this act by the Supreme Court of this state, as recently decided in the case of *Eldred v. Okmulgee Loan & Trust Co.* (not yet officially reported) 98 Pac. 929, and is, I think, in accord with the history and spirit of all congressional legislation looking to the allotment of these lands in severalty and the dissolution of these tribal governments. It follows that the approval of the Secretary of the Interior was not essential as to the validity of the lease of the complainant, Moore, to the United States Loan & Trust Company, except as to that portion of the land comprising the homestead.

But has complainant established his contention that this lease should be canceled? In addition to his claim of minority, which, as we have seen, is not established, he alleges in his complaint that the consideration of \$50, claimed in the lease, was never paid, and that such sum was grossly inadequate and unconscionable; that he was informed by the agent who secured the lease that there was no oil in that part of the territory; that this agent was the agent not only of the lessee, but of Usher Carson, Sharp & Sloan, and subsequent assignees of said lease; that each of them knew of the fraud that was perpetrated upon him, and knew that the lease was obtained for a grossly inadequate consideration, and by false and fraudulent representations as to the value of the land and as to the fact of its containing oil, and that the lease was of the reasonable value of 10 per cent. royalty and a bonus of \$100,000. The evidence fails to show any collusion between Sharp & Sloan or Carson and the loan and trust company, the original lessee. Nor does the evidence show that, at the time the lease was made, the consideration named therein was so inadequate as, in my judgment, to warrant a court in canceling this instrument. It does not appear that the royalty of one-tenth, or 10 per cent., of the oil, provided for in the lease, was less than the usual royalty. Nor does the evidence show that the bonus of \$50 was at the date of the lease grossly inadequate. The evidence fails to establish that in the procurement of the lease any person representing the loan and trust company made any representations regarding the absence of oil in that part of the territory, and the further fact that an oil lease was being taken would naturally have caused such a representation to have been received with suspicion. Heckman, the agent of the lessee, who procured the lease, testifies that the consideration of \$50, recited in the instrument, was paid by crediting lessor for borrowed money. This is denied by the lessor. But he executed the instrument, so far as the evidence

shows, voluntarily, and it recites the payment of the \$50. Neither Carson nor Sloan had any intimation that it was not paid. I fail to find that the consideration of this lease was grossly inadequate, or that any fraud was practiced upon complainant in its procurement. But even if there had been such fraud practiced by the agent of the loan and trust company in the procurement of this lease as would have warranted the court in canceling it in the hands of the original lessee, still, as it does not appear that Sharp & Sloan, the assignees of said lease, had any notice whatever of such fraud or misrepresentation, or that the consideration was not paid, they hold the lease as innocent purchasers of the interest thereby conveyed, so far as any equities urged by the complainant are concerned. 23 Am. & Eng. Encl. Law (2d Ed.) p. 477, and cases cited in note. It follows that, as between the complainant and Sharp & Sloan, this lease is valid as to the west 80, but is invalid as to the homestead.

Next in point of time is the warranty deed from complainant to defendant Sawyer. This deed was procured on July 28, 1906. It appears from the evidence that, shortly after the Litchfield lease of April 12th was secured, the St. Louis Oil Company procured a lease on some land south of and cornering with the land covered by this deed. Defendant Sawyer was a copartner in this company. As the St. Louis Company was going to drill upon its property, Sawyer conceived the idea of buying from Moore, the complainant, the land covered by this deed. He testifies it was then about a mile and a half away from production; he thought it would be a good speculation if oil should be struck on the St. Louis Company's property; his partner, Litchfield, then had the lease on the property. At this time I. N. Ury was representing the complainant in an effort to secure a pardon for him, and was in constant communication with complainant regarding the matter. Sawyer testifies that Ury also represented him in the purchase of most of the land he was then buying in the Indian Territory. On July 28, 1906, Sawyer, together with his attorney, Tomlinson, and Ury went to the penitentiary to see the complainant relative to the purchase of his land. After a conference, lasting nearly all day, and in which, upon the one side, Ury, Tomlinson, and Sawyer were trying to procure the deed for a sum not exceeding \$800, and gradually raising the offer, and Moore was refusing to sell, the deed was finally procured for a consideration of \$1,150 which was then paid. It was represented to the complainant at the time by Ury that \$800 was a fair valuation for the land. Ury had seen the land, and admits that oil had been developed in that locality, and that there was more or less oil excitement; but this was not communicated to complainant. Complainant was not informed by Sawyer that he was interested in the adjoining property and expected to prospect the same. He was not informed that oil was being produced within a mile and a half of the property. Sawyer, or those acting for him, represented that the value of the land was not to exceed \$10 per acre. The evidence also strongly tends to prove that it was at the time represented to Moore that it was not thought there was any oil there, and that the

land was good only for grazing purposes. Complainant testifies that, had he known the true conditions existing at the time, he would not have made this deed. Did defendant Sawyer's failure to advise complainant of the proximity of oil production, and his purpose of sinking wells upon the adjoining property, and the representation as to the value of the land and as to what it was useful for, amount to such fraudulent concealment of the truth and misrepresentation of fact as in equity entitled the complainant to a cancellation of his deed? Fraud, in equity, includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained. In *Loewer v. Harris*, 57 Fed. 373, 6 C. C. A. 398, the court said:

"It is an elementary proposition in the law of fraud that, if one party to a contract knowingly assists in inducing the other to enter into it by leading him to believe that which he himself knows to be false, his conduct is fraudulent, and it matters not whether the result is brought about by misrepresentation or by keeping silent when duty requires a disclosure. As was said in *French v. Vining*, 102 Mass. 135, 3 Am. Rep. 440: 'Deceit may sometimes take a negative form, and there may be circumstances in which silence would have all the legal characteristics of actual misrepresentation.'"

"Where the party intentionally or by design misrepresents a material fact, or produces a false impression in order to mislead another or to entrap or cheat him, or to obtain an undue advantage of him, in either such case, there is a positive fraud in the truest sense of the term; there is an evil act with evil intent." *Smith v. Richards*, 13 Pet. 36, 10 L. Ed. 42.

"Conveyances from weak men, for small considerations, much below the value, in necessitous circumstances, and especially if obtained from men not fully cognizant of their rights, \* \* \* will be set aside." *Bunch v. Hurst*, 3 Desaus. (S. C.) 273, 5 Am. Dec. 551.

"If either party to a transaction conceals some fact which is material, which is within his own knowledge and which it is his duty to disclose, he is guilty of actual fraud." 2 *Pomeroy's Eq. Juris.* § 901.

After stating that it is not every concealment or failure to disclose material fact that amount to fraud, Mr. Pomeroy, in the section just quoted, says:

"While the decisions admit these propositions, they are agreed, on the other hand, that it is only silence which is permitted. If, in addition to the party's silence, there is any statement, even any word or act, on his part, which tends affirmatively to a suppression of the truth, to a covering up or disguising the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent."

In 20 Cyc., at page 65, it is said:

"Although a prospective purchaser has special knowledge of facts which enhance the value of the property, and the vendor is ignorant of these facts, the purchaser is, ordinarily, under no duty to disclose them to the vendor, and is not liable in an action of deceit for failure to do so. But if, in such a case, he volunteers to convey information which may influence the vendor's conduct in making the sale, he is bound to tell the whole truth, and a fraudulent misrepresentation of a material fact will render him liable. Indeed, it has been held that there is no difference in legal effect between fraudulent misrepresentation by a vendor and by a purchaser. Thus, where the vendor is ignorant of the facts, the purchaser's fraudulent misrepresentations as to the quantity of land in the tract, or as to extrinsic facts, materially

affecting the value of the property, or his false assertions as to its value and condition, where the property is distant from the place of contract, are actionable. Where the parties deal on equal footing, and the facts in question are equally open to the knowledge of the vendor, the general principles requiring reasonable investigation or inquiry are applicable. But where any relation of trust or confidence exists between the parties, so that the vendor is induced to rely in the honesty and superior knowledge of the purchaser, or where the purchaser has special knowledge of the facts while the vendor is ignorant thereof, and the purchaser's representations are positive assertions made as of his own knowledge, the vendor is justified in relying on the statements, and cannot be deemed negligent in not making further investigation."

In the case of *Wheeler v. Smith et al.*, 9 How. 55, 13 L. Ed. 44, the complainant, Wheeler, sought to have set aside an agreement he had made with the executors of his deceased uncle, Chas. Bennett, by which he had relinquished certain rights in his uncle's estate and refrained from contesting the will. He had been induced by the executors to execute the agreement. One of them, a lawyer, stated to complainant that in his opinion the will was valid, but the compromise was made to avoid litigation. The Supreme Court say:

"The complainant, it seems, had studied law, but it is manifest from the facts before us that he was but little acquainted with business, was an inefficient and dependent man, easily misled, especially by those for whose abilities and characters he entertained a profound respect. From the high character of the executors, no one can impute to them any fraudulent intent in this transaction. Looking to what they considered to be the object of the testator, they felt themselves authorized, if not bound, to effectuate his purposes by making this compromise with his heir at law. They had no personal interest beyond that which was common to the citizens of Alexandria. And we admit that they may have acted under a sense of duty, from a misconception of their power under the will.

"But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. Having the confidence expressed in the validity of the devise, they could hardly have felt themselves authorized to pay to the complainant twenty-five thousand dollars for the relinquishment of a pretended right. Nor could they have deemed it necessary, in the agreement of compromise, substantially to constitute him the donor of the munificent bequest to the town and trade of Alexandria.

"We are to judge of this compromise by what is stated in the bill, the facts being admitted by the demurrer. And it appears to us that the agreement, under the circumstances, is void. It cannot be sustained on principles which lie at the foundation of a valid contract. The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and with a proper understanding of his rights."

In this case, the complainant was confined in the penitentiary in another state; he never had seen the land, and there is no evidence that he had any definite knowledge of the conditions surrounding the land relating to its value on July 28, 1906, when the deed was procured, except as he was informed by Sawyer, Tomlinson, and Ury. The parties were not on equal footing, and the disadvantage under which the complainant labored by reason of his confinement in the penitentiary, and consequent inability to visit the land, is a circumstance which, of itself, requires that a court of equity scrutinize the transaction the more closely. Mr. Ury, whom Sawyer procured to go from Muskogee to assist him in securing the deed, is the man who, at the time, was representing complainant in



seeking a pardon, and in whom, therefore, the complainant evidently reposed special confidence. Mr. Ury's success in procuring the pardon was dependent upon complainant's providing money to pay his lawyers, and he could only procure it by disposing of his land, or a portion of it. I am convinced from the evidence that Sawyer had Ury accompany him to Leavenworth because of Ury's relations with the complainant, and his consequent usefulness in influencing complainant to sell his property; and, while complainant did not at first accept the price suggested by Ury as reasonable, it may be fairly inferred from the testimony that the complainant's need of money to secure his pardon, and the urgent solicitation of Ury that he make the sale, were largely influential in inducing him to do so. Complainant was in distress and urgently in need of money, which in the very nature of things must have been known to Sawyer. He secured Ury as his agent or intermediary to accomplish the purchase, who at the time occupied a confidential relation with the complainant. These conditions gave him a decided advantage over complainant, and it became correspondingly incumbent on him that he treat complainant with the utmost good faith.

While I do not find in the record any direct testimony as to the market value of the land on July 28, 1906, the date the deed was secured; still, considering the fact that it was within a mile and a half of producing property, that the adjoining property was considered of sufficient promise to warrant the company in which Sawyer was interested to go to the expense of sinking wells thereon, that it was then within the territory covered by the oil excitement, and that the deed which complainant was being urged to give deprived him of any participation in advances in the price of the land incident to development, and from future royalties, and from a consideration of all the evidence in the case, I am forced to the conclusion that neither \$8 nor \$10 per acre, nor the price which defendant Sawyer paid, which was something over \$14 per acre, was, under all the existing circumstances, a fair and adequate consideration for the land at the time. In section 928 of Equity Jurisprudence, Mr. Pomeroy says:

"If there is nothing but mere inadequacy of price, the case must be extreme in order to call for the interposition of equity. Where the inadequacy does not thus stand alone, but is accompanied by other inequitable incidents, the relief is much more readily granted. But even here the courts have established clearly marked limitations upon the exercise of their remedial functions, which should be carefully observed. The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not of itself a sufficient ground for relief, provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstance of oppression. When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative."

In view of this inadequacy of consideration, coupled with the representations made as to the value of the land and the uses of which it was capable, and Sawyer's silence as to the real conditions surrounding the land, and in view of all the attendant circumstances and relative position of the parties at the time, it is my opinion that the prayer of complainant that said deed be canceled and held for naught should be granted. The decree will further provide that complainant, Moore, repay to the defendant Sawyer the sum of \$1,150, the consideration originally paid, together with interest thereon at the legal rate, from the date it was paid, which amount shall be made a lien upon the land described in said deed until fully paid.

We now come to a consideration of the quitclaim deed from the complainant to G. R. McCullough and the warranty deed from McCullough to O. M. Lancaster. I find from the evidence that the quitclaim deed referred to was secured from complainant by Moffatt, who, at the instance of McCullough, visited complainant in the penitentiary for that purpose. Upon Moffatt's first visit to complainant, he attempted to secure a warranty deed from him; complainant refused to execute a warranty deed for the reason, as stated by him, at the time, that he had already deeded the property and had nothing to deed. Moffatt then left him, but returned the next day with a quitclaim deed. This he presented to complainant, representing that it was only a paper showing that complainant had no interest in the property. Moffatt told complainant he desired such a paper for use in some litigation instituted or to be instituted regarding the land. Complainant relied upon this statement and executed the quitclaim deed without knowledge that it was in fact a deed, but believing that it was merely a statement such as Moffatt had represented it to be, and received from Moffatt the sum of \$120, which amount is recited in the instrument as the consideration.

I find from the evidence that at the time of the execution of this deed the land it purports to convey was worth not less than \$25,000. Within a few days after the execution of the quitclaim deed, McCullough offered the land to Lancaster for the sum of \$1,200, agreeing to make him a warranty deed therefor. Lancaster accepted the offer, and a few days later paid McCullough the sum of \$1,200 and secured from him a warranty deed. He made no examination whatever as to the title, relying solely upon McCullough's statement and the warranty deed. Lancaster at the time was interested in several properties in the Glenn Pool field, and knew of two producing wells then in existence, one with capacity of about 200 barrels and the other with capacity of about 1,200 barrels per day, both within a radius of  $1\frac{1}{2}$  or 2 miles from this property. In view of this state of affairs, is complainant entitled to a cancellation of the deeds to McCullough and Lancaster?

In section 918 of volume 2, Pomeroy's Equity Jurisprudence, the author says:

"The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. 'A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud,

but, to use Lord Cottenham's language, from his children and his children's children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud.' There is one limitation: If the property which was acquired by the fraud has come by transfer into the hands of a bona fide purchaser for a valuable consideration and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed, and the remedy of the defrauded party, with respect to the property itself, is gone; his only relief must be personal against those who committed the fraud. To this limitation there is, however, an exception, where the general rule giving relief applies even as against a bona fide purchaser. Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment which is void, as where he was procured to execute it by the fraudulent representation and under the conviction that it was entirely a different instrument, or where it was fraudulently executed in his name without any authority, express or implied, or where, after being executed by him for one purpose, it was fraudulently altered without his knowledge or authority, so as to include the property, or where it was a forgery, and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property, by means of such transfer, comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy. Equity will relieve by cancelling the fraudulent apparent transfer, and by compelling a reconveyance or reassignment, even as against the holder who is innocent of wrong. The doctrines of equitable estoppel and of bona fide purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority."

In the light of this well-recognized authority applied to the foregoing facts, I am clearly of the opinion that these instruments should be canceled, even though it were made to appear that Lancaster was a bona fide purchaser for a valuable consideration, without notice. The evidence, to my mind, clearly establishes that the complainant was induced to execute the quitclaim deed by misrepresentation on the part of Moffatt amounting to fraud, and under the conviction that it was an entirely different instrument from what it purports to be upon its face; that he did not intend thereby to convey any interest in the land, and, under the circumstances of this case, did not do so. This is borne out by the complainant's testimony and that of witness Fisher, clerk at the prison and a disinterested party. Moffatt was acting for McCullough, and whatever he did in the procurement of the deed affects it as though done by McCullough himself. *Stackpole v. Hancock*, 40 Fla. 362, 24 South. 914, 45 L. R. A. 814.

But can the defendant Lancaster be said to be a bona fide purchaser for a valuable consideration, without notice? As a man of ordinary intelligence, in view of the familiarity he is shown to have had with the properties in the Glenn Pool and their values, the very fact that the fee-simple title to this 80 acres could be secured for even \$1,200 was sufficient to arrest his attention. Even the slightest examination into the title, along the line which would most naturally suggest itself to him, would have at once disclosed to him the quitclaim deed upon which his grantor relied, wherein would have been recited the absurd and grossly inadequate consideration of \$120, a sum so small as to shock the conscience of any man having his knowledge of the existing conditions. In *Simmons Creek Coal Co. v. Doran*, 142 U. S. 437, 12 Sup. Ct. 246, 35 L. Ed. 1063, the Supreme Court quote approvingly from the Virginia Court of Appeals as follows:

"Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care and make due inquiries. He is bound not only by actual, but also by constructive, notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice."

In view, then of these things of which he was bound to take notice, in what attitude does the law place defendant Lancaster under the circumstances of this case. The rule is well stated in 23 Am. & Eng. Encl. of Law (2d Ed.) p. 495, as follows:

"It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof, and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed."

He is offered property worth \$25,000 for the sum of \$1,200. His grantor's title is evidenced by what the parties to the instrument were pleased to term a quitclaim deed, reciting a consideration of \$120. A derrick for the sinking of a well is already erected upon the property or nearing completion; within a mile and a half or two miles are several producing wells, one with a capacity of 1,200 barrels per day. No one, in my judgment, who will impartially consider the evidence can escape the conclusion that if, as Mr. Lancaster claims, he was ignorant of all these things, it was because he shut his eyes and his ears to information which, had he exercised the diligence of a man of ordinary prudence, would have been imparted to him, and which information would have conducted him to a full knowledge of the complainant's equities in this case. If so, then he is charged with such knowledge, and cannot be heard to say that he is a bona fide purchaser without notice. The manifest inadequacy of consideration, both in the deed from Moore to McCullough and that executed by McCullough to him, was sufficient to put Lancaster upon inquiry.

"To constitute good faith, there must be absence, not alone of participation in the fraud, or collusion with the vendee, but also of the knowledge or even notice of the fraud, or of facts and circumstances calculated to put an ordinarily prudent business man on inquiry, so that he would ascertain the truth." *Wafer v. Harvey County Bank*, 46 Kan. 597, 26 Pac. 1032.

In the case of *Smith v. Phillips*, 9 Okl. 304, 60 Pac. 119, in discussing the question of the inadequacy of the consideration involved in that case, the Supreme Court of Oklahoma say:

"Phillips thereafter took a deed from Evans therefor, the consideration of which is stated to be two hundred and fifty dollars; \* \* \* the deed from Evans to Phillips including not only the south portion of lot 3, for which the evidence shows that H. E. Smith had paid a thousand dollars, but also the whole of lot 1, for only a part (less than half) of which Johanna Smith had in the previous year paid to Evans three hundred and fifty dollars. The gross disparity which the face of the deed shows that Evans offered and

sold a portion of his property for to Phillips is sufficient to upset any theory that Phillips was a bona fide purchaser."

Mr. Pomeroy, in his work on Equity Jurisprudence (volume 2, § 600), says:

"What facts are sufficient to put the party upon an inquiry, so that he may thereby be charged with the actual notice inferred from circumstantial evidence? Among the facts to which as evidence such force has been attributed are: Close relationship, personal intimacy, or business connections existing between the purchaser and the party with whom he is dealing or between him and the holder of the adverse claim; great inadequacy of the price, which might arouse the purchaser's suspicion and put him upon inquiry as to the reasons of selling the property at less than its apparent value; the sight or knowledge of visible matter or objects upon or connected with the subject-matter which might reasonably suggest the existence of some easement or other similar right."

In the case of *American Emigrant Company v. County of Wright*, 97 U. S. 339, 24 L. Ed. 912, the Supreme Court thus refer to the inadequacy of consideration involved in that case:

"The emigrant company secures about six thousand acres of land of the value of \$1.25 per acre and \$981 in cash. Over \$8,000 for the vague promise of doing \$500 worth of public improvements. The very inadequacy of the consideration is enough to throw the strongest suspicion on the fairness of the transaction."

Each case of this character must be determined by its own peculiar circumstances. The complainant in this case was not on an equal footing with persons dealing with him, but labored under such a manifest disadvantage that a court of equity may well scrutinize closely the transactions involved. The mere statement of the circumstances known, or which should have been known, to Lancaster when he purchased this land, forces the conclusion that they were sufficient to have put an ordinarily prudent man upon inquiry, and that the inquiry, if followed with reasonable diligence, would have led to a discovery of the defects in the title and the equitable rights of the complainant.

The consideration mentioned in the quitclaim deed upon which his grantor, McCullough, relied, was so grossly inadequate as to furnish satisfactory and decisive evidence of fraud. *Pom. Equity Jurisprudence*, § 927. Even the \$1,200 paid by him was so much less than the evidence shows the value of the property to have been that its inadequacy is at once apparent.

I have not overlooked counsel's contention that the instrument termed a quitclaim deed is in fact more than a quitclaim. But however this may be, regardless of the exact character of the instrument, I find the other circumstances already recited entirely inconsistent with good faith and lack of notice on the part of Lancaster. He cannot, therefore, claim the rights of a bona fide purchaser. The prayer of the complainant, that the quitclaim deed to McCullough and the warranty deed to Lancaster be canceled, is granted, and a decree will be rendered accordingly. The decree will provide, however, that complainant pay said McCullough the sum of \$120, received by him at the time of the execution of the instrument purporting to be a quitclaim deed, and interest at the legal

rate from date it was received by him, which amount shall become a lien upon the land described in said instrument until fully paid.

This brings us to a consideration of the relative rights of Litchfield and Sharp & Sloan, under their respective leases. The Litchfield lease is prior, in point of time, to the trust company lease, held by Sharp & Sloan, the former having been executed on April 12, and the latter on June 1, 1906.

It is immaterial that the Litchfield lease was not recorded in the recording district where the land was located prior to the assignment of the trust company lease to Sharp & Sloan, because the evidence is clear that, at the time they secured the trust company lease, Sloan, who, as the evidence shows, was acting for himself and Sharp and others at that time interested, knew that the lease to Litchfield had been executed and lodged with the Indian agent for transmission to the Secretary of the Interior for his approval. Therefore Sharp & Sloan had actual notice of the Litchfield lease. The evidence shows that the officials of the loan and trust company and Carson also knew of this lease. But they contend that advices which they received from the Indian agent's office, relative to the cancellation of Litchfield's lease, were such as to justify them in assuming that Litchfield had abandoned the same, and that it had been canceled. It appears that the firm of Zevely, Givens & Smith, attorneys at Muskogee, represented the firm of Litchfield & Sawyer. It also appears that the correspondence and business generally of the firm, and, to an extent, the individual business of Litchfield, was carried on by Sawyer, who, it appears, was in charge of their office at Independence, Kan. It further appears that Mr. McCaughtry, from the office of Zevely, Givens & Smith, early in November, 1906, came to the Indian agent's office, and requested that the lease be canceled, and on November 14, 1906, the Indian agent transmitted the lease to the Interior Department, advising that the parties desired it canceled, and so recommended.

The lease was never actually canceled, for, on December 3d following, upon advice of Sawyer that the request for cancellation had been in error, the Indian agent wired the department requesting the return of the lease, which was done. The transfer to Sharp was dated November 20th, which was between the date the original lease was forwarded for cancellation and the date of the request that it be returned. Sloan says he was acting upon information from the Indian agent's office. The records in the office show that the lease had been forwarded for cancellation. It appears that, having been lodged with the Indian agent for transmission to the Secretary of the Interior, the practice was not to withdraw the lease, but to forward it to the department for disapproval, as the Indian agent's letter of transmissal indicates. While the letter states that both the lessor and the lessee requested its cancellation, there is no evidence other than the letter itself that Moore, the lessor, ever made such a request. Sawyer testifies that, at the suggestion of Litchfield, he inquired about the lease while in Muskogee, early in December, and, discovering that it had been forwarded for cancellation, advised the

Indian agent that it was an error. It was then the telegram of December 3d was sent to the department, recalling the lease and advising of the error.

Under these circumstances, can Sloan be said to have been a bona fide purchaser, without actual notice? I think not. He knew of the existence of the lease. He made no inquiry of Litchfield, but relied entirely upon the information he secured from the Indian agent's office. The records there show, not that the lease had been canceled, but that it had been forwarded for cancellation. As to whether it would be canceled, depended upon the action of the Secretary. If, as Sawyer testifies, the request for cancellation was in error, then an inquiry directed to Litchfield would immediately have appraised Sloan of this fact. Under all the circumstances, I do not find that he exercised that diligence which the law requires of one put upon notice of a prior conveyance to determine the facts relating thereto. He, therefore, took the interest in the trust company lease conveyed to him subject to the rights of Litchfield. He states in his testimony that he made this deal with Carson after a conference with Sharp, and, in fact, made it for himself and Sharp and others interested, and Sharp is therefore bound by whatever notice or knowledge Sloan had. The remaining one-eighth interest transferred by Carson to Sharp, in January following, was transferred after the error had been corrected in the Indian agent's office, and the Litchfield lease, together with all accompanying papers, forwarded for approval; and it therefore follows that this one-eighth interest was secured at least with no less notice or knowledge of Litchfield's rights than that which attaches to the seven-eighths interest conveyed in November previous. Nor do I consider there is any merit in the contention that the Litchfield lease was a unilateral contract, from which Litchfield or complainant could withdraw at any time, and that the subsequent execution of the lease to the trust company by complainant amounted to a repudiation by him of the former lease. On April 16th, four days after it was executed, Litchfield lodged his lease with the Indian agent for the Secretary's approval. By agreement with complainant he had deposited the bonus agreed upon with the officials of the prison, to be paid when the lease should be approved. Whether the approval of the Secretary as to the land not homestead was necessary or not, the parties had made his approval an element in the contract, and, pending his action in the matter, the mere execution by complainant of the lease to the trust company could not affect his prior contract with Litchfield.

It therefore follows that Sharp & Sloan took the trust company lease with notice of and subject to the prior rights of the Litchfield lease, and while, as between themselves and the complainant Moore, the lease is held to be valid as to the west 80, they cannot exercise any rights under it, so far as oil and gas are concerned, during the term of the Litchfield lease, or until such time as it shall cease to be a valid and subsisting instrument. As to the 40 acres

comprising the homestead, the lease is invalid, and should be canceled so far as it affects that property.

A number of other questions were raised in the course of the trial, and urged by counsel in argument and by briefs, which it is now unnecessary to decide.

Let decree be entered in accordance with this opinion.

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THE KENNEBEC.

(District Court, S. D. New York. October 23, 1908.)

**COLLISION (§ 85\*)—EVIDENCE—FOG.**

Collision in a fog in Boston Harbor between the Steamship Kennebec, inward bound, and a scow lying alongside of a dredge, engaged in improving the North Channel. The steamship held in fault for excessive speed and the dredge and scow for failing to sound fog signals and to hear the approach of the steamship.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 85.\*

Collision rules, speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

(Syllabus by the Judge.)

Wing, Putnam & Burlingham and Edward S. Dodge, for libellant.  
Carver & Blodgett, for claimant.

ADAMS, District Judge. This action was brought by the Daly & Hannan Dredging Company, owner of Dredge No. 6 and Scow No. 2, against the Steamship Kennebec, to recover the damages, said to be \$9,000, sustained through a collision between her and the Scow No. 2, lying alongside of Dredge No. 6, in Boston Harbor on the 29th day of July, 1905.

The allegations of the libel are that the No. 6 was properly and lawfully stationed at a point about one mile distant E. by N.  $\frac{1}{4}$  N. from Deer Island Light and about  $\frac{3}{8}$  of a mile S. W.  $\frac{3}{4}$  W. from Great Faun Bar Bell Buoy, engaged in the construction and improvement of what is called the North Channel, leading from President Roads eastward to Broad Sound, Boston Harbor, (an approach not then opened to navigation of large vessels) where the libellant was lawfully engaged in dredging under contract with the United States; that No. 6 was held in position by spuds at each corner and was heading about N. E.; that Scow No. 2 was made fast on the starboard side of No. 6, and other dredges and vessels were also engaged in the same work; that the wind was light and the tide not quite half flood; that the weather was foggy but objects could be seen quite plainly at a distance of from 400 to 500 feet. It is further alleged that about 5 A. M. of said day the Kennebec came up the channel, inward bound for Boston, and struck the No. 2 on the starboard side near the bow at about right angles, breaking her planks etc., and cutting into her deck about 3 feet; that the forward port spud of No. 6 was broken; that the steamer swung around along the starboard side of No. 2 and took off one

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



strake of about 75 feet and then proceeded on her way. It is further alleged that since July 25, 1905, the No. 6 has been at work in substantially the same place in which she was at the time of the collision; that the steamer has been employed in making daily trips to and from the coast of Maine; that owing to the fact that the dredging operations in the North Channel were unfinished, other vessels of the size and class of the Kennebec bound from President Roads to Broad Sound and vice versa, were using the South Channel; that the Kennebec, however, had occasionally previous to the collision been seen passing the dredges in the North Channel. It is further alleged that the collision was not caused or contributed to by those in charge of No. 6 or No. 2, which performed all the duties incumbent upon them, but was wholly due to the negligence of those in charge of the Kennebec in that she was proceeding at an improper rate of speed in a fog, had no proper lookout, was not in charge of a competent officer, did not give any sufficient sound signals, did not avoid the No. 6 and No. 2, which were stationary and fast to the ground, was not in the proper channel, did not seasonably slow, stop and reverse before the collision and did nothing to avoid the collision.

The allegations of the answer deny that the so-called North Channel was not open to navigation of large vessels; admit that the wind was light, the tide flood and the weather foggy but deny that objects could be seen quite plainly at a distance of 400 or 500 feet; admit that on the morning of July 29, 1905, the Kennebec when coming up the channel, inward bound from Boston, struck a scow near the end; admit that the steamer had been employed in making daily trips to and from the coast of Maine and used the so-called North Channel; deny that the collision was not caused or contributed to by those in charge of No. 6 or No. 2, and in general the allegations of fault charged against the Kennebec, and requiring proof of some other matters alleged in the libel. Further answering it is alleged that the Kennebec was approaching Boston on her regular trip from Bath, Maine; that when in the vicinity of Baker's Island, she entered a thick fog which continued from that time until after the collision; that immediately upon approaching the fog the engines of the steamer were slowed down and from that time until the collision she proceeded at a reasonable rate of speed in a fog; that upon entering the fog and thereafter, she sounded fog signals regularly at intervals of at least every minute until after the collision; that the master, two pilots and the quartermaster were in the pilot-house and a lookout was properly stationed forward and so continued up to the time of the collision; that the steamer proceeded slowly and cautiously on her regular course, keeping a close lookout for sounds and vessels; that while so proceeding and when in the vicinity of Faun Bar, a dredge and scow were seen and reported by the lookout close aboard and nearly ahead; that no bell, whistle or other signal was being given upon the scow or dredge; that the engines of the steamer were immediately put full speed astern and her helm aport to try and clear the scow; that by these manœuvres the head of the steamer was thrown to starboard but she did not have time to clear and hit the scow about 4 or 5 feet from the end. It is

further alleged that if any notice by bell or otherwise had been given by those on the dredge or scow, the steamer would have had no difficulty in locating and avoiding them; that the steamer and those in charge of her were wholly without fault and did everything that could have been done to avoid a collision; that those on the dredge and scow were solely at fault for the collision in that they did not give any sound or signal or bell as required by vessels at anchor in a fog, especially in a channel, and when the steamer's whistle could or should have been heard approaching; in that they were improperly anchored or moored in an improper place.

Many witnesses were examined and a great volume of testimony taken. A great deal of this testimony related to matter not now in dispute.

The place of collision was fixed by United States engineers as being on the Eastern part of Little Faun Shoal, where there was a depth at mean low tide of about 12 feet. A few hundred feet to the southward and westward of No. 6 and No. 2 another dredge was anchored in about 15 feet of water. To the northeastward about a mile, two other dredges, known as Breyman Dredges, were anchored.

Dredge No. 6 was about 122 feet long and 40 feet wide. She had a square bow and a rounding stern. On her deck was a house of 2 stories containing the machinery and sleeping quarters of the crew. The dredging bucket, or dipper, and the long crane, or arm, by which it was held and operated, were at the bow of the dredge. She was held in position while working by 4 vertical timbers, called spuds or anchors, each 85 feet long and 3 feet square.

No. 6 had a bell on top of the lower house held by an iron frame. The bell was 8 or 10 inches in diameter at the mouth and about 12 inches high. It was rung by a cord leading down to the lower deck. She also had a steam whistle the sound of which could be heard for a half of a mile to a mile. Her machinery when working made considerable noise and the exhaust of her steam could be heard about the same distance.

The scow was 185 feet long and 40 feet wide. It was divided into 6 double pockets for holding dredged material. Each pocket was divided by a partition running athwartship, thus making 12 single pockets. At the bottom of each pocket was a gate fitted with chains and operated from the deck of the scow so that each pocket could be dumped as required.

Neither No. 6 nor No. 2 had any motive power of its own and was entirely dependent on tugs for navigation from place to place. By means of the dipper, or bucket, and of the chains operating it, however, No. 6 could, when occasion required, move forward about 10 or 12 feet.

The crew of the dredge, at the time of the collision, consisted of 2 engineers, 2 cranesmen, 2 cooks, 2 firemen, 5 deck hands and a watchman. One of the engineers was absent on the day of the collision. No. 2 had no crew, the necessary work upon her, operating the pockets and placing her, being done by the deck hands from the dredge.

The Government had been engaged for several years in straighten-

ing, widening and deepening the two channels, the North and the South, from President Roads to Broad Sound. At the time of the collision, the improvement of South Channel had been completed, and that channel was abundantly provided with buoys and elaborate range lights and was in constant use by vessels, even of the greatest draft. The improvement of the North Channel was incomplete, the natural channel being deemed difficult and dangerous for all vessels except those of light draft.

On the morning of July 29th, 1905, No. 6 and No. 2 were engaged upon improvements then being made by the Government and about 5 o'clock this collision occurred. Dredges worked in North Channel whenever it was calm and there was no motion or sea. No. 6 had been working continuously, and in substantially the same position as that in which she was placed at the time of the collision since July 25, 1905.

On the day of the collision No. 6 began work at 4 A. M. in charge of her master. There was little or no wind, and except for the noise made by the dredge the morning was quiet. About 10 minutes before the collision, she was moved forward a few feet and a signal of two blasts blown upon her whistle. About 5 minutes later No. 2 was also moved and a signal of one blast was then blown upon the whistle of No. 6.

At the time of the collision No. 6 was made fast to the bottom by her spuds. No. 2 was alongside on the dredge's starboard side and extending forward of the bow of the dredge by about  $\frac{1}{2}$  the length of the scow. The tug Charles F. Dunbar was made fast to the port quarter of the dredge. They were all heading N. E. working upon a cut running N. E. and S. W.

A few minutes before the collision, it was found that the latch which should hold closed the bottom of the bucket of No. 6 did not work properly and after the bucket had been lowered to the bottom several times and had failed to bring up a load, the bucket was swung over No. 2 and the cranesman of the dredge stepped onto the scow to make the necessary repairs to the latch. Until the bucket was thus swung over, the engines of No. 6 had been making their usual noise, audible for some distance away, probably  $\frac{1}{2}$  of a mile to a mile. This noise continued up to shortly before the collision. The watchman of No. 6 had been ringing the bell of the dredge until about 5 minutes before the collision when he left it to go into the hold to oil the machinery.

The steamer struck the scow on the starboard side, 7 to 10 feet from the bow and about at a right angle. The scow was of heavy construction but the force of the blow broke several planks on the side, 2 stringers on the inside and 4 beams, started the decking all over the forward end of the scow and the plank shear; and generally strained and started the scow all over, making a cut in her side about 3 feet deep on the deck, extending, but not of that depth, below the water line. The force of the blow also cracked the forward port spud of the dredge, which was 3x3 feet in thickness, about  $\frac{2}{3}$  across.

The steamer after striking then swung around, bringing her port side to the starboard side of the scow and as she went ahead took off the mentioned length of strake of the starboard plank shear of the

scow. The steamer then passed out of sight in the fog. She did not stay by the No. 2, nor did she, in any respect, conform, or attempt to conform, to the requirements of Act September 4, 1890, c. 875, § 1, 26 Stat. 425 (U. S. Comp. St. 1901, p. 2902), but her failure merely placed upon her the burden of showing that she was not responsible for the collision. The *Luzerne* (D. C.) 148 Fed. 133, affirmed 157 Fed. 391, 85 C. C. A. 328.

The scow began to fill with water immediately after, and in consequence of the collision and the contents of three of her pockets, which had already been filled, had to be dumped in order to save her from sinking.

The *Kennebec* was a side wheel steamer 256 feet long and 45 feet beam. On the morning of the collision she was drawing 7 feet 6 inches forward and 8 feet 6 inches aft. She had the ordinary type of beam engine and was able to run at full speed from  $10\frac{1}{2}$  to 12 knots, making from 15 to 18 revolutions of her wheels. Her pilot house was on the upper deck 35 to 40 feet from her stem. At the time of the collision the windows were properly open. She was then running on a regular route between Boston and Gardiner, Maine, leaving each port upon alternate days, so that either going to or coming from Boston, she was constantly passing through Broad Sound. Her days for leaving Boston were Tuesday, Thursday and Saturday and for leaving Gardiner, Monday, Wednesday and Friday. On Friday, July 28th, she left Gardiner at 3:37 P. M.; and Bath at 6:44 P. M. and passed out of the Kennebec River by Sequin Light at a little after 8 P. M. Fog was first encountered when she was off Baker's Island Light but it was not of great importance until she reached the North East Graves Whistling Buoy at the entrance of Broad Sound, when it became thick and remained so until after the collision. At the time when she had the buoy abeam she had her lookout stationed on the forward deck, her quartermaster was at the wheel and her first pilot was in the wheel house in charge of her navigation. Subsequently the other officers, as claimed in the answer, came into the wheel house. At the buoy her course was changed to W. by S.  $\frac{1}{2}$  S. and thereafter, until in the immediate vicinity of the dredge and scow, this course was maintained, except for a slight deviation shortly before the collision to avoid an anchored scow, from which there was an immediate return to said course. This course was not one laid down on any chart and involved a crossing of both the North Channel and the South Channel without the use of either of them in the manner indicated and intended by the Government publications with respect to navigation. With a small clearance, sufficient for safe navigation, of the whistling buoy to the northward and of the Deer Island Light to the southward, a course of W. by S.  $\frac{1}{2}$  S. would bring a vessel bound inward to the immediate vicinity of, if not directly to, the place where the scow was lying.

Until the arrival of the *Kennebec* at the Whistling Buoy, she had been running at her full speed of  $10\frac{1}{2}$  to 12 knots. At that place, or soon after passing it, the speed was reduced to about 7 knots an hour. For a little time she ran at this speed and then, it is claimed, her speed

was further reduced, while still going under one bell, by orders given from the pilot house to the engineer through the speaking tube, to turn the wheels as slowly as possible, which were observed and effected, it is claimed, a reduction to  $2\frac{1}{2}$  to 3 knots, the slowest speed she could run and preserve steerage way. It appears however, from the testimony of the first pilot, who was in charge of her navigation and from the log book kept by him, that she passed the Graves Buoy at 4:30 A. M. and that the collision occurred 25 minutes later or at 4:55 A. M. It is claimed that she made several stops during this time but it does not clearly appear that her engines were stopped more than once, and the stoppage was so short that headway was not lost to any appreciable extent. The distance from the Whistling Buoy to the place of collision was something over 3 knots, so that the average speed during this time was fully 8 knots per hour, some part of which, about a knot, was due to the flood current. When the steamer struck she was at right angles to the scow, lying N. E., and must have been heading about N. W. Her previous course had been W. by S.  $\frac{1}{2}$  S. and she swung therefore  $5\frac{1}{2}$  points, which indicates considerable headway, notwithstanding it was stated that she did not have headway enough to swing to any material extent. What the speed was immediately prior to the collision does not appear. The engines were reversed at full speed and made one or two turns back before the blow, but the steamer's headway was not materially arrested. From the foregoing and the damage done to the scow by the blow, the fact that one of the spuds of the dredge was broken, there can be little doubt that the speed was excessive, especially if the rule established in *The Umbria*, 166 U. S. 404, 417, 17 Sup. Ct. 610, 615, 41 L. Ed. 1053, is to be followed. It was decided April 5, 1897. It was said:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill, until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway."

The *Kennebec* urges that the *Umbria* rule is unreasonable and should not be applied, as it has not been followed in all cases, citing particularly *La Bourgogne*, 86 Fed. 475, 30 C. C. A. 203, decided April 7, 1898, and *The Benjamin A. Van Brunt*, 98 Fed. 131, 38 C. C. A. 668, decided November 8, 1899. In the former the speed of *La Bourgogne* was not particularly in question and the *Ailsa* was held wholly in fault because she anchored outside of the anchorage limits. In *The Van Brunt*, the *Pilgrim* which collided with her was excused because it was held that she was exercising proper precautions though she was still under way and the *Van Brunt* solely in fault for anchoring in an improper place. *The H. F. Dimock*, 77 Fed. 226, 23 C. C. A. 123, however, was referred to with approval. It was there held that a steamer navigating in a dense fog must slow down to such speed as is consistent with the safety of other vessels using the channel, and if such speed does not afford sufficient steerage way, she should come

to anchor. That is practically the same as the requirement of the Umbria, and if applied to this case, it shows that the Kennebec was proceeding at too great a rate of speed. It is not contended by her that she was able to bring herself to a standstill before the collision. On the contrary, it is urged that although she was proceeding at a very slow rate, nevertheless the collision occurred, unavoidably as far as she was concerned, because she could not see the scow in time to stop her headway. There was a current of about seven-tenths of a knot an hour running somewhat across the channel but generally toward Boston, which accelerated the steamer's progress beyond the speed given by her engine. It is not necessary to determine the rate of speed the steamer was making. It is sufficient for the purpose of establishing her fault to find that she was running at too high a rate of speed for safety under the circumstances. The fog was not so dense but that the dredge lying to the S. W. about 400 feet could be seen and the Scow No. 2 could have been and doubtless was seen that distance.

It is also urged against the Kennebec that she had no competent nor proper lookout. It is true that the lookout had been continuously on duty from about 8 o'clock the previous evening, excepting when opposite Boon Island, he went below for 7 or 8 minutes to get some coffee. He then returned to lookout duty and remained there until about 4 o'clock in the morning, when he was relieved for a few minutes by the 1st and 2nd mates who took positions 12 or 15 feet from the stem and remained there. The lookout returned shortly and took a position from 4 to 8 feet behind these men but his faculty for observation was not diminished, and, although he must have been weary from his long vigil, he was the first to see the scow. When aided by the officers he was fully competent to perform his duties.

It is urged that the noise of a dredge working, which was heard on the steamer, was the No. 6, but the testimony of the steamer shows that the dredge noise they heard was from the Breyman dredges mentioned above, which the steamer passed on her starboard. Upon the whole, I think there was no proper criticism to be made upon the steamer with respect to lookout.

It is also urged against the Kennebec that she had no competent officer on deck. It is said of the master that his incompetency appears:

(a) In permitting the faulty stationing and disposition of the lookout and allowing the lookout mentioned above, called "bow watchman" to remain on duty for more than 8 continuous hours—4 times the usual length of a lookout's watch—until he became unfit for the performance of his duties.

It seems to be true that the lookout was on duty too long but he seemed able to withstand the strain and perform his duty.

(b) In permitting the excessive speed of the steamer. This is a just criticism.

(c) In taking a course from Graves Whistling Buoy which did not follow any of the usual or established channels.

The steamer was not bound to follow either of the channels if she could find enough navigable water elsewhere.

(d) In that personally he was an unfit person for command. "He testified before the court; and his inaccuracy, incoherency, and wild and random methods of answering questions, and pretending to point out locations on the chart, is spread upon the record, and can not fail to have impressed the court."

Capt. Colby impressed me on the trial as being an honest witness and a capable navigator, though not one using scientific methods. I do not consider that his estimates of the speed of his vessel were reliable; but apart from his statements in that particular, I believe that he told the truth substantially and intelligently, considering the stress he was under from a minute and able cross examination.

Fault on the part of the steamer being established it remains to be determined whether the scow was also in fault.

The principal allegation against her is the fact that neither she nor the dredge sounded any bell or made any other noise to warn the steamer of her presence. It is conceded that they did not make any fog signal, but contended that it was not required by law. The argument is:

"The preamble of the Inland Rules (U. S. Comp. St. 1901, p. 2876)—which are the rules applicable to this case—provides that 'the following regulations \* \* \* shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States,' etc.

The Preliminary Definitions (page 2876) of the act say: 'The word "Steam-vessel" shall include any vessel propelled by machinery.'

Under Sound Signals for Fog, and so forth (page 2880), is found: 'Art. 15, 2. A steam-vessel shall be provided with \* \* \* an efficient bell.'

'A sailing-vessel of twenty tons gross tonnage or upward shall be provided with a similar \* \* \* bell.'

'In fog, mist, \* \* \* whether by day or night, the signals described in this article shall be used as follows, namely:'

'(d) A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds.'

'(f) All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, shall sound a blast of the fog-horn, or equivalent signal, at intervals of not more than one minute.'

The above are, we submit, all of the provisions of the Inland Rules applicable upon this particular question.

(a) The Statute having so specifically provided, in article 15 (2), that a steam vessel, \* \* \* and a sailing vessel of twenty tons gross tonnage or upward shall be provided with a bell, it goes without saying that the Statute intends that vessels not falling within the two classes so designated shall not be provided with a bell.

(b) Accordingly, when, in (d), the Statute provides that 'a vessel when at anchor, shall \* \* \* ring the bell,' it can only mean that such vessels as the Statute has required to be provided with a bell shall ring it.

Other vessels, falling within the classes mentioned in (f) 'shall sound a blast of the fog-horn, or equivalent signal.'

(c) It is entirely clear that nothing in the Statute requires a Steam Dredge, or Scow,—neither of them having any motive power, \* \* \* or not 'navigating' at all, or not even navigating by any of the means specified in (f),—to be provided with a bell.

(d) It is, also, plain, as matter of construction of the Statute in which the Inland Rules are contained, that none of the provisions (cited above), can be said to require such a Steam Dredge, or Scow, to ring a bell, or give any other signal in fog.

It is hardly worthy of remark that the consideration, urged at argument, to the effect that the fact that Dredge No. 6 had a bell, has any tendency to

show her obligation to ring it, in fog, is wholly wide of the mark. There are, obviously, many other uses for a bell on a Dredge.

(e) It is submitted that the present is an instance,—(of which there are several),—of clear, possibly unintentional omission, and oversight in the drawing of the Statute.

(f) Again, it is exceedingly questionable whether,—apart from the considerations urged above,—the expression 'A vessel when at anchor,' in (d), could be reasonably held applicable to a Dredge held, and fixed, rigidly, to the bottom by spuds, as was Dredge No. 6, on the morning of the collision."

Notwithstanding the argument, I think it is clear that the libellant's vessels here were required to use the ordinary precautions to warn other vessels of their presence. It was distinctly held by Judge Dodge—In *re Eastern Dredging Co.* (D. C.) 138 Fed. 942—that a scow is a vessel to be dealt with as such by persons concerned with maritime affairs. Dredges have, I think, been uniformly treated as vessels subject to the ordinary rules relating to navigation—The *City of Birmingham*, 138 Fed. 555, 71 C. C. A. 115, for example—and it would be anomalous if they could occupy navigable waters in a fog without giving other vessels, which were justified in navigating there, warning of their presence. That they were considered as being within a rule requiring the ringing of a bell is shown to some extent by the fact that this dredge had a bell. It is urged that the bell may have been intended for other purposes. That may be, but it was not proved to have been so, and it is more than probable that it was supplied to be used for fog conditions. Whether it was so intended is immaterial, however, because it was the duty of a dredge to be supplied with a bell and to ring it at least every minute. The master of the dredge testified that it was customary to use the bell in a fog.

It is urged, however, that the dredge was making the other sounds mentioned above.

Assuming that these sounds were made, it is not at all clear that any reliance can be placed upon the estimate of time. That the sounds were not heard in time to be of any use to the *Kennebec*, though she had a good lookout, is reasonably certain. It is also established that the *Kennebec* was continually sounding fog signals which were not heard on the dredge until immediately before the collision and then nothing was done to warn the *Kennebec*.

I think, therefore, that the dredge and scow also committed faults contributory to the collision.

There will be a decree for the libellant for half damages, with an order of reference.

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#### THE PATIENCE.

MORSE & ROGERS et al. v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. New York. August 5, 1908.)

#### 1. COLLISION (§ 85\*)—OVERTAKING STEAMER AND TOW—FOG.

A collision which occurred at night in a fog southeast of the Pollock Rip Shoals lightship off the coast of Massachusetts between the last of three tows and an overtaking steamer which ran into the towline after passing the tow *held* due solely to the fault of the steamer either in fail-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



ing to locate the tow or in failing to keep away, it appearing that the tows all carried proper lights and that the steamer's lights were seen from the second and third tows before the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 169; Dec. Dig. § 85.\*]

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

2. COLLISION (§ 61\*)—NAVIGATING WITH LONG TOW.

The fact that a tug with tows at sea was navigating at night with unnecessarily long towing hawsers does not render her in fault for a collision, unless the length of the tow caused or was a factor in causing it.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. § 61.\*]

3. COLLISION (§ 82\*)—NAVIGATING IN FOG—SPEED.

A speed of from four to six knots on the part of a tug with tows navigating at sea at night in a fog is not ordinarily negligent.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 82.\*]

Collision rules—speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

In Admiralty.

Wing, Putnam & Burlingham (Henry E. Mattison, of counsel), for Joy S. S. Co.

Carpenter, Park & Symmers (Samuel Park and James K. Symmers, of counsel), for Walter J. Tice.

Wallace, Butler & Brown (Fredk. M. Brown and Howard S. Harrington, of counsel), for cargo owners.

Lord, Day & Lord (Charles J. Fay, of counsel), for claimants Kendall and Bridges.

Armstrong, Brown & Boland (Pierre M. Brown, of counsel), for Philadelphia & R. Ry. Co.

CHATFIELD, District Judge. The present case is based upon a petition filed by the owner of an ocean-going steam tug, the *Patience*, asking for a limitation of the liability of the tug, in order to contest that liability for damages, loss, etc., arising from a collision which occurred on the 7th of May, 1905, at a few minutes after half past 1 in the morning, in the waters to the south and east of the Pollock Rip Shoals lightship, which is stationed about four miles off the coast of Massachusetts, southeast of Cape Cod, and north of the shallow waters between Nantucket Sound and the Atlantic Ocean. As shown by the government chart put in evidence, a passage called the "Pollock Rip Slue" extends in a direction approximately southwest by south from a point about two miles southwest of the lightship, and to the south of this Pollock Rip Slue is located the Pollock Rip lightship. The slue is some two miles in length, and is comparatively narrow, while near the Pollock Rip lightship the channel makes its way by several turns between shoals of extremely shallow water.

Upon the night in question the *Patience*, a seagoing tug about 125 feet in length, had left Boston for New York, having in tow three barges, none of which at the time was loaded, and which were, named in the order in which they were towed, the *Franklin*, the *Indian Ridge*,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the Glendower. The testimony shows that the hawsers between the tug and the Franklin, and between the Franklin and the Indian Ridge, were about 150 fathoms in length. The hawser between the Indian Ridge and the Glendower was perhaps a little shorter, but approximately the same, at any rate over 125 fathoms. Early in the evening, or around half past 8, when the Patience and her tow were not far from Cape Cod, a heavy fog set in, and instructions were given to the engineer of the tug to reduce the steam pressure to 135 pounds, and the tow proceeded thus to a point off Chatham, Mass., and some four or five miles from the Pollock Rip Shoals lightship. At this point the speed of the ship was slowed to one bell, and the statement of the captain to the United States local inspectors, made three days after the accident, as well as the testimony of the engineer and of the captain on the trial, would indicate that the Patience, with the tow, the barges being light, was proceeding at a rate through the water of from four to five knots, the tide was ebb, setting in the direction in which the towing was proceeding, and running with the strength of from one to one and a half knots. The Patience was sounding ordinary steam fog whistles, of one long and two short blasts, at intervals of about two minutes, and reached a point about half a mile to the eastward of the Pollock Rip Shoals lightship at 1:30 a. m. Before reaching the lightship the whistles of one or two steamers and of another tow were heard, but these vessels passed by, on one side or the other, some time before the lightship was reached. The testimony of the witnesses shows satisfactorily that these boats all went out of hearing, and there is nothing to connect them with subsequent events. Each of the two forward barges in the tow had two white stern lights, as well as the red and green side lights, and the captain of the Glendower, for a short time previous to half past 1, was giving fog signals from an automatic horn on the bow of his vessel. The Glendower had one white stern light and red and green side lights. The steamer Aransas, of the Joy Steamship Line, left Boston the same evening for New York, and proceeded at full speed until she ran into the same fog, at about 8:30 p. m. The Aransas reached Cape Cod about 10:30, changed her course to south-southeast, then to south by west, and between half past 12 and 1 o'clock reached a point opposite Chatham lightship.

In the statement made to the inspectors three days after the collision, the captain fixes the time of passing Chatham at 12:55, while upon the trial he fixed it at 12:30 a. m. The testimony of the other witnesses would seem to indicate that the Aransas reached a point opposite Chatham in the neighborhood of 12:50 or 12:55 a. m. At this point her engines were stopped, and she then ran under one bell to a point off the Pollock Rip Shoals lightship, where, having located the whistle on the lightship, her course was changed to south-southwest toward the Pollock Rip Slue.

The witnesses from the Aransas testified to the hearing of various signals from passing vessels during the fog, which apparently did not decrease in density, but these vessels had all passed, and no further signal was heard until just before passing up Pollock Rip Shoals light-

ship, when several of the witnesses on the Aransas testify that they heard the signal of the Glendower, blowing one long and two short. This signal ceased about 10 minutes before the accident.

It will be remembered that the Glendower was some 2,700 feet from the Patience, and the captain of the Glendower testifies that he heard the whistles of the Aransas coming on an approximately parallel course, that he blew his whistles until the Aransas had reached a point forward of his beam, and then, considering that she had passed by, he went back toward the stern of his vessel, and to the cabin to see the compass.

The witnesses upon the Aransas do not seem to have located the fog signals of the Patience, and if they heard them no particular attention was paid to them; but the signals of which notice was being taken were apparently those blown by the captain of the Glendower. None of the witnesses on board the Patience heard the signals on board the Aransas, and it was impossible for the Patience to see through the fog the lights of any of the barges beyond that nearest to the Patience herself. This places the distance at which a light could be seen at about 900 feet, and the captains of the various barges testify that they could see the barges next to them, but no others.

The testimony of the witnesses on the Aransas is to the effect that they steadily held their course, after the fog signals which had been heard from the Glendower ceased, that suddenly white stern lights were seen ahead, followed almost immediately by a red light a few points off the starboard bow, and a green light also to starboard, followed in a few moments by a blow amidships on the starboard side of the Aransas, from which she sank in about 15 minutes.

The testimony of the witnesses is unanimous as to the place in which the Aransas was struck, and that the bow of the Glendower crushed in the bulkhead and upper works of the Aransas to such an extent that she proceeded to fill immediately. All the passengers were saved, with the exception of one woman, who disappeared, although fitted with a life-preserver and assisted toward one of the boats.

The testimony of the captain of the Glendower is that his hawser was partially submerged, and that the Glendower was following directly in the wake of the other barges, which were following in a straight line the course of the Patience; that there was no veering or change of course, and that the stem of the Aransas struck the hawser some 300 or 400 feet from the bow of the Glendower. The captain of the Glendower rushed to the bow of his vessel, cut the hawser with an ax, and before any change of course could be made the vessels came together in the manner aforesaid. The helmsman of the Glendower felt the swerve and strain on his hawser, which he says was jerked violently to starboard. The Glendower started ahead rapidly, he met the swerve with his helm, and then the hawser parted, and in a short time the collision occurred.

There is some testimony by the mate of the Aransas that just prior to the collision an order was given to port the helm of the Aransas, but there is nothing to indicate the degree or rate at which the Aransas responded to the helm. There is a conflict of testimony as to whether

the Aransas, under this ported helm, had steerageway or was backing, inasmuch as, just before the signal to port was given, the engines were directed to be reversed. If the Aransas had been going astern at the time of porting the helm, the testimony is that the bow would be thrown to port, and inasmuch as she continued across the bow of the Glendower, and apparently to starboard, it seems to be apparent that the reversing of her engines had not yet stopped her headway, and that the throwing of her helm to port brought the steamer further across the Glendower's bow. The efforts of the Glendower's steersman to overcome the effect of the blow on the hawser also continued, in all probability, and threw the head of the Glendower to port.

The witnesses from the Aransas testify to having seen the white stern lights of the barge ahead, and there is but one conclusion to be drawn from the situation (inasmuch as there is no evidence to indicate any attempt on the part of the tow to circle out to sea for an anchorage), and that conclusion is that, when the captain of the Glendower ceased blowing his fog horn, the Aransas, which was following a course on the outside, apparently converging slightly with that of the tow, ran alongside of the Glendower, and struck the hawser before realizing her whereabouts. It may be that, seeing the stern lights of the Indian Ridge, with the knowledge that a tow was in the immediate neighborhood, the Aransas proceeded to port her helm and reverse her engines to keep out of the way. The same action would have resulted if the Aransas, or any person in the pilot house of the Aransas, suddenly saw the red light of the Glendower and the stern light of the Indian Ridge, a signal to reverse and to port being the natural one under the circumstances. But negligence cannot be imputed either to the captain of the Aransas nor to the captain of the Glendower for what happened at this point. The vessels were in extremis then. And still less can any negligence for the action taken at this point be imputed to the captain of the Patience, who knew nothing of the matter until signaled by the Glendower that the barge was adrift.

It is apparent from the cases and the International Rules that the Glendower was not compelled to give fog signals. International Rule 15 provides that a vessel in tow may sound fog signals, and, in the light of the collision, it would perhaps have prevented the accident if the captain of the Glendower had continued to sound his signals after he had assumed that the Aransas was forward of his beam. But it seems impossible to assume negligence on his part in considering that signals were necessary only to the point where the boat passing seemed to have gone clear, and there seems to have been no duty or no rule which would require the captains of the other barges to give fog signals under the circumstances. The Patience seems to have performed her duty in every respect, unless with respect to the question of speed, which will be considered later.

The evidence shows that the captain of the Patience intended to consider anchoring at some point to the west of the channel and south of where the collision occurred. Much testimony was devoted to inquiring whether he could have anchored north of this spot. But it is dif-

ficult to see what negligence there can be in proceeding as he did, and it is academic to question whether he intended to anchor, or intended to run the slue with or without shortening his hawsers. What might have been done after leaving the place where the accident occurred would not have prevented the accident. The testimony would indicate that he was proceeding as he would if not intending to anchor at all, and, if the *Patience* is to be held responsible, it must be for going ahead, and not for debating the possibility of anchoring.

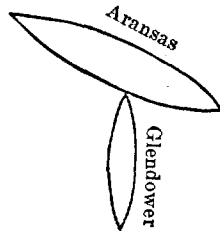
There is no evidence on which to base the suggestion that the *Patience* was struggling out into the open sea, as if to hunt for an anchorage, except the opinion of the captain of the *Aransas* as to the course upon which the tow was proceeding, and all of the testimony seems to indicate that he was mistaken on this point. Nor does the question of the length of the tow seem to enter into the matter. If the tow had been shorter, the signals of the *Patience* and the signals of the *Aransas* might more easily have been heard by each other. If the hawser to the *Glendower* had been longer, the boats might have cleared. But the length of the tow only puts upon the towboat the responsibility of greater caution, and the cases cited (*The Gladiator*, 79 Fed. 445, 25 C. C. A. 32, *The Harold* [D. C.] 84 Fed. 698, and *The Whitney* [D. C.] 77 Fed. 1001, affirmed 86 Fed. 697, 30 C. C. A. 343) while criticising long tows in such waters and in this very locality, do not attempt to make the use of long towing hawsers negligence, unless the length of the tow enters into the happening of the accident. Here the length of the tow, or the number of boats ahead of the *Indian Ridge* in the tow, had nothing to do with the matter.

An attempt has been made to argue that the *Patience* was negligent in that she was proceeding at too great a rate of speed, and thus made it impossible to avoid accident if the tow or any one of the barges struck another vessel. On this theory, the only way to be entirely free of negligence would have been not to have been in the place, or to have been at anchor; and again the rate of speed, provided the speed was not excessive, would have no bearing upon the question of negligence, unless that rate of speed entered directly into the cause of the accident.

It can hardly be argued that the captain of the *Patience* should have contemplated that if a vessel struck the hawser between two of the barges, or in some way placed itself in front of one of the vessels of the tow, he would be chargeable with negligence, unless going so slow that the impact of the vessels would not injure one another. As has been said before, the only absolutely safe method of procedure in this manner would be to stand still, and a speed of from four to six knots in the open waters at the point in question would not seem to be ordinarily negligent, even in a fog, if the other ordinary precautions were properly taken. As to the speed of the *Aransas*, in the same way, it can hardly be considered negligent to have proceeded to the Pollock Rip Shoals lightship at the rate at which she was going. She certainly slowed up just before the accident, and, to have prevented the overtaking, would have had to be going slower than the tow. This was unnecessary, unless the mere fact of passing, without other negligence, was the cause of the collision.

Whether the Aransas was negligent in attempting to pass the tow without slackening speed, and whether her officers used proper care and judgment in locating by hearing and by sight the fog signals and lights of the tow, presents the only difficulty in the case. It is apparent that some confusion existed at the moment when the captain, pilot, and helmsman of the Aransas discovered the white lights of the Indian Ridge and the red lights of the Glendower, and at that time the vessels must have been almost in a straight line from the Patience, through the Franklin, Indian Ridge, Aransas, and Glendower. The courses of the tow and of the Aransas approximately parallel, but with the Aransas on the port or outside, must have brought the Aransas, at the time she had passed the Glendower and thus lost sight of the Glendower's stern lights, very close to the line of the tow. That this is so can be seen from the testimony of Crocker, who testifies (page 258) that he was at the port window of the pilot house, and saw the white stern light of the barge ahead, at the same time that the captain saw the red light of the Glendower, the captain being "on the starboard side." Crocker testifies that at that time the engines had been stopped, and the set of the ebb tide apparently had the effect of bringing the vessels closer together. It is also testified that the Aransas had been slowed up to take soundings; but, if so, there is all the more reason for considering that speed did not cause the collision, and all the more reason for holding the officers of the Aransas, the overtaking vessel, negligent in not locating the tow. According to Crocker's testimony, the signal to start the engines astern and to port the helm was given as soon as the lights were seen, and it is the opinion of those upon the Aransas that the bow of the Aransas moved to port and not to starboard; but in view of the fact that the captain of the Aransas in his diagram, placed in evidence, makes the Glendower strike the Aransas approximately as follows:

—it would seem that the movement of the Aransas under its helm must have been sharply to starboard, and just afterward the collision occurred. If this assumption be correct, the only mistake was in assuming that the engines could be reversed and the Aransas started back in time to avoid collision. An error of judgment under those circumstances could hardly be deemed negligence, and it is extremely doubtful if the collision could then have been avoided, although the effect might have been different if the blow had been imparted in a different direction.



The captain of the Indian Ridge testified that the Aransas changed her course after passing the Glendower, that he could see the masthead lights of the Aransas plainly, and saw them swing out of line (the forward of these lights on the lower masthead moving to starboard), that the Aransas passed the Glendower 300 feet away, and that the Aransas came on at full speed. If this be true, the Aransas should have seen the lights of the tow as well as heard the whistle of the Patience, and, being the overtaking vessel, was plainly to blame.

It may be that the accident occurred in the following way: The tow would take some 5 minutes to go half a mile, and the testimony is that the vessels sank about half a mile southeast of the lightship. The Patience had been running on a course to the lightship approximately south by west. The accident occurred within 10 minutes after locating the lightship, and changing the course to southwest by south. The Aransas also changed her course from south by west to south-southwest when opposite the lightship. If the tow had not proceeded a full mile, and if the Glendower had not completely gained the new course, the Aransas (especially if she changed her course a little to the north of the spot where the tow was changing) would have been on a line rapidly converging with the path of the Glendower when the vessels came alongside. Under such circumstances the Aransas could have crossed the line of the Glendower, without a change of course. But how can it be considered that the Aransas was not negligent in failing to locate the tow in time to keep out of the way, or in not keeping out of the way when she plainly knew she was overtaking the tow?

The Aransas has charged negligence on the part of the Patience and the Glendower, the Glendower has charged negligence on the part of the Aransas, the Patience has charged negligence on the part of the Aransas, and the owners of the cargo of the Aransas have charged negligence on the part of all three, although as to the Aransas the question of the proceedings to adjudicate and limit the liability of the Aransas, in which the owners allowed the matter to go by default, is set up as a bar to this charge of fault against the Aransas. The proceeds from the sale of the Aransas not being sufficient to cover costs, that proceeding was allowed to go by default. If the liability of the Aransas were the one question herein, the matter might be considered *res adjudicata*; but in view of the result of the former proceeding, the issues in that proceeding to limit the liability of the Aransas were clearly immaterial, so far as determining which vessel was in fault. The Aransas herself has charged negligence and opened the issue in that respect, and the plea of *res adjudicata* cannot be taken advantage of as against the vessels concerned. Inasmuch, however, as it seems to this court that none of the vessels other than the Aransas can be said to have been in fault, and as the proceeds of the Aransas have been exhausted, all of these questions become of no consequence in this proceeding.

The various petitions should be dismissed, with the exception of the application of Walter J. Tice, owner of the Patience, for a limitation of the liability of that vessel, in which proceeding judgment relieving the owner of liability should be granted.

## UNITED STATES v. BEDOUIN S. S. CO., Limited.

(District Court, S. D. New York. November 9, 1908.)

## ADMIRALTY (§ 46\*)—PROCESS—SERVICE.

The service here was made upon the parties who represented the owner of a vessel in her chartering to the government and in the prosecution of a claim against it. *Held*, that the service was sufficient.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 46.\*]

(Syllabus by the Judge.)

Wallace, Butler & Brown, for the motion.

Henry L. Stinson, U. S. Atty., and Harold S. Deming, Asst. U. S. Atty.

ADAMS, District Judge. This is a motion to vacate and set aside the service of a citation alleged to have been served upon the respondent. It appears that an action was commenced by the United States against the Bedouin Steamship Company to recover damages arising through the breach of a contract entered into between the parties August 20, 1900, for the chartering and use of the steamship Arab, the property of the respondent, which was warranted by the respondent to be, and to be kept, tight, staunch and strong and well and sufficiently manned and equipped for merchant or transport service. It is alleged by the libellant that by reason of the steamer's unfitness for service, disbursements amounting to \$7,444.27 were necessarily made and that it is also entitled to recover back charter money paid to the extent of \$4,852.08. Upon this complaint process was duly issued and served by the marshal upon Paul Gottheil, one of the members of the firm of Funch, Edye & Co., "as agents for the Bedouin Steamship Co., Ltd."

The motion in question was then made, based upon an affidavit, dated October 5, 1908, of the said Gottheil, which stated as follows:

"Deponent further says that the business of the said firm with reference to the steamer Arab was confined to negotiating and, as broker or agent, effecting a charter party between the United States of America as charterer, and the Bedouin Steamship Navigation Company, Limited, as owner of the steamer Arab. The connection of deponent's said firm terminated upon the execution of the charter party aforesaid, except that deponent's firm from time to time, as an act of courtesy, remitted to the Bedouin Steamship Navigation Company, Limited, certain installments of charter hire which were remitted to deponent's said firm by William Lamb, by whom, as deponent is informed and believes, said installments of charter hire had been collected from the United States Government.

Deponent further says that his said firm has had no other relations with the Bedouin Steamship Navigation Company, Limited, except with reference to the chartering of the Arab and certain other vessels of said company, and has had no relations of any kind for about three years last past. Deponent's firm is not now and, except as aforesaid, never has been an agent or authorized to act in any capacity for or on behalf of the Bedouin Steam Navigation Company, Limited.

Deponent further says that the process herein was served upon him personally as a member of his said firm on the 29th day of September 1908, and that neither deponent nor his said firm then had or ever has had at any time authority to accept service of process in any action against the Bedouin Steamship Navigation Company, Limited."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



An opposing affidavit, made by the assistant district attorney, and dated October 12, 1908, was filed on behalf of the libellant as follows:

"On information and belief, that upon the due filing of the Libel in this case a citation issued out of this Court and was served upon Funch, Edye & Co. as alleged agents of the Bedouin Steamship Company, Ltd., of Liverpool, England, the Respondent in this case.

Deponent further says, on information and belief that the claim of the libellant in this case is based upon transactions and disagreements arising out of a charter party entered into in 1900, and renewed in 1901, between the said Libellant and the said Respondent, in the execution of which charter party, Funch, Edye & Co. acted as agents for the said Respondent.

That on October 13, 1902, Funch, Edye & Co., by Paul Gottheil, duly executed and delivered to Hopkins & Hopkins of Washington, D. C., a power of attorney (a copy of which marked 'A' is hereto annexed and to which, for greater certainty, deponent begs leave to refer, in which the said Funch, Edye & Co. declare themselves to be the agents of the aforesaid Respondent, and constitute the said Hopkins & Hopkins their attorneys for the prosecution of a claim of the said Respondent against the said libellant, arising out of the aforesaid charter party, under which power of attorney the said Hopkins & Hopkins have prosecuted the said claim in the present time.

That April 4, 1903, the Auditor for the War Department received an itemized statement of the said claim, signed and certified, 'Funch, Edye & Co., Agents for the Bedouin Steam Navigation Company.'

That in June and July, 1903, the aforesaid Libellant by its proper agents presented a cross claim against the aforesaid Respondent, said claim arising out of the aforesaid charter party.

That July 3, 1903, the said claim of Funch, Edye & Co. was disallowed by the Auditor for the War Department, and the said cross claim of the said Libellant confirmed.

That April 18, 1904, Funch, Edye & Co., by Hopkins & Hopkins, their attorneys, took an appeal to the Comptroller of the Treasury.

That June 18, 1904, this appeal was in substance denied, and the aforesaid cross claim of the United States in substance affirmed.

That November 23, 1907, the Treasury Department of the United States made demand of Hopkins & Hopkins, as attorneys of record, for settlement of the aforesaid cross claim of the United States.

That January 7, 1908, Hopkins & Hopkins, replied that 'relative to a balance alleged to be due the Government from the Bedouin Steam Navigation Co., owners of the S. S. "Arab," Funch, Edye & Co., agents, we beg to state that the Company does not regard the statement of account rendered by the accounting officers of the Treasury as proper, and, believing on the other hand that the government is, in reality, indebted to it, it declines a settlement upon the basis demanded.'

That for this cross claim, still unpaid, the present Libel has been filed.

Deponent further says, that the ground of his belief and the sources of his information are duly certified copies of papers on file in the Departments of the Government. That the reason this affidavit is made by deponent and not by the Libellant is that the Libellant is a corporation sovereign."

The power of attorney mentioned above is as follows:

"From the office of

Hopkins & Hopkins

Counsellors at Law,

Washington, D. C.

Be it known that we, Funch, Edye & Company, of New York, Agents for the S. S. 'Arab', and the Owners thereof, have made, constituted and appointed and by this instrument do hereby make, constitute and appoint Hopkins & Hopkins, of Washington, D. C., our true and lawful attorneys and agents for the prosecution of the claim of the owners of said Steamship against the United States, arising out of the charter of said steamship by the Quartermaster's Department, War Department, during the year 1900-1901,

giving and granting to our said Attorneys full power and authority to do and perform all matters and things pertaining to said claim as fully and completely as we might or could do if personally present at the doing thereof.

We witness our hands and seal this 13th day of October, 1902.

Funch, Edye & Co.,

By Paul Gottheil. [Seal.]

Thereafter the said Gottheil made another affidavit, dated October 19, 1908, as follows:

"Paul Gottheil, being duly sworn says that he is now and during all of the times mentioned in the libel, was a member of the firm of Funch, Edye & Co., and that he is familiar with all the business dealings between the Bedouin Steam Navigation Company and Funch, Edye & Co.

The firm of Funch, Edye & Co., neither have, nor had any general power or right to represent or act for or in the name of the Bedouin Steam Navigation Company, and Funch, Edye & Co., were never advertised or held out to be such agents. Funch, Edye & Co., acted solely as brokers, and in no case was any vessel belonging to the Bedouin Steam Navigation Company chartered through Funch, Edye & Co., without the proposed terms being first submitted to the Bedouin Steam Navigation Company and being by them approved. Other chartering brokers in the City of New York had, and now have the same privilege exercised by Funch, Edye & Co., that is to say, the privilege of submitting terms for proposed charter parties to the Bedouin Steam Navigation Company, and on receiving word that such terms are approved by the Bedouin Steam Navigation Company of effecting the charter party. It is not unusual for a broker effecting a charter party to receive payments from the charterer and forward same to the owner.

Deponent further says, on information and belief, that at all the times mentioned in the libel, the Bedouin Steam Navigation Company was, and now is a foreign corporation not engaged in any trade or business beyond chartering vessels owned by it. That all the vessels owned by said Bedouin Steam Navigation Company are, and at all the times mentioned in the libel have been 'tramp' steamships.

That since the chartering of the 'Arab' by the United States of America, another firm in the City of New York has effected a charter party or charter parties for and in the name of the Bedouin Steam Navigation Company.

Deponent further says that Funch, Edye & Co., have never had any interest in the claim of the Bedouin Steam Navigation Company against the United States of America. This claim belonged to the Bedouin Steam Navigation Company, and in prosecuting same, Hopkins & Hopkins at all times acted as the attorney of the Bedouin Steam Navigation Company and not of Funch, Edye & Company."

Thereafter an affidavit was made by Sherburne G. Hopkins, dated October 28, 1908, as follows:

"Sherburne G. Hopkins, of Washington, D. C., deposes and says that I am, and for the ten years last past have been a member of the firm of Hopkins and Hopkins; that I am familiar with the relations between the firm of Hopkins & Hopkins and the Bedouin Steam Navigation Company, Ltd., in connection with the conflicting claims arising out of the chartering of the steamship 'Arab' by Quartermaster's Department, United States Army; and that in December, 1901, or January, 1902, we were employed by George F. Mason, Esq., an officer of the Bedouin Steam Navigation Company, Ltd., who had come to Washington for the purpose of conferring with us in reference to prosecuting the claim of the owners of the steamship 'Arab' against the United States. Funch, Edye & Company took no part in the conference between Mr. Mason and Hopkins & Hopkins. We understood at that time, and still consider that we were employed by, and at all times acted for the Bedouin Steam Navigation Company, Ltd. The power of attorney, dated October 13, 1902, purporting to authorize us to prosecute the claim of the owners of the steamship 'Arab' against the United States, was subsequently executed, after the Auditor for the War Department had questioned our authority to prose-

cute this claim, in the absence of a power of attorney, and we believe Funch, Edye & Company executed such pursuant to special authority conferred for that purpose upon them by the Bedouin Steam Navigation Company, Ltd."

The libellant cites *In re Hohorst*, 150 U. S. 653, 663, 14 Sup. Ct. 221, 225, 37 L. Ed. 1211. At the latter page it was said:

"The firm of Kunhardt & Co. being the financial agents of the corporation, the office of the firm being in the City of New York, and being the office of the corporation for the transaction of its monetary and financial business in this country, the service of the subpoena in New York upon the head of the firm as general agent of the corporation was a sufficient service upon the corporation. *St. Clair v. Cox*, 106 U. S. 350, 359, 1 Sup. Ct. 354, 27 L. Ed. 222; *Société Foncière v. Milliken*, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. Ed. 208; *Mexican Central Railway v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *New York Code of Civil Procedure*, § 432; *Tuchband v. Chicago & Alton Railroad*, 115 N. Y. 437, 22 N. E. 360."

It does not seem that the above authority applies to this case. There the parties served were the general monetary agents of the defendants, who conducted a regular shipping business of considerable importance at New York, while in this case the steamship company had no regular place of business at this port. The affidavits do show, however, that Funch, Edye & Co. in an instrument appointing agents for the collection of a claim on the part of the owners of the Arab arising under the charter party of that steamer, styled themselves "Agents for the steamship Arab and the owners thereof." In considering this claim, the proper officers of the Government found that there was nothing due to the claimant, but on the contrary that the Bedouin Company owed the United States. The claims arose out of the same transaction, namely, the chartering of the Arab by the Government from the Bedouin Company, and Funch, Edye & Co., while having pressed the claim of the Company it represented and acted in the collection of the hire due for the services of the steamer, and while still maintaining the validity of the claim against the Government, refuses to recognize the claim of the Government against the Bedouin Company. It would seem to be unreasonable that they should be permitted to act against the Government in matters pertaining to the steamer and at the same time be allowed to say that they are not the agents of that company when a claim is made against it arising out of the same transaction. I think it must be held that they were the agents of the company for the purpose of service of process. The statements in the affidavit of Mr. Hopkins, *supra*, when read in connection with the other affidavits in the matter, only tend to show a confirmation by the Bedouin Company of the acts of Funch, Edye & Co., when acting as its agents, in appointing Hopkins & Hopkins to prosecute its claim against the Government.

The motion is denied.

## In re STRICKLAND.

(District Court, S. D. Georgia, S. W. D. February 26, 1909.)

## BANKRUPTCY (§ 363\*)—CLAIMS AGAINST ESTATE—WITHDRAWAL BY CREDITOR.

A creditor of a bankrupt holding notes containing a waiver of homestead right and exemption, who filed his claim in the bankruptcy proceedings and also an intervention seeking to have certain property sold separately and the proceeds applied on his debt, may properly be permitted to withdraw his claim and intervention in order to prosecute his remedy in the state court against the property set apart to the bankrupt as exempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 550; Dec. Dig. § 363.\*]

In Bankruptcy. On petition of bankrupt to review order of referee allowing J. G. Curry, a creditor, to withdraw proof of debt and intervention.

C. C. Thomas and J. R. Walker, for bankrupt.  
W. W. Lambdin, for creditor.

SPEER, District Judge. The bankrupt has filed a petition for the review of an order by the referee, permitting one J. G. Curry, an alleged lien creditor of the bankrupt, to withdraw from the records of the court his proof of debt and intervention. These are based upon two purchase-money notes, containing waivers of homestead and exemption, aggregating the sum of \$879.49. The ground of the motion for the withdrawal of the claim was "inadvertence upon the part of counsel, being mistaken as to the proper forum in which he should endeavor to set up said claim." On January 13, 1908, Strickland was adjudicated a bankrupt. On January 23d the first meeting of creditors was held, and at this meeting John C. McDonald appeared as the attorney at law representing Curry, and filed the claim referred to, with proof thereon. Thereafter said attorney filed a motion for an order segregating certain property of the bankrupt, and also sought to have the same sold separately, claiming the proceeds thereof as purchase money for property bought by the bankrupt from the said Curry. On February 3d a sale of the assets was had, and the said attorney sought to obtain the proceeds for the property, claimed as aforesaid by virtue of the purchase-money lien. Before the determination of this petition, however, the said attorney presented in lieu thereof the motion which is now in question, asking leave to withdraw from the files of the court the claim and original notes, in order that his client might proceed in equity, in a state court, to subject the homestead of the bankrupt and enforce his rights under alleged waivers contained in said notes. This counsel proceeded to do by filing in the state court a bill in equity, securing an injunction against the bankrupt, and a receiver to hold the exemption, which had been set apart by the trustee in bankruptcy. Upon the motion to withdraw, the referee issued the usual rule nisi. This was heard on February 28th, and on the 20th of March following the referee passed an order, permitting Curry to withdraw his claim upon

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the condition that such withdrawal should be without prejudice to the right of the bankrupt thereafter to contend before the state tribunal that the proceedings in this court operated as an estoppel. The petition for review relates to this order of the referee. The bankrupt is the only party objecting to the withdrawal of the proceedings, and it does not appear that any creditor objected, or joins now in the petition to review.

The only question before the court is the propriety of the referee's order, allowing a creditor to withdraw his proof of debt and intervention before the final determination of the cause. Now, the right to dismiss legal proceedings has long inured to parties in all jurisdictions, state and national. *Veazie v. Wadleigh*, 11 Pet. 55, 61, 9 L. Ed. 630; *Stevens v. Railroad (C. C.)* 4 Fed. 97. The only limitation upon that right is that the party dismissing shall pay all costs, and that the dismissal shall not violate any substantial right, nor render it unavailable. That is the law in Georgia, and obtains almost universally. Sections 4970, 5044, Civ. Code 1895; *Evans v. Sheldon*, 69 Ga. 110; *People's Bank of Talbotton v. Exchange Bank*, 119 Ga. 367, 46 S. E. 416; *Kean v. Lathrop*, 58 Ga. 355. Can the withdrawal of a proof of debt be said to violate any substantial right of the bankrupt, or place him in a position more prejudicial than that which he occupied before the proof was filed? An examination of the precedents shows that all of the recent cases sanction a withdrawal or amendment, under ordinary circumstances, of proceedings in bankruptcy. Mr. Loveland in his work on Bankruptcy, discussing the subject, says:

"The judge or referee has power, in his discretion, to allow proofs of debt to be amended or withdrawn. In cases of mistake or ignorance, whether of fact or of law, the judge or referee will exercise that power in the absence of fraud, and when all parties can be placed in the same position they would have been in if the error had not occurred, and where justice seems to demand that it should be done." Loveland on Bankruptcy, 403.

In *Re Meredith (D. C.)* 16 Am. Bankr. Rep. 331, 144 Fed. 230, the question arose before Judge Newman in the Northern district of Georgia, and the action of a referee, permitting a withdrawal, although not discussed, was sustained. In this state, a note containing a waiver of homestead and exemption rights has been held to be in the nature of a security for the payment of the debt. In *Bell v. Dawson Co.*, 120 Ga. 628, 48 S. E. 150, Chief Justice Simmons, for the Supreme Court of the state, observed:

"The waiver becomes in the nature of a security, in that the debt may be made out of any property owned by the debtor, without regard to any exemption rights which the debtor would have had but for the waiver."

Here, the creditor seeks to enforce his debt by employing the remedies afforded by the laws of Georgia, viz., by subjecting the homestead set apart to the bankrupt by the trustee in this court by proceeding in equity in a state court upon the waiver notes, and by having a receiver appointed to hold and disburse to the creditor such part of the homestead as he may be held entitled to receive. That procedure seems justified by the ruling of the Supreme Court in *Lockwood v.*

Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, where it was held that a trustee in bankruptcy acquires no title to exempted property, save that which is incident and necessary to his duties to the estate and to the bankrupt in setting it aside. In the case of *Bell v. Dawson Company*, supra, it was held that the remedy of creditors holding waiver notes may be found in section 4904 of the Civil Code of Georgia, which is as follows:

"A court of equity may appoint a receiver to take possession of, and hold subject to the direction of the court, any assets charged with the payment of debts, where there is manifest danger of loss, or destruction, or material injury to those interested."

The appropriate remedy under this general equity power is then summarized by the court in these words:

"The latter's remedy is in a court of equity, which court is authorized under the laws of this state to give (the creditor) a judgment in rem against the exempted property, subjecting it to his claim, and, where such property is personalty of a perishable nature, or such as will be destroyed by the use, to appoint a receiver to take charge of such property until the judgment in rem has been obtained." *Sanford v. Fidelity & Guaranty Co.*, 116 Ga. 689, 43 S. E. 61.

The question of the right to amend a proof of debt came before the Supreme Court of the United States in the case of *Hutchinson v. Otis*, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179. In the opinion rendered by Mr. Justice Holmes, that right was affirmatively established. See, also, *In re Scott* (D. C.) 93 Fed. 418; *In re Myers* (D. C.) 99 Fed. 691; *In re Wilder* (D. C.) 101 Fed. 104; *In re Stevens* (D. C.) 107 Fed. 243; *In re Swords* (D. C.) 112 Fed. 661; *In re Tiffany* (D. C.) 17 Am. Bankr. Rep. 296, 147 Fed. 314; *In re Castleberry* (D. C.) 16 Am. Bankr. Rep. 159, 143 Fed. 1018; *In re Brumbaugh* (D. C.) 12 Am. Bankr. Rep. 204, 128 Fed. 971; *Ingram v. Wilson*, 11 Am. Bankr. Rep. 195, 125 Fed. 913, 60 C. C. A. 618; *In re Ogilvie*, 5 Am. Bankr. Rep. 374.

The bankrupt, however, contends that the withdrawal of a proof of debt falls within the equitable doctrine of election, and that the action of Curry in electing to file his claim before the referee precludes him from pursuing the remedy of subjecting the exemption in the state court. Counsel invokes the language of section 4012 of the Code of Georgia, as follows:

"A case of election arises whenever a person is entitled to one of two benefits, to each of which he has legal title, but to enforce both would be unconscientious and inequitable to others having claims upon the same property or funds. In such cases equity has jurisdiction to compel an election."

It may be said, in passing, that this language expressly refers only to property or funds to which "legal title" may be held, and it does not in terms apply to such intangible rights or remedies as the filing of proof of debt in a bankruptcy court, or the beginning of an equitable proceeding in a state court. Besides, the equitable doctrine seems inapplicable to the particular facts of this case. In the seventh volume of the *Encyclopedia of Pleading & Practice*, p. 362, the principle underlying cases of this character is stated in the following language:

"The test of the doctrine is, whether the plaintiff proceeds upon contradictory or irreconcilably inconsistent principles of redress, or upon consistent theories of his rights in the premises."

And further:

"As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose; but his choice is not final, and, if not satisfied with the result of that, he may commence and carry through the prosecution of another remedy."

Nor does it seem, even where the remedies may be deemed inconsistent, that a fruitless or abortive attempt to utilize one remedy, under a mistaken conception of fact or of law, will necessarily debar a suitor from the utilization of another. In 15 Cyc. it is said:

"There is a difference between an election of remedies and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims, merely because of attempts to collect them by inappropriate actions upon which recovery could not be had." 7 Enc. of Pleading & Practice, 366; *Clark v. Heath*, 8 L. R. A. (N. S.) 144, 101 Me. 530, 64 Atl. 913, and cases cited.

Now, in the relative rights and remedies which have been developed within the twilight zone between law and equity, the doctrine has been long settled that the foreclosure of a lien will not debar the holder from maintaining his action at law on the personal debt upon which it is based, and also the converse principle, that such action at law will not prevent subsequent foreclosure in equity. Says Mr. Tiffany in his treatise upon Real Property, vol. 2, p. 1276:

"It has always been considered, in the absence of a statutory provision to the contrary, that the mortgagee may enforce his different rights at the same time, pursuing concurrently his suit in equity to foreclose and his action at law on the note or bond evidencing the mortgagor's personal liability. Likewise, recovery in an action on the debt does not affect the right to subsequently foreclose; nor does the completion of foreclosure prevent a subsequent suit to recover on the personal liability, unless the result of the foreclosure is to satisfy the debt."

In this connection, see *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603, 616, 23 L. Ed. 405; *Burnell v. Martin*, 2 Doug. 417; *Very v. Watkins*, 18 Ark. 546; *Connecticut Mut. Life Ins. Co. v. Jones* (C. C.) 8 Fed. 303; *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; *Morgan v. Sherwood*, 53 Ill. 171. The same principle has been held by various courts to obtain—in the procurement of a distress warrant, and the subsequent foreclosure of a mortgage on the same crop (*Davis v. Collier*, 13 Ga. 485); in a suit in ejectment on a security deed, and an action at law on the note secured (*Dykes v. McVay*, 67 Ga. 505); in the foreclosure of a mechanic's lien, and an action for the work done (*Hunt v. Darling*, 26 R. I. 480, 59 Atl. 398, 69 L. R. A. 497; *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507); in a libel in rem in admiralty, and an action at law for the debt (*Wolf v. Cook* (C. C.) 40 Fed. 432; *People ex rel. Granger v. Judge*, 27 Mich. 406, 15 Am. Rep. 195). Discussing the reason underlying this class of cases, in *Jones v. Conde*, 6 Johns. Ch. (N. Y.) 77, Chancellor Kent remarked:

"The one remedy is in rem, and the other in personam; and the general rule to which this is an exception applies only to cases where the demand at law and in equity are equally personal, and not where the cumulative remedy is in personam, while the other remedy is upon the pledge."

The facts here indicate that Curry proved his claim, and filed an intervention before the referee. Other than this, it does not appear that his counsel took any active part, or exercised any material influence, in the bankruptcy proceedings until the application was made to withdraw the claim. It is true that he appeared at the first meeting of creditors where a trustee was elected, but that election was the unanimous choice of the creditors. Nor can the rights of the bankrupt be said to be unjustly prejudiced. It is not denied that he executed the two notes, containing waivers of his homestead and exemption rights. These waivers were already in existence when the proofs of debt were filed. How, then, may the bankrupt justly claim that he is deprived of any substantial right which he possessed before the filing of the proofs here. Any defense or set-off which he might then have offered is still as open to him in the state court. His position here is based upon only three essential rights and duties: (1) To deliver all of his assets to the trustee for liquidation; (2) having complied with that duty, to receive a discharge from his indebtedness; and (3) to receive in proper case his exemption. This court has no concern with the subjection of that exemption to the legal claims of creditors, nor with the bankrupt's disposition of the same after it is set apart to him by the trustee. It seeks merely to secure to the debtor a right, created by the laws of the state and conserved by the bankruptcy act, as are the liens of creditors, and it looks to the laws of the state to determine the nature of the exemption which shall be allowed. Having given the debtor his right, and set apart his homestead and exemption, the court will leave him to the courts of his own state to determine whether or not he has executed an inchoate lien thereon, which such courts may enforce. As no substantial right of the bankrupt which existed when the proofs of debt were filed will be impaired, the withdrawal sought will be permitted.

Order may be taken, affirming the action of the referee, and denying the petition for review.

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In re SMYTH.

(District Court, E. D. Pennsylvania. February 19, 1909.)

No. 2,884.

**BANKRUPTCY (§ 140\*)—PROPERTY VESTING IN TRUSTEE.**

A corporation agreed to furnish \$2,500 to enable a debtor to make settlements with his other creditors, a list of whom he supplied. The money was placed in the hands of the corporation's attorney, to be paid out by him direct to the creditors shown on such list, and the corporation took the debtor's judgment note for the amount, together with his other indebtedness to it, and afterward entered judgment on such note. The debtor was afterward adjudged a bankrupt, and the corporation proved the full amount of its judgment and received a dividend thereon. At the time of the bankruptcy the sum of \$300 of the amount placed in the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



hands of its attorney, and which had been turned over by him to a third person to make settlement with a certain creditor, had not been paid out, but the corporation had no knowledge of such fact. *Held*, that under the agreement it was not the intention that any part of the money furnished by the corporation should be paid to the bankrupt, and that the \$300 did not belong to his estate and was not recoverable by his trustee, even though the corporation through mistake had proved its claim therefor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

In Bankruptcy. On certificate of referee.

Referee D. W. Amram filed the following opinion and made his order thereon February 24, 1908:

This matter comes before me upon the petition of the trustee and the separate answers of James S. Alcorn and F. A. Poth & Sons, Inc. From the testimony taken before me I find the following facts:

In April, 1906, Isaac Smyth, a retail liquor dealer, being then indebted to F. A. Poth & Sons, Inc., brewers, for about \$5,000, asked for an additional loan of \$2,500. Negotiations for this loan were made with Frederick J. Poth, the president of the said corporation, to whom Smyth stated that he was largely indebted to other creditors, and that he had succeeded in obtaining their agreement to settle their respective claims at about 25 per cent., and that if F. A. Poth & Sons, Inc., granted this loan for this purpose, the corporation would be his only creditor. The president of the corporation agreed to make the loan, and subsequently the loan was formally granted by a resolution of the board of directors of the corporation, and, in accordance with the understanding previously had between Frederick J. Poth and Isaac Smyth, the sum of \$2,500 was placed by F. A. Poth & Sons, Inc., in the hands of their attorney, Franz Ehrlich, Jr., Esq., with instructions to distribute the same among the creditors of Isaac Smyth, in accordance with the statement which he had given. It was not intended that any of this money should be paid to Smyth himself, nor did Smyth ever expect to receive any of it, and in fact none of the money ever came into his hands.

A statement sworn to by Smyth and containing a list of all of his creditors among whom the \$2,500 were to be distributed was placed by him in Mr. Ehrlich's hands, and all of the said \$2,500 were thereupon distributed in accordance with the said statement, with the exception of two items, one of \$300 and one of \$167. The latter seems to have been a balance over and above the sum required to make the said settlement, and this balance was awarded to James S. Alcorn, Esq., for services rendered by him as attorney for said Isaac Smyth. As to the item of \$300, a check was drawn by Mr. Ehrlich to the order of B. F. Owens, Esq., attorney for A. L. Whealton, and delivered to Mr. Alcorn for the purpose of handing over the same to the payee. Owens, however, declined to accept the check, and asked that the amount be divided and two checks drawn, one for \$75 to the order of B. F. Owens, and the other for \$225 to the order of John E. Beatty. Mr. Alcorn thereupon returned the check of \$300 to Mr. Ehrlich. The latter drew two checks as aforesaid, and delivered them to Mr. Alcorn, who, upon tendering these checks to Mr. Owens, was informed that A. L. Whealton, the creditor, declined to make settlement in accordance with the terms agreed upon. Mr. Alcorn thereupon returned the two checks to Mr. Ehrlich, stating, however, that if Mr. Ehrlich would give him the sum of \$300 he would probably be enabled to obtain a release of this claim, as he was under the impression that it could be settled, notwithstanding what had occurred. But the settlement was never made, and the money is still in Mr. Alcorn's hands.

At the time when the corporation granted the loan to Mr. Smyth he signed a judgment note to the order of the corporation for \$7,500, a sum which included his prior indebtedness of \$5,000 and the present loan of \$2,500, and this note was recorded in the court of common pleas No. 1.

Subsequently Isaac Smyth was adjudicated a bankrupt, and thereafter F. A. Poth & Sons, Inc., filed a proof of debt against the bankrupt estate for

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the full amount of its claim, to wit, \$10,899.11, a sum which included the said loan of \$2,500, and received a dividend of 15 per cent. upon the said claim. At the time when the said proof of debt was filed the claimant did not know that the sum of \$300, which was to have been paid to Whealton, had not been disposed of in accordance with the original agreement.

I am of the opinion that upon these facts the said sum of \$300 never became the property of the bankrupt, and that it, together with the balance constituting the full amount of the loan of \$2,500, was placed in the hands of Mr. Ehrlich, as attorney for F. A. Poth & Sons, Inc., to be applied to a specific purpose. The checks drawn by Mr. Ehrlich were drawn for this purpose, and the \$300, which were finally paid over by Mr. Ehrlich to Mr. Alcorn, were not paid to the latter as attorney for Isaac Smyth, to be received by him as the property of Isaac Smyth, but were paid to him at his request, upon his assurance to Mr. Ehrlich that if the money were placed in his hands he would be able, by means known to himself, to apply the same in satisfaction of the claim of Whealton in accordance with the original agreement.

It is argued that because F. A. Poth & Sons, Inc., granted a loan to Isaac Smyth of \$2,500, and took judgment against Smyth for the said loan, the title to the said \$2,500 immediately vested in the said Isaac Smyth. I am of the opinion, however, that the formal resolution of the board of directors of F. A. Poth & Sons, Inc., did not constitute the whole contract between the corporation and Smyth, and that the conditions under which the loan was asked for and granted clearly establish the fact that none of this money was intended to pass to Isaac Smyth, but that all of it was intended to be paid to his creditors, and that the note taken by F. A. Poth & Sons, Inc., was merely collateral security for the repayment of the money to the corporation by Smyth if the same was distributed in accordance with the terms of the settlement.

The fact that F. A. Poth & Sons, Inc., subsequently filed their proof of debt against the bankrupt estate of Isaac Smyth for the full amount of the claim, allowing no credit on account of the item of \$300, does not alter the situation, inasmuch as I find that at the time when the proof of debt was filed the claimant did not know that this sum of \$300 had not been applied to the purpose for which it was given; but as the record shows that F. A. Poth & Sons, Inc., have received a dividend of 15 per cent. on the full amount of their claim, which dividend includes \$45 on account of the said item of \$300, equity requires that a proper credit for the said amount of \$300 be given on their proof of debt, and that they return the said sum of \$45 to the trustee in bankruptcy.

I therefore find and conclude that the said sum of \$300 is the property of F. A. Poth & Sons, Inc., and I shall enter an order directing the said James S. Alcorn to distribute the said sum of \$300 as follows: To F. A. Poth & Sons, Inc., \$255; to Hans J. Ehrlich, trustee in bankruptcy for Isaac Smyth, \$45; that the proof of debt of the said F. A. Poth & Sons, Inc., shall be reduced by the amount of the said \$300, and shall be allowed in the sum of \$10,599.11, and that further dividends, if any, shall be paid on the said balance of \$10,599.11 only.

Order: And now, February 24, 1908, upon consideration of the petition of the trustee, filed December 10, 1907, the answer of James S. Alcorn, filed December 17, 1907, and the answer of F. A. Poth & Sons, Inc., filed January 16, 1908, and after hearing testimony and argument of counsel, and in accordance with the foregoing opinion, it is ordered that James S. Alcorn distribute the sum of \$300 now in his hands as follows: To F. A. Poth & Sons, Inc., \$255; to Hans J. Ehrlich, trustee in bankruptcy for Isaac Smyth, \$45. And it is further ordered that allowance of the proof of debt of the said F. A. Poth & Sons, Inc., in the sum of \$10,899.11, be reconsidered, and that the said proof of debt be now allowed in the sum of \$10,599.11, and that further dividends, if any, be allowed upon the said claim as reduced to \$10,599.11.

The following opinion and order of the same referee was subsequently filed:

On February 28, 1908, the petition of Hans Ehrlich, trustee, and Isaac Smyth, claimant, was filed in the above matter, praying that the question of

title to \$300, which, by an opinion and order of the referee, filed on February 24, 1908, was found to be in F. A. Poth & Sons, Inc., should be reopened and a rehearing granted to take additional testimony. On March 9, 1908, I heard argument on behalf of the petitioners and F. A. Poth & Sons, Inc., and on March 24, 1908, entered an order dismissing the petition. On March 31, 1908, the said trustee and claimant filed an exception to the said order of March 24, 1908, and on the same day filed a petition praying for a certificate of the record to the judges of the District Court.

The petition to reopen the case and grant a rehearing to take additional testimony purports to set forth the facts which the petitioners expect to be able to prove. A careful examination of this petition and the argument of counsel thereon convinces me that the allegations in the said petition are either irrelevant and immaterial, or insufficient by reason of vagueness, or already on record in the testimony taken in the proceedings and considered by me in my opinion and order of February 24, 1908.

The first allegation in the said petition, as to the discovery that a certain agreement existed between F. A. Poth & Sons, Inc., and Isaac Smyth, whereby payments were to be made in certain sums on account of beer sold by the said F. A. Poth & Sons, Inc., to the said bankrupt, and that such payments were made until January 28, 1907, when a certain execution issued in the matter of Whealton v. Smyth, is wholly immaterial and irrelevant.

The second allegation, to wit, "that the said F. A. Poth & Sons, Inc., at the time of the said execution by Whealton well knew that the said \$300 had not been paid to Whealton," is a statement of a conclusion, and not of a fact. At the argument I called the attention of counsel for the petitioners to the insufficiency of this statement, and asked him to state whether he could supplement it by a statement of fact. This, counsel stated, he was unable to do, but that he would offer the testimony of the bankrupt as to statements made to him by an employé of F. A. Poth & Sons, Inc., to wit, the driver of the wagon that supplied him with beer, to support the following allegation, that "on account of the said execution and levy it (F. A. Poth & Sons, Inc.) could not continue to deliver beer to the said Smyth on credit of two weeks as before," etc., and that upon this testimony was based the conclusion that F. A. Poth & Sons, Inc., at the time of the said execution well knew that the said \$300 had not been paid to Whealton.

The third allegation, as to the amount of payments on account of the judgment note of Smyth held by Poth & Sons, Inc., is immaterial and irrelevant.

The fourth allegation, as to Smyth's efforts to ascertain the name of the person who held the \$300, is irrelevant and immaterial.

The fifth allegation, with reference to the alleged payment of the \$300 to B. F. Owens, and Owens' denial of the receipt of the same, is immaterial, since it appeared in the testimony taken before me that the said \$300 were tendered to B. F. Owens and refused by him.

The sixth allegation, referring to the subpoena served on F. J. Poth, president of the company, and statements made to him at the time by Smyth, is irrelevant and immaterial, except in so far as it disproves the second allegation in the said petition "that the said F. A. Poth & Sons, Inc., at the time of the said execution by Whealton well knew that the said \$300 had not been paid to Whealton."

All of the subsequent allegations, in so far as they are relevant, contain statements of fact which appear fully of record and were considered by me in my opinion filed February 24, 1908.

And now, March 31, 1908, upon consideration of the exception to the order of the referee, filed March 24, 1908, and in accordance with the foregoing opinion, it is ordered that the said exception be, and the same is, hereby dismissed.

Harry S. Mesirov, for claimant.

S. Morris Waln, for trustee.

J. B. McPHERSON, District Judge. I fully agree with the finding of the learned referee that the \$300 which has been specifically followed into the hands of James S. Alcorn was not the property of

the bankrupt, and therefore that the trustee has no title thereto. But the order appended to the report cannot be sustained; it distributes the money in Mr. Alcorn's hands, and is radically inconsistent with the conclusion that the fund did not belong to the bankrupt. If this is true, the District Court has no further jurisdiction in the premises, and has therefore no power to make distribution. The referee's suggestions, however (for they can only be considered as suggestions), seem to do substantial justice, and, if the parties choose to carry them out, I may say that no objection appears to such voluntary action. But the only enforceable decision that the court has jurisdiction to make is that the trustee has no right to the money.

The order entered by the referee is, therefore, so modified as to read that the trustee's petition is refused.

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In re ALASKA FISHING & DEVELOPMENT CO.

(District Court, W. D. Washington, W. D. February 24, 1900.)

No. 627.

**1. SALES (§ 208\*)—EXECUTORY CONTRACT—TRANSFER OF TITLE.**

An executory contract for the sale and delivery of a quantity of fish to be thereafter caught vested no title in the purchaser until the fish were delivered, although payment was made in advance.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 208.\*]

**2. BANKRUPTCY (§ 347\*)—DISTRIBUTION OF ESTATE—PRIORITIES—RECEIVER'S CERTIFICATES.**

The amount of receiver's certificates authorized by a court of bankruptcy to raise money required for the purpose of preserving property of the estate represents an expenditure for the benefit of all parties in interest, and is entitled to priority of payment from the proceeds of such property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 533; Dec. Dig. § 347.\*]

**3. BANKRUPTCY (§ 345\*)—DISTRIBUTION OF ESTATE—PRIORITIES.**

Priorities between creditors of a bankrupt corporation determined.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 531; Dec. Dig. § 345.\*]

**4. MARITIME LIENS (§ 7\*)—NECESSITY FOR SERVICES—TOWAGE SERVICE.**

A fishing company had salted and put up in barrels a season's catch of salmon at an Alaska port, and placed the same on a barge owned by it. The company, which was a California corporation, was insolvent, and the barge had no motive power. The owner of a tug learning such facts dispatched her to the assistance of the barge; her services were accepted by the master, and she towed the barge to Tacoma. There was no express contract between the tug owner and the company or master of the barge. *Held*, that the tug owner was entitled to a maritime lien for the value of the service on both barge and cargo, the barge alone not being of sufficient value, there being an implied agreement therefor arising from the necessity of the services and the circumstances under which they were rendered.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 11; Dec. Dig. § 7.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. Heard on exceptions to report of a special master respecting priorities between preferred creditors.

Chas. Bedford, for bankrupt and for William Johnson and Roger R. Vair, creditors.

Hughes, McMicken, Dovell & Ramsey and Edward C. Hanford, for Puget Sound Tugboat Company, a creditor.

L. B. da Ponte, for National Bank of Commerce, a creditor.

F. H. Kelley, for trustee.

HANFORD, District Judge. In the fishing season of 1907, the bankrupt corporation had a fishing station in Alaska, where it was engaged in catching salmon and other kinds of fish, and preserving them by salting and putting them up for market in barrels, and it owned and used in that business the barge Enoch Talbot, a vessel without masts or sails or other power of propulsion. At the close of the season the barge, with the season's catch on board, was towed from the fishing station to Tacoma by the steam tug Pioneer, a vessel owned and operated by the Puget Sound Tugboat Company. The corporation appears to have had little, if any, working capital, and it failed to secure a sufficient quantity of fish to equal in value the expenses of the year's operations, and when the barge arrived at Tacoma it had no money to pay for services of the tug, or wages of the barge crew or fishermen or other employes. The wages and some other debts of the corporation and incidental expenses were paid through an arrangement between the managing agents of the corporation, and the captain of the barge, and William Johnson, whereby a broker advanced the money to make said payments, and was reimbursed out of the proceeds of the sale of part of the salt fish, which were taken out of the barge and delivered to Johnson, and then delivered to the purchasers. The bill for towage has not been paid, and the tug's owner claims to have had a maritime lien on the barge and cargo. Before that part of the cargo not sold, as stated, had been unloaded from the barge, a receiver appointed by the superior court of the state of Washington for Pierce county took possession of the barge and employed watchmen. Soon afterwards this proceeding in bankruptcy was initiated by creditors of the corporation, and the same person who was acting as receiver under appointment of the state court was by this court appointed receiver, and thereafter the property was in his custody, as receiver of this court, until it was surrendered by him to the trustee of the bankrupt's estate, chosen in conformity to the bankruptcy law, after the corporation had been adjudicated a bankrupt. During the period of the receivership, a watchman previously employed by Johnson was to some extent looking after the property, and by reason thereof Johnson claims to have had possession of the cargo remaining in the barge as owner thereof. On a showing that there was five feet of water in the hold of the barge, and that it was necessary to discharge the cargo and repack and resalt the fish to prevent deterioration thereof, the receiver obtained from this court authority to borrow money necessary for expenses in the care and preservation of the property, including wages of watchmen,

and he did borrow \$1,223 from the National Bank of Commerce, on receiver's certificates, and expended the same in payment of such expenses. Johnson made no application to this court for an order directing the receiver, or the trustee, to surrender possession of the fish, and made no opposition to the doings of the receiver in repacking and resalting the fish, nor to the surrender of the fish to the trustee of the bankrupt's estate, although he had timely information of these proceedings through his watchman and his attorney.

The trustee sold the barge and the fish for a gross sum pursuant to a stipulation signed by attorneys representing all the parties, and the purchase money constitutes the fund to be distributed. By the terms of the stipulation, whatever liens and rights could have been lawfully asserted against the property before it was sold by the trustee are deemed to have become attached to the money which the trustee holds, and, the amount being insufficient to discharge all such claims by paying them in full, it is necessary for the court to determine the priorities.

Johnson appears to have provided the materials for construction of the barrels, in which the fish were packed, and the salt, and to have paid to the bankrupt corporation \$5,000 on a contract by which the corporation agreed to fill 2,000 barrels and deliver them to him on a wharf at Tacoma. On these facts and his alleged possession of the fish, Johnson bases a claim as owner of the fish which were sold by the trustee. He also claims a first lien on the fund by right of subrogation, on the alleged ground that the money expended in payment of wages of seamen and others was his money.

The first of these claims is not tenable, because the executory contract for future delivery of fish in barrels at Tacoma was not effective to vest any title to or right of property in fish which had not been caught, and the fact that the fish were still in the hold of the barge when a receiver of this court took possession of them proves conclusively that no sale had been consummated by delivery. Johnson had no lawful authority to seize the barge or place a keeper in charge of it, nor to obstruct judicial process. Nor did the bankrupt corporation or the captain have any right to impair the rights of other creditors, under the bankruptcy law, by surrendering the barge to him. In the proceedings before the special master, reference was made to a bill of sale, but no bill of sale was produced, nor was there any competent evidence to prove the execution or contents of such a document; therefore, no rights can be predicated upon a conveyance of title by a bill of sale.

The disbursements by the receiver were necessary for the preservation of the fish, and the money which he used was loaned on the faith of certificates authorized by the court. In the interest of all parties, the court assumed an obligation to cause redemption of the receiver's certificates out of any fund which should become available, and by reason of such action there is now a sum of money in the hands of the trustee, to be contested for, instead of a quantity of spoiled fish in the hold of the barge. Under these circumstances, any lien which Johnson acquired by right of subrogation is subordinate to the rights of the holder of the receiver's certificates.

The only theory on which Mr. Johnson's claim by right of subrogation can be sustained is that the fish which were sold previous to the appointment of a receiver had become his by delivery to him when unloaded from the barge, and that the proceeds from sales thereof were expended in discharging maritime liens. Those liens, however, if valid, attached to the vessel and cargo, they were equally liens against that part of the cargo sold by the broker as against the remainder, and it would be contrary to equity to allow Mr. Johnson to absorb the entire fund in the hands of the trustee to the exclusion of other maritime liens. Considering that the evidence is indefinite and uncertain as to the amount of valid maritime liens which have been paid, the court will marshal the assets, including the proceeds of fish sold previous to the receivership. It is the opinion of the court that the money in the hands of the trustee is, in fact, the remnant of a general fund to be disbursed under an equitable rule. In this view, Mr. Johnson's claim is in rank subordinate to the lien for towage, because the other maritime liens have been paid out of the general fund, and this remains unpaid.

Concerning the claim of the Puget Sound Tugboat Company, for towage, the decision of the court allowing the same is rested upon the following facts: An agent of the tugboat company received information by a telephone message from the son of the manager of the bankrupt corporation to the effect that the barge was at Pleasant Bay, Alaska, loaded and in need of the services of a tug to bring her to Tacoma; she was in fact helpless without the assistance of a tug; her owner was a California corporation and insolvent; the agent of the tugboat company believed that compensation for services of the tug would be a valid charge enforceable against the barge and cargo, and, without entering into a contract with any one, the tug was dispatched to Pleasant Bay; her services were tendered to and accepted by the captain of the barge, and the service was performed. The barge is the hull of a worn-out and dismantled sailing vessel of uncertain value, so that there was actual necessity for pledging the cargo as well as the barge for the towage service.

The chief contention in opposition to the lien for towage is that there was no lien, because there was no express agreement between the tugboat company and the owner or master of the barge specifically hypothecating the barge and cargo for the towage bill. The expressions in judicial opinions which seem to support that idea are not in accord with the elementary principle of the maritime law which is the foundation of strictly maritime liens, viz.: Necessity for credit, where the owner has no personal credit engenders a lien for necessities supplied, at the instance of the master of a ship, to enable the ship to proceed on her voyage in a seaworthy condition; the object of the law being to "furnish wings and legs" to enable a vessel to proceed to her destination. "The vessel must get on; this is the consideration that controls every other; and not only the vessel, but even the cargo, is sub modo subjected to this necessity." *The St. Jago de Cuba*, 9 Wheat. 414, 6 L. Ed. 122. The lien attaches to the ship and freight, or to the ship, freight, and cargo, as necessity in

each particular case may require. In cases in which liens have been denied, the Supreme Court has been careful to distinguish those cases by their peculiar facts, and has given a safe rule to be applied in separating valid maritime liens from claims which are not valid, by clearly stating the conditions essential to the validity of a maritime lien. *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609, *The Rock Island Bridge Case*, 6 Wall. 213, 18 L. Ed. 753, and *The Julia Blake*, 107 U. S. 426, 2 Sup. Ct. 692, 27 L. Ed. 595, are instances. In the latter case Chief Justice Waite made reference to the decision of Sir William Scott in *The Gratitude*, 3 C. Rob. 240, as having incontrovertibly established the power of the master of a vessel, under proper circumstances, to hypothecate the cargo.

The owner being absent and the shipmaster under stress of necessity, a lien for necessities attaches, by legal implication, without his formal express consent. "A lien arises if services are rendered and materials furnished for the supply and repair of the ship, in the presence of the master and with his acquiescence, though he does not actually order them." 19 Am. & Eng. Enc. of Law (2d Ed.) p. 1098; *The Philadelphia*, 75 Fed. 684, 21 C. C. A. 501; *Id.*, 84 Fed. 1020, 28 C. C. A. 684; *The Tiger* (D. C.) 89 Fed. 384; *The Alfred Dunois* (D. C.) 76 Fed. 586.

There was no market for the fish at Pleasant Bay, the unpaid wages of the barge crew and of fishermen amounted to a large sum, and, from a business point of view, that was not a pleasant place for the barge and her cargo to remain; she required the assistance of a tug, and it was the duty of her captain, representing all interests, to accept the services of the Pioneer. That is what he did, and under the circumstances stated, without an express agreement creating a lien, there is a legal presumption that the credit of the vessel and cargo was the inducement for the towage service, and there was an implied hypothecation of both, subject only to the paramount lien for mariner's wages. *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *The Lulu*, 10 Wall. 192, 19 L. Ed. 906; *The Patapsco*, 13 Wall. 329, 20 L. Ed. 696; *The Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *Mut. Ins. Co. v. Baring*, 20 Wall. 159, 22 L. Ed. 250; *The Erastina* (D. C.) 50 Fed. 126; *The Elm Park*, *Id.*; *The Saratoga* (D. C.) 100 Fed. 480; 19 Am. & Eng. Enc. of Law (2d Ed.) 1096, 1097.

The court directs that a decree be entered directing that the money in the hands of the trustee be disbursed as follows:

First. To the payment of taxes, if any.

Second. To the payment of all costs and expenses in the handling, preservation, and sale of the property, including redemption of the receiver's certificates and payment of the receiver's compensation in the amount allowed by the referee.

Third. To the payment of the claim of the Puget Sound Tugboat Company.

Fourth. The residue to be paid to William Johnson.



## THE SALLIE

(District Court, E. D. Pennsylvania. February 8, 1909.)

No. 56.

## SEAMEN (§ 27\*)—EMPLOYÉS ON DERRICK HOIST—LIEN FOR WAGES—"VESSEL."

A derrick hoist *held* to be a vessel subject to the jurisdiction of a court of admiralty, and against which the engineer and general utility man employed thereon by the owner were entitled to a seaman's lien for wages.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. § 163; Dec. Dig. § 27.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7297-7301.]

In Admiralty. On final hearing.

A. Frank Staley, for libelants.

Willard M. Harris, for respondent.

J. B. McPHERSON, District Judge. This is a libel for wages, upon which a good deal of testimony has been taken. I see no occasion to discuss the evidence, however, but shall only state briefly my conclusions:

1. The derrick hoist Sallie is a vessel, subject to the jurisdiction of the district court in admiralty.

2. Each of the libelants was employed by the owner and master of the vessel; Weikel was to receive \$15 per week, and Vincent was to receive 25 cents per hour, but not to exceed \$10 per week.

3. The services rendered were maritime in their nature, entitling the libelants to a lien on the vessel, Weikel being in charge of the engine that operated the derrick, and Vincent being a guy tender and general utility man.

4. The libelants were engaged in their respective employments from September 21 to November 24, 1908, without any interval that need be noticed.

5. From November 24th to December 14th, when the vessel was taken into the marshal's custody, she was in charge of the libelants, who continued to perform the same services, except such as were necessary to the operation of the derrick.

6. The master did not direct the vessel to be laid up for the winter, nor did he discharge the libelants, and they remained on her from November 24th to December 14th, awaiting further instructions and acting under their respective contracts of employment.

7. The evidence is not sufficient to justify the credit of \$15 that is asked for by the claimant.

8. There is due to John A. Weikel the sum of \$153.25, with interest from December 14, 1908, and to William Vincent the sum of \$96.09, with interest from the same date.

Decrees for these amounts respectively may be entered, with costs of suit.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## UNITED STATES v. HANSON.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,632.

**1. WATERS AND WATER COURSES (§ 222\*)—CONSTITUTIONAL LAW (§ 62\*)—RECLAMATION ACT—DELEGATION OF LEGISLATIVE POWER.**

The reclamation act of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511), providing for the irrigation by the United States of arid public lands, is within the power of Congress as to lands within the states as well as territories, under Const. art. 4, § 3, giving it power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and is not in violation of the Constitution on the ground that it authorizes the expenditure of public money without an appropriation, since it is in itself an appropriation of the proceeds of land sold, nor as delegating legislative authority to the Secretary of the Interior.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222;\* Constitutional Law, Cent. Dig. § 96; Dec. Dig. § 62.\*]

**2. PUBLIC LANDS (§ 47\*)—RECLAMATION ACT—WITHDRAWAL OF LANDS FOR PURPOSES OF ACT.**

The reclamation act of June 17, 1902, c. 1093, § 3, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 513), directs the Secretary of the Interior to "withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act," and authorizes him "to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works." *Held*, that two classes of withdrawals were thereby provided for, and that the exception of homestead entry from the second had no application to the first; withdrawals and reservations thereunder being, from the necessity of the case, absolute.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 133; Dec. Dig. § 47.\*]

Rights acquired by homestead settlements and entries, see note to McCune v. Essig, 59 C. C. A. 434.]

**3. PUBLIC LANDS (§ 131\*)—OCCUPANCY OF UNSURVEYED LANDS—RIGHTS OF OCCUPANT.**

The mere occupation of unsurveyed public land, although with the bona fide intention of acquiring title thereto under the homestead law when it shall be surveyed, gives the settler no rights as against the United States, and Congress may at any time before the initiation of homestead rights reserve the land for any public purpose.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 347; Dec. Dig. § 131.\*]

**4. PUBLIC LANDS (§ 132\*)—WITHDRAWAL UNDER RECLAMATION ACT—RIGHTS OF SETTLER.**

The reclamation act of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511), contains no provision for the recognition or protection of any right of a settler on unsurveyed public lands which may be withdrawn and reserved thereunder for use in the construction of irrigation works, nor is there any such provision in Act June 27, 1906, c. 3559, 34 Stat. 519 (U. S. Comp. St. Supp. 1907, p. 519), or other statute of the United States, and such a settler has no right which he can oppose to the taking of the land for such purpose.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 348; Dec. Dig. § 132.\*]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Washington.

On December 31, 1906, the United States commenced an action of ejectment against the defendant in error to recover the possession of a one-half section of government land in Klickitas county, state of Washington, alleging in the complaint that in October, 1905, the defendant in error, without right or title, had entered into the possession of said premises, which prior to that time had been withdrawn from entry, location, or settlement of any kind or character. The defendant in error answered, alleging that on April 29, 1891, the land in controversy was unsurveyed public land of the United States, and that on that date he took possession of the same with intent to file a homestead thereon under the laws of the United States, and that he has continued to reside thereon, and made his home thereon from that date until the present time, at all times intending to prove up on said land as soon as the same was surveyed and open to entry; that the land has not yet been surveyed; that the defendant in error has cleared about 10 acres thereof, and has from  $\frac{1}{2}$  to 2 acres under fence. The answer also alleged that the action is unauthorized by any law of the United States; that its purpose is to obtain possession of the land in controversy with a view of using it for the reclamation service of the United States under the act of Congress of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511); and that by virtue of that statute the Secretary of the Interior was authorized to acquire by purchase, or by condemnation under judicial process, any rights or property necessary for the carrying out of said act. To this answer the plaintiff in error demurred. The demurrer was overruled, the court holding that, notwithstanding that the land was unsurveyed and not open to homestead entry, and notwithstanding that it was withdrawn for forest reservation purposes on September 8, 1902, and for reclamation purposes on September 13, 1904, the settlement of the defendant in error thereon for homestead purposes gave him a prior right thereto, and that the government could only obtain the land for reclamation purposes by condemnation. The plaintiff in error replied, denying the qualifications of the defendant in error to enter said land as a homestead, and denying the bona fides of his alleged settlement. A trial was had before a jury, and at the conclusion thereof the court, upon the motion of the defendant in error, instructed the jury to return a verdict in his favor. Section 3 of the act of June 17, 1902, 32 Stat. 388 provides as follows:

"That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: Provided, that the commutation provisions of the homestead laws shall not apply to entries made under this act."

A. G. Avery, U. S. Atty. and J. B. Lindsley, Asst. U. S. Atty. for plaintiff in error.

Henry J. Snively, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The defendant in error raises in this court for the first time the question of the constitutionality of the reclamation act on the grounds: First. That the work to be done and the expenditures to be made under it are not public and governmental in character, and are not within the limited powers belonging to the federal government. Second. Conceding that the government has the power to pass such an act affecting public lands in a territory, it has not such power as to lands within the states or in any localities where there are no government lands; therefore an act which essays to do both is void because it is impossible to segregate the valid from the invalid portion thereof. Third. That it authorizes the expenditure of the public moneys without an appropriation by Congress. Fourth. That it delegates legislative authority to the Secretary of the Interior, and authorizes him to determine what and where irrigation systems shall be built and maintained, and what shall be expended thereon.

The Constitution gives to Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In *United States v. Gratiot*, 14 Pet. 526, 10 L. Ed. 573, it was said that Congress has the same power over the public lands as over any other property belonging to the United States, "and this power has been vested in Congress without limitation." In *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534, Mr. Justice Field, referring to the constitutional provision above quoted, said:

"That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made."

In pursuance of that power, Congress passed the reclamation act to make marketable and habitable large areas of desert land within the public domain, which lands are valueless and uninhabitable unless reclaimed by irrigation, and the irrigation whereof is impracticable except upon expenditure of large sums of money in the construction of a system of reservoirs and distributing canals. All previous efforts of the government to make these arid lands available for settlement had resulted in failure. By the desert land act of March 3, 1875, c. 160, 18 Stat. (vol. 3) 497, Congress had made provision for their use by individual settlers, and on March 3, 1877 (Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1548]), had enacted further legislation to facilitate the reclamation of such lands by private entrymen, and in 1894 (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422, [U. S. Comp. St. 1901, p. 1554]), to provide for the irrigation of the arid public lands, had passed the Carey act, by which it proposed to donate to the states in which such lands were located so much thereof not exceeding 1,000,000 acres in each state, as the state would cause to be reclaimed. These efforts having failed to accomplish the desired end, the reclamation act was passed. Congress, being the owner of the lands and vested with unlimited authority over the same, as it has

been held by numerous decisions of the Supreme Court, had unquestionably the right to expend money thereon for their improvement. It has always exercised the right to expend money in causing surveys of the public lands to be made, and in providing for the protection of the public lands. Nor do we discover any ground for holding that its power over the public lands within a state stands upon any different basis from that of its power over public lands in a territory. Although the government on admitting a state into the Union relinquishes its control of the disposition of the waters of the state, except in so far as the regulation of commerce is concerned, it relinquishes none of its rights over the public lands included within the territorial limits of the state. The government is still sovereign over such lands, and, in the nature of things, so long as it does not interfere with state legislation over waters of the state, it must have the same power to improve, protect, and offer for settlement or sale the public lands within a territory. The power of Congress to govern the territories has nothing to do with this power over the public lands. In *Camfield v. United States*, 167 U. S. 519, 17 Sup. Ct. 867, 42 L. Ed. 260, the court said:

"While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a state which it would have within a territory, we do not think the admission of a territory as a state deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection."

The defendant in error quotes the language of the opinion in *Kansas v. Colorado*, 206 U. S. 91, 27 Sup. Ct. 665, 51 L. Ed. 956, in which it was said:

"We have within our borders extensive tracts of arid land, which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government; but if no such power has been granted, none can be exercised."

But it is clear from other expressions in the opinion that the language so quoted had reference solely to the question of the power of Congress to interfere with the state control over the flow of waters within its limits, which control, subject to the power of Congress to regulate commerce, is vested wholly in the state. Elsewhere in the opinion it was said:

"As to those lands within the limits of the states, at least of the Western states, the national government is the most considerable owner, and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation."

The disappearing point of the power of Congress to reclaim arid public lands within a state is thus placed at the line where such legislation interferes with state legislation over the subject of reclamation. No such interference is suggested in the present case.

Nor does the act violate the Constitution in that it authorizes the expenditure of public moneys without an appropriation. The act itself is the appropriation. It provides that the proceeds of the sale of public lands "are hereby reserved, set aside and appropriated as a special fund in the treasury to be known as the 'Reclamation Fund.'" It

is said that the appropriation is indefinite. This is true, but it is not more indefinite than other appropriations which have been made by Congress from the beginning of the government, the constitutionality of which has never been questioned.

But it is urged that the act delegates legislative authority to the Secretary, in that it authorizes him to determine what irrigation system shall be built and maintained, and what amount shall be expended thereon. A similar contention was advanced in *Union Bridge Company v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, concerning the river and harbor act of 1899 (Act March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3540]), which gave to the Secretary of War power to determine whether bridges on navigable waters of the United States are unreasonable obstructions to navigation, and providing for the removal of such bridges when so condemned by the Secretary. But the court held that the act was not unconstitutional as a delegation of legislative power to an executive officer. Said the court:

"In performing that duty, the Secretary of War would only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

Of course it was impossible to determine in advance the extent of the fund that would be available for reclamation purposes. It was the will of Congress expressed in the act that, with certain reservations, the whole of the fund to be derived from the sale of public lands in each of the designated states and territories should, for a specified period, be devoted to the reclamation of the arid lands of that state or territory. Section 9 of the act apportions the amounts so to be expended in each district. It is only the use of the revenues derived from taxation that is by the Constitution expressly restricted to the payment of the debts, and provision for the common defense and general welfare of the United States. And, if by implication the funds derived from the sale of public lands of the United States are subject to the same restriction, there is no difficulty in the way of holding that the use of the funds contemplated by the reclamation act is for the common welfare. It is as clearly as much so as are the grants of lands in aid of the construction of transcontinental railroads which have been judicially sustained. We find no ground for holding that the act is unconstitutional.

Prior to the date of the reclamation act, the defendant in error had settled upon the land in controversy, intending to make a homestead entry thereon whenever it should be surveyed or offered for settlement. It has never been surveyed or offered for settlement, and the question arises whether or not he has acquired such right thereto that it may not be withdrawn under section 3 of the act. That section makes provision for two distinct classes of reservations of public lands for two distinct purposes. It provides, first, that the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc. No exception whatever is expressed as to lands which are authorized to be withdrawn

for these purposes. It provides, second, for the withdrawal of any other public lands "believed to be susceptible of irrigation from said works." Such lands are to be withdrawn from entry "except under the homestead laws." We are unable to assent to the proposition that these two provisions for withdrawal are in *pari materia*, and that the exception expressed in the second as to entry under the homestead laws is to be read into the first. On the contrary, we find from the fact that the exception is inserted in the second case and omitted from the first convincing proof of the intention of Congress that there was to be no exception of lands to be withdrawn under the first clause. There was the best of reasons for expressing such an exception as to lands to be withdrawn under the second clause, for it was the whole scheme of the act to reclaim arid lands for the purpose of inducing homestead settlement thereon. There was the best of reasons for omitting it from the first clause, for it was the intention to reserve thereunder only such lands as were needed for the actual occupation of the reclamation service, such as for reservoirs, dams, canals, and pumping works. In the very nature of the case there could be no exception for homestead entry on such reserved lands unless they were subsequently found to be unnecessary for the purpose for which they were reserved. In that event the act provides that the Secretary restore them "to public entry."

There is nothing in the essential nature of the acts of entering upon unsurveyed public land, residing thereon and improving the same with the intention to enter the same as a homestead, to confer upon the settler any vested right, or any kind of claim to the land, and such acts create no impediment to the power of the government to devote the land to any public purpose. *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920; *Campbell v. Wade*, 132 U. S. 38, 10 Sup. Ct. 9, 33 L. Ed. 240; *Tarpey v. Madsen*, 178 U. S. 220, 20 Sup. Ct. 849, 44 L. Ed. 1042; *Northern Pacific Railroad v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. Ed. 479; *Russian American Packing Co. v. United States*, 199 U. S. 570, 26 Sup. Ct. 157, 50 L. Ed. 314. In *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, it was held that a settler on the public domain in advance of the public surveys acquires no right except the preferential right to secure the land after it is surveyed and offered for settlement. The court said:

"The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him: 'If you wish to settle upon a portion of the public lands and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them.'"

It is the clearly expressed doctrine of this and other decisions that mere occupation of public land gives no right as against the United States, and that Congress has the power to set aside such land prior to the acquisition of homestead rights thereon and reserve the same for any public purpose. Prior to such reservation, the most that a

settler on unsurveyed lands intending to enter the same as a homestead can claim is the protection of his possession under the permission of the government to enter thereon in advance of the public surveys.

In *Washington & Idaho Railroad Company v. Osborn*, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 356, it is true, it was held that such a settler had a "possessory claim" which was protected by an act of Congress granting to railroad companies rights of way over public lands in a territory, but it was so held because the act conferred upon the Territorial Legislature the power to provide for the manner in which private lands and "possessory claims on lands of the United States" might be condemned. A similar case was *Spokane Falls & N. Railway Company v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. Ed. 79. So it was held by this court in *Holmes v. United States*, 118 Fed. 995, 55 C. C. A. 489, under the act of Congress of March 3, 1891,<sup>1</sup> authorizing the President to withdraw lands for forest reserves, but protecting against reservation all lands embraced in any legal entry, or covered by any lawful filing of record, or upon which any valid settlement had been made pursuant to law, whereof the statutory period within which to make entry of record had not expired, that unsurveyed land in the possession of a settler who had made his home thereon in good faith, with the intention to make a homestead entry thereon when surveyed, was land on which a "valid settlement" had been made within the exceptions intended by the act.

We have to inquire, therefore, whether any right to the protection of his possession was given to the defendant in error by any other provision of the reclamation act or by any other statute of the United States. We search in vain to find in the language of any provision of the act itself any expression of the intention of Congress to recognize or protect such a right. It is not to be found by implication in the clause which provides for condemnation, for the power of condemnation was necessary to be conferred in order to extinguish such rights in lands as might have become vested by settlement initiated or perfected under the land laws, and it is not to be presumed that the power so granted was intended for any other purpose. Its exercise is expressly limited to cases "where in carrying out the provisions of this act it becomes necessary to acquire any rights or property." It is not to be found in section 2 of the act of June 27, 1906, c. 3559, 34 Stat. 519 (U. S. Comp. St. Supp. 1907, p. 520), cited by the defendant in error, which provides:

"That wherever the Secretary of the Interior in carrying out the provisions of the reclamation act shall acquire by relinquishment lands covered by a bona fide unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made."

This refers to entries so initiated under the land laws as to confer upon the entryman vested rights, which rights are voluntarily relinquished. Otherwise there would be no occasion for the enactment. A settler on unsurveyed public land has nothing to relinquish, and he would have the right, in the absence of any such statute, to

<sup>1</sup> Chapter 561, § 24, 26 Stat. 1103 (U. S. Comp. St. 1901, p. 1537).



make "another and additional entry" on the public land. Nor is it to be found in section 3 of the act of May 14, 1880, c. 89, 21 Stat. 141 amended by Act June 6, 1900, c. 821, 31 Stat. 683 (U. S. Comp. St. 1901, p. 1393), which gives to a settler who intends to claim a homestead the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and provides that their right shall "relate back to the time of settlement, the same as if they had settled under the pre-emption laws." This gives no right before an entry has been perfected. It provides that then the right shall relate back to the time of settlement the same as if settlement had been made under the pre-emption laws. In *Russian American Packing Co. v. United States*, 199 U. S. 570, 26 Sup. Ct. 157, 50 L. Ed. 314, a case which arose long after that act went into effect, it was said that there is no vested right in a pre-emptor until the purchase money has been paid.

We are of the opinion that the possession of the defendant in error of the land in controversy was of grace and not of right, that he has acquired no right which he can set up as against the United States, and that it was not the intention of Congress, as expressed in the reclamation act or elsewhere, that the progress of reclamation should be burdened or impeded by unnecessary litigation.

The judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer to the answer.

**NOTE.** The following is the opinion of Whitson, District Judge, filed in the court below:

**WHITSON, District Judge.** Plaintiff sues in ejectment to recover the east half (E.  $\frac{1}{2}$ ) of section 12, township 21 north, of range 11 east, and for damages.

In addition to the usual averments, it is alleged that these lands have heretofore been withdrawn, and at all times in the complaint mentioned were withdrawn, from entry, location, or settlement of any kind or character. The only date mentioned in the complaint is October, 1905, from which it may be concluded that any withdrawal applicable to the subject-matter of the action was made on or about that time.

The amended answer sets up that possession is sought for carrying out the intent of the act of Congress of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511), commonly known as the "Reclamation Act," and that the defendant, prior to the 29th day of April, 1891, while the lands were unsurveyed, and prior to withdrawal by the Secretary of the Interior, being duly qualified, settled upon the east half of the northeast quarter of the northeast quarter (E.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ ), the east half of the southeast quarter of the northeast quarter (E.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$ ), the north half of the southeast quarter (N.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ ), and the northeast quarter of the southwest quarter (N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ ), of said section, as a homestead; that he has ever since resided upon and occupied, and now resides upon, occupies, and claims, the same under the laws granting homesteads to actual settlers upon the public domain; that he has complied with and is entitled to the benefits of said laws, and may lawfully file upon, enter, and receive title to that part of the section last above described when the surveys made since his settlement shall have been approved, since no authority exists for the prosecution of the action or for depriving him of the rights so initiated. The northeast quarter of the southwest quarter is not involved. To that extent there is no issue raised. The north half of the southeast quarter is a part of

the east half of the section, but as to the east half of the northeast quarter of the northeast quarter, and the east half of the southeast quarter of the northeast quarter, those tracts are not recognized legal subdivisions, and no statute has been pointed out whereby entry could be made thereof under the laws of the United States. The issue presented, it will be seen, involves 80 acres only.

The statement of what is proposed, if the allegations of the answer be true, at once challenges attention and invites the most careful scrutiny. If the plaintiff should prevail, the defendant's improvements would be taken without compensation; his possessory right would be confiscated; his hopes of ultimately acquiring the title would be destroyed; and he would be compelled to bid farewell to a home which he has occupied for 17 years, relinquishing the land over which he has exercised dominion by virtue of a statute of the United States, and in full compliance with its provisions, while standing impotently by to see it devoted to other uses, a result which at the time of his settlement he had no reasonable ground to anticipate. Considering that the court is asked to become an instrument of injustice, it is to be remarked that it will only do so in obedience to rules of statutory construction demanding an interpretation of existing statutes favorable to such an end, for surely the proceeding has neither necessity nor merit for its justification, as I shall presently show.

That Congress has power by appropriate legislation to withdraw, or authorize the withdrawal of, public lands which have been offered for sale, or such as are subject to settlement or entry under the public land laws, may be conceded. That the claims of settlers in good faith who have entered thereon pursuant to existing laws may be disregarded, and that, in the absence of any saving clause, they are remediless, cannot be denied. That the government as a landed proprietor has the same rights and remedies as private individuals for the protection of its property, including the right to recover possession, was long ago settled.

These contentions made on behalf of the government are sustained by a long line of authorities. *Camfield v. United States*, 167 U. S. 525, 17 Sup. Ct. 864, 42 L. Ed. 260; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Yosemite Valley Case*, 15 Wall. 77, 87, 21 L. Ed. 82; *Campbell v. Wade*, 132 U. S. 38, 10 Sup. Ct. 9, 33 L. Ed. 240; *Shiver v. United States*, 159 U. S. 495, 16 Sup. Ct. 54, 40 L. Ed. 231; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920; *Russian American Packing Co. v. United States*, 199 U. S. 570, 26 Sup. Ct. 157, 50 L. Ed. 314; *Wagstaff v. Collins*, 97 Fed. 3, 38 C. C. A. 19.

But the disposal of the public lands is vested solely in Congress by the Constitution. *Irvine v. Marshall et al.*, 20 How. 558, 15 L. Ed. 994; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *United States v. Fitzgerald*, 15 Pet. 407, 10 L. Ed. 785.

And it is to the statutes applicable to the facts here presented that reference must be made, for it will not be contended that a law may be suspended, thereby denying to a settler rights which have been expressly conferred by legislation.

Referring to such claims in *Russian American Packing Company v. United States*, *supra*, it was observed:

"Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and receipt from the proper land officer given to the purchaser. Until this has been done, it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler."

Again, in *Buxton v. Traver*, *supra*, in discussing the occupancy of a pre-emptor of unsurveyed public lands, we find the following:

"A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase."

Continuing, and speaking of the filing, and the acts required of the pre-emptor, it was said:

"Until then he has no estate in the land which he can devise by will, or which, in case of his death, will pass to his heirs at law. \* \* \* The

United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. \* \* \*

It was declared, if the required steps are not taken, that:

"The title to the land remains unaffected, and subject to the control and disposition of the government, as before his occupancy."

In the former case withdrawal was made by the President in virtue of express authority conferred by Congress, while in the latter the claimant died before the lands were surveyed, and it was held that his heirs did not succeed to the title by virtue of his claim initiated on unsurveyed land. It was evidently considered a personal privilege which did not descend under the provisions of the statute; but, whether so considered, it fully appears that in both cases the supremacy of Congress was strictly observed; in the one by express language, and in the other by referring to "the control and disposition of the government," having in view, of course, the only branch of the government authorized to act in the premises. The power vested in Congress to dispose of the public lands carries with it the power to withdraw privileges extended, and, until such rights as have been granted are withdrawn by the only authority which may confer them, they still exist. A different rule prevails, it is true, between the government and a claimant, and between those who would contest among themselves for the prior right of purchase or entry. This distinction was recognized by the Circuit Court of Appeals for this circuit in *Holmes v. United States*, 118 Fed. 995, 55 C. C. A. 489. But while recognizing it, the Circuit Court was reversed for disregarding the claim of a homestead settler upon the public domain, where the question was presented by an action for possession, as here, upon the ground that there had been no authorized withdrawal of the land which could affect the claim of the settler on unsurveyed land. The status of the land was described by the court as follows:

"It is conceded that the land in controversy had not, prior to the date of the proclamation of the President, been embraced in any legal entry or covered by any lawful filing of record in the United States Land Office. \* \* \*"

An explicit statement of the views of the court appears in the syllabus, from which the following is taken:

"While the mere occupancy and improvement of public land give no right as against the United States, yet the occupancy and improvement of unsurveyed public land, in good faith, by a settler who makes it his home, with the intention of making entry of the same under the homestead or pre-emption laws when it shall have been surveyed, has always been recognized as lawful, and as giving the settler a possessory claim, which entitles him to preference when the land is opened for entry; and, in view of such recognition, such a settler must be regarded as having made a 'valid settlement pursuant to law,' within the meaning of the President's proclamation of December 20, 1892, setting apart, as a forest reservation, certain public lands in California, but excepting all lands within the prescribed boundaries 'which may have been prior to the date hereof embraced in any legal entry or covered by any lawful filing duly of record, \* \* \* or upon which any valid settlement has been made pursuant to law'; and under the rule of the later decisions of the Supreme Court, that the withdrawal of lands from entry by the Interior Department as being within a railroad grant did not defeat the rights of subsequent settlers thereon where the withdrawal was in fact unauthorized, it is immaterial that the land of such settlers had been so withdrawn, and had never been formally restored to the public domain."

This case is relied upon to sustain the action; but it is an authority sustaining the defendant's position unless Congress has authorized the withdrawal upon which recovery must rest.

Of that only, it remains to inquire. The inquiry leads to the construction of the acts relating to homesteads and those providing for the reclamation of arid lands. The defendant has been pertinaciously designated by counsel as a squatter, and to sustain that view those decisions of the Supreme Court have been cited which hold that no length of occupancy or extended improvements will give one who, without license, goes upon public lands, the right to claim as against the government. *Sparks v. Pierce et al.*, 115 U. S. 408, 6

Sup. Ct. 102, 29 L. Ed. 428; *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423.

The familiar provisions of the homestead law relating to settlement, and the like, need only be referred to, but Act May 14, 1880, c. 89, § 3, 21 Stat. 141, amended by Act June 6, 1900, c. 821, 31 Stat. 683 (U. S. Comp. St. Supp. 1907, p. 1393), 6 Fed. St. Ann. 301, is applicable. It is there provided:

"That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

A settler under the pre-emption laws was required to file his declaratory statement "within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement. Section 2266, Rev. St. amended by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097 (U. S. Comp. St. 1901, p. 1381).

The statute of 1880 has been construed as conferring rights concerning public lands, whether surveyed or unsurveyed, which did not exist prior to its passage, and as giving express authority for making settlement upon such lands under the homestead laws, giving the settler the right to claim, as of the date of his settlement, by relation. *Maddox v. Burnham*, 156 U. S. 545, 15 Sup. Ct. 448, 39 L. Ed. 527.

Referring to a pre-emption settler in *Buxton v. Traver*, *supra*, it was said: "He has been permitted by the government to occupy a certain portion of the public lands, and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing; that is, the right to pre-empt it."

Webster defines "squat" as follows:

"To settle on a piece of land without permission or right, as on public land, or in the unfenced outskirts of a town."

A squatter is an intruder; one who enters without legal authority; he is a trespasser *ab initio*. *Bouvier's Law Dictionary*; *Words & Phrases*, tit. "Squatter," vol. 7, p. 6619.

The defendant, therefore, is not a squatter. His possession was lawful at the time he initiated it. This is an important consideration, for, if he be a trespasser pure and simple, he has no defense. The policy concerning the disposal of the public lands has always been to encourage settlements. Those who have reclaimed the wilderness, who have extended the frontier, have been deemed worthy of the utmost consideration, and in construing the law, if it has been put to severe tension or its letter violated by the Interior Department, it has been out of solicitude for those who have made actual settlements upon public lands, and have shown an earnest desire to comply with the provisions of law. The homestead law has been invariably referred to as a beneficent boon conferred by the bounty of the government, and the homestead settler has ever been protected when accepting the invitation thereby extended, while claiming in good faith. It has never been the practice to molest or hinder the fullest assertion of the right to acquire lands under this law. With this well-defined policy, and the principle that Congress only may withdraw an invitation by it extended, in view, we turn to the reclamation act, and in doing so it is to be observed that these statutes are in *pari materia*.

The defendant's settlement antedates the passage of the reclamation act by about 11 years. The purpose which runs through the statutes relating to homesteads is intensified in the legislation for reclaiming arid lands. Homesteads are expressly protected under the latter act, and it is a matter of public notoriety that by the later legislation it was intended to still further aid those of our citizens who would reside upon, reduce to a state of cultivation, and improve such lands as can only be rendered susceptible of cultivation by means of the works expressly authorized for their irrigation. Whether Con-

gress intended that the Secretary of the Interior should, when the public interests require, withdraw lands from entry to which possessory rights had lawfully attached, and for which the right to enter had been initiated, turns upon the interpretation to be given the language which follows, found in section 3 (Act June 17, 1902, c. 1093, 32 Stat. 388 [U. S. Comp. St. Supp. 1907, p. 513]):

"That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or inadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works, shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: Provided, that the commutation provisions of the homestead laws shall not apply to entries made under this act."

The construction relied upon by counsel is that, for "lands required for irrigation works," a homestead claim may be ignored, notwithstanding the express provisions that no withdrawal may be made as against homestead entries generally upon lands to be irrigated. This construction is extremely technical and literal. It would lead to the conclusion that one who had actually reclaimed his land might be deprived of it unless it should fall within the limits of some contemplated irrigation scheme. It would give the homesteader whose land is to be irrigated the advantage of one whose land needs no irrigation and who is in no way interested in the contemplated works. The fact that lands reclaimed under the act can only be taken under the homestead law supplies a forceful reason for the inference that it was not intended to interfere with homestead settlers. This law being so distinctly preserved, it cannot be concluded that there was an intention to place one who should be so unfortunate as to have by his own enterprise reclaimed his land, even though he may not have had an opportunity to make his entry in the land office, at a distinct disadvantage with one who had never attempted reclamation, or had not even settled or made an entry. That it was not so intended is abundantly justified, also, by the provisions of section 4, requiring that those who receive the benefits of irrigation shall ratably contribute to the cost; and by those of section 6, which provide for turning the works over to the persons who shall have paid therefor; and also by the authority conferred by section 7 to condemn property needed for any particular enterprise. If anything further were needed to confirm this construction, it may be found in the amendment of June 27, 1906, c. 3559, § 2, 34 Stat. 519 (U. S. Comp. St. Supp. 1907, p. 520), from which the following quotation is made:

"That wherever the Secretary of the Interior, in carrying out the provisions of the reclamation act, shall acquire by relinquishment lands covered by a bona fide unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made."

Again, section 5 of the amendatory act protects the entryman under the desert land act. Thus it would appear that every claimant and entryman, if plaintiff's theory can prevail, has been protected except the particular homesteader who would have needed no aid.

While it must be conceded that if Congress has clearly made manifest its intention to accomplish that which is here contended for it is competent to do so, yet reading all the acts together relating to the subject, the holding must be that it was not intended to authorize the Secretary of the Interior to withdraw lands to which it would be held that homestead rights had attached, but for the passage of the reclamation statutes, but rather to anticipate future claims which might embarrass the establishment of works in contemplation. So the language of section 3 would seem to indicate, for withdrawal is to be made before giving the scheme publicity. The rule applicable here may be briefly illustrated. "When there are two provisions of law in the statutes relating to the same subject, effect is to be given to both if practicable." *Chicago Railway Co. v. United States*, 127 U. S. 406, 8 Sup. Ct. 1194, 32 L. Ed. 180. "Where two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, and no purpose to repeal the earlier act is expressed or clearly indicated, the court will, if possible, give effect to both." *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614. "No construction should be given to a statute that would inevitably lead to absurd results when this can be sensibly avoided." *Interstate Drainage & Investment Co. v. Board of Commissioners*, 158 Fed. 274, 85 C. C. A. 532. See, also, *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *United States v. Healey*, 160 U. S. 145, 16 Sup. Ct. 247, 40 L. Ed. 369; *United States v. New York*, 160 U. S. 609, 16 Sup. Ct. 402, 40 L. Ed. 551.

Counsel for the plaintiff desire to know what it is that the plaintiff ought to pay for in this case. This is the answer: Inasmuch as it seeks to take from this defendant his improvements, deprive him of possession, and apply them to the use of persons who are to profit by carrying on the irrigation scheme for which this land is demanded, and they are to pay the actual cost, the defendant ought not to be required to furnish without compensation that which is a necessity and a benefit to those persons. It has been held, under the act of 1875 granting rights of way to railroads over the public domain, that on unsurveyed land one in possession, even under the pre-emption law, is entitled to damages for his possession. *Spokane Falls & Northern Ry. Co. v. Ziegler*, 167 U. S. 65, 73, 17 Sup. Ct. 728, 42 L. Ed. 79; *Washington & Idaho Railroad Co. v. Osborn*, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 356. And the possessory rights and improvements of those in possession have repeatedly been made the subject of the exercise of the right of eminent domain. *Washington & I. R. Co. v. Osborne*, 2 Idaho (Hasb.) 557, 21 Pac. 421; *Larson v. Oregon Ry. & Nav. Co.*, 19 Or. 240, 23 Pac. 975; *Yakima County v. Tullar*, 3 Wash. T. 393, 17 Pac. 885; *Johnson v. Bridal Veil Lumbering Co.*, 24 Or. 182, 33 Pac. 528.

It would be a poor requital to the defendant, for the wasted days of labor, and the weary years of effort, to be assured that the homestead law is one of great beneficence, even though he might not be able to see the justice of appropriating his property for the benefit of others no more meritorious than himself. The semiprivate enterprise of reclaiming arid lands carried on by the government, where it is taking property for the use of others, in the absence of any express authority of Congress, places the plaintiff in the same situation as a private individual. It has the right of eminent domain. *Sess. Laws Wash.* 1905, p. 180, c. 88. This it should invoke.

The answer sets up a partial defense, and, as the demurrer is general, it must be overruled. If any issue of fact is to be raised by the pleadings, it may come on for trial at the May term in North Yakima.

## OSBORNE et al. v. McDONALD et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,592.

## DESCENT AND DISTRIBUTION (§ 71\*)—HEIRSHIP—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence considered in a suit to recover the estate of a decedent, and held insufficient to establish the fact that complainants were legal heirs of decedent, where it consisted largely of family tradition that the grandfather of the older generation of complainants married a second time and had a son, of the same name as decedent, who had not been heard from for nearly 50 years, and there was no evidence of such marriage or of the name or identity of the second wife, if any.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 235; Dec. Dig. § 71.\*]

Appeal from the Circuit Court of the United States for the Northern Division of the Western District of Washington.

For opinion below, see 159 Fed. 791.

In Equity. This is a suit brought by the complainants against the executors and trustees of the last will of James Osborne, deceased, and the city of Seattle, a municipal corporation, for the recovery of the residue of the estate left by said James Osborne, deceased. The complainants claim to be the only surviving heirs at law of said James Osborne, deceased, and entitled to said residue under the laws of the territory of Washington in force in said territory at the time of the decease of said James Osborne in the month of December, 1881.

Chas. K. Jenner and Solon T. Williams (Harrison Bostwick, of counsel), for appellants.

Chas. F. Munday, for appellees executors and trustees.

Scott Calhoun, for appellee City of Seattle.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). James Osborne died, testate, in the city of Seattle, in the then territory, now the state, of Washington, in the month of December, 1881, and left real and personal property of considerable value, which he disposed of by his will, providing for funeral expenses and the expenses of his last sickness; the payment of his debts; making certain bequests to his partner in business and others; and the residue of his estate, both real and personal, he gave to his executors named in the will, and to their successors in office, in trust, for the purpose of converting the same into ready money and creating a fund which should be kept at interest until expended as directed in the will. After the residue of the estate had been converted into money, the executors were to propose to the city of Seattle to build a public hall for which the said entire fund should be contributed, provided that the said city of Seattle should contribute a like and equal sum. The proposition was to be submitted annually until the same should be accepted by

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the city of Seattle, and the wishes of the testator carried into effect. No relatives were recognized or provided for in the will. The appellants, as complainants in the court below, claiming to be heirs of the deceased, filed their amended bill in equity in the Circuit Court on April 21, 1906, praying that they be adjudged sole heirs at law of the deceased (with the exception of certain other heirs mentioned and described in the amended bill of complaint).

The original bill of complaint is not in the transcript of record, but it appears to have been filed on June 12, 1905. The jurisdiction of the Circuit Court was invoked by the amended bill on the ground of diverse citizenship. The defendants demurred to the amended bill of complaint, and entered their pleas to the jurisdiction on the grounds that certain of the complainants and one of the defendants were citizens of the state of California. Thereupon complainants moved to dismiss out of the case the complainants who were citizens of the state of California. This motion was granted, and the demurrers on other grounds overruled. The defendants answered alleging, among other things, that they had no knowledge or information sufficient to base a belief as to whether the complainants were heirs of the said James Osborne, or whether the said James Osborne left surviving any heirs at all, and upon the evidence taken in the case the court below was of the opinion that the heirship of the complainants had not been established as required by law, and accordingly dismissed the bill.

James Osborne was never married. The complainants claiming as his heirs trace their descent from five children of one Abraham Osborne by a first marriage, and claim that James Osborne was a son of Abraham Osborne by a second marriage. The five children of Abraham Osborne, through whom complainants trace their relationship to James Osborne, were Caroline (Doty), Horace, Lewis K., Solomon E., and Clark H. Where these children were born does not appear from the evidence, but a reasonable inference drawn from the testimony is that they were born near New York City, at or near Tremont, in the neighborhood of the Bronx. The evidence indicates that Caroline was born in 1807. Horace was older than Lewis K., but the year of his birth is not stated. The latter was born in August, 1812. Solomon E. was born in 1814, and Clark H. in 1819. All these children of Abraham Osborne are dead. The testimony in support of complainants' case comes mainly, therefore, from grandchildren and great-grandchildren of Abraham Osborne, who testify concerning the declarations of deceased persons as to their residence, and relationships by blood and marriage. The deposition of William E. Osborne, a son of Solomon E. Osborne, residing in Brooklyn, N. Y., was read at the hearing. He was asked if he knew, from information derived from statements made by his father and uncles, where and with whom his father and his uncles lived in their boyhood days, or by whom they were raised. He replied that they were very young when their mother died, and their father turned them over to their uncle Northrop, and he brought them up. This Uncle Northrop lived at North Salem, Conn. The witnesses further testified that, while



these children were living with their uncle, their father, Abraham Osborne, was living in New York, down near Tremont, in the neighborhood of the Bronx. He was asked if he knew where Abraham Osborne lived after this alleged second marriage. He said, "I think he lived in that neighborhood somewhere." He was asked if he was sure he did not live in New York City. His answer was, "Well, in New York, but I would not say positively New York City; I know it was somewhere in New York." S. Wallace Osborne, also a son of Solomon E. Osborne, residing at East Norwalk, Conn., stated in his deposition that the boys of Abraham Osborne went to live with their Uncle Northrop at North Salem, and stayed with their uncle until they were 21. They all learned the trades of masons. This witness was asked why his grandfather left the boys when they went to live with their uncle. The witness replied that he thought it was because his grandfather got married again. He also testified that when Northrop Osborne had the children of Abraham Osborne, with whom he lived at North Salem, he had heard his father say that Abraham Osborne lived in New York City. This witness, whose deposition was taken in October, 1906, was asked whether he had any means or knowledge whereby he could approximately fix the time of his grandmother's death. He replied that she had been dead about 80 years. This statement would fix the date of her death about the year 1826.

The deposition of Annie Doty was taken. She is the widow of Lewis W. Doty, a son of Caroline Doty, who was the daughter and eldest child of Abraham Osborne. The witness testified that the mother of Caroline Doty, the wife of Abraham Osborne, died at Christie street, New York City, when Caroline Doty was 15 years of age. This statement would fix the year of her death in 1822. This witness was asked if she knew where Abraham Osborne was living during the greater part of his life. She replied she thought he lived in Danbury, but the longest period they knew of he lived in New York. She did not know where he went from New York—whether south or west—but she knew he went away.

Turning now to the testimony relating to James Osborne in the state of Washington, we find that the evidence tends to show that he was born in 1835; that he arrived at Puget Sound in 1859 or 1860, and was first located at Port Gamble, and a few years later he located at Seattle. Two witnesses were produced at the hearing who knew him in that locality, Lyman B. Andrews and Winfield S. Jameson, to whom he stated that he was from New York. Andrews testified that James Osborne told him that he was raised near New York City, Westchester county. The locality of the Bronx was mentioned. He said his mother had died before he left home. His father was still living at that time. He did not get along, and, having an opportunity to go to sea, he shipped for a voyage to Havre, France. He was gone three or four years. Returning home, he remained three or four months, then left for the Pacific Coast around Cape Horn. He landed in San Francisco, but afterwards went up to Port Gamble on Puget Sound. This was in 1859 or 1860.

Jameson testified that he heard James Osborne remark that he came from Westchester county, N. Y., the town of Morrisania. He spoke

of going to sea and making a voyage to France; witness thought he said Havre. He spoke of having come around the Horn to San Francisco in a sailing vessel, and from San Francisco to Port Gamble, also in a sailing vessel.

William Cauldwell, a journalist, residing in New York City, testified that he lived in Morrisania from 1849 to 1891; that he knew a man named Louis K. Osborne. (In referring to Louis or Lewis K. Osborne, we follow the record designating the person either as Lewis or Louis, as it there appears; but no point is made that this difference in the name indicates a different person.) He lived at Tremont, adjoining Morrisania, which was formerly called Upper Morrisania. This Louis K. Osborne had a relative named James Osborne. The witness thought he was a half-brother. About 1852 this James Osborne went away from Morrisania. He returned about 1857. He said he thought he would go to California. He did go away, and afterwards the witness received a letter from him written either from Sacramento or San Francisco. This was in 1859. He wrote he was going north to Puget Sound to a place the name of which was either Gambel, Gandlet, Gantel, or Gambul. The name was peculiar, and impressed itself upon the mind of the witness. The deposition of this witness was taken in October, 1906. He testified that he was then 77 years of age. He was therefore born about the year 1829. He testified that his intimacy with Louis K. Osborne was that of an esteemed personal acquaintance. "He and I," said the witness, "were both young at that time." The witness on cross-examination, indicated that the time referred to was in 1852 and 1853. The witness was at that time 23 or 24 years of age, and he testified that Louis K. Osborne was then 25 or 26 years of age. They were, therefore, as the witness testified, "both young at that time." The witness was asked if Louis K. Osborne was married at that time. He answered, "No, I do not think so." But the Lewis K. Osborne referred to in the testimony of the complainants as a son of Abraham Osborne and their relative was born in 1812, and in 1852 and 1853 he was 40 or 41 years of age. Here is a difference of 15 years in the age of the Louis K. Osborne whom Cauldwell knew, and the Lewis K. Osborne, the supposed half-brother of James Osborne. It is not probable that Cauldwell would make such a mistake, and the only reasonable inference is that they were not the same person. Furthermore, this Lewis K. Osborne who was the relative of the complainants became the father of a large family, and, by the testimony of his son Lewis D. Osborne, we are informed that he was married twice. By his first wife he had seven children, as follows: John W., Louis P., Winthrop, Richard, Caroline, Mary Elizabeth, and Eliza Elzea. By the second wife he had six children, as follows: Maggie (Sparks), William C., Minnie E. (Hegeman), Robert E., Lewis D., and George I. The evidence does not state when any of the children by the first wife were born. But the depositions of Minnie E. Hegeman, Robert E. Osborne, and Lewis D. Osborne, the children by the second wife, were taken in the case, and from their testimony we learn that Minnie E. Hegeman was born in 1859; Robert E. Osborne, 1860; and Lewis D. Os-

borne, 1867. Is it probable that the Louis K. Osborne who was 25 or 26 years of age in 1852 or 1853, and a single man, as testified to by Cauldwell, married and became the father of seven children, lost his wife, and was married the second time, and among the children by his second wife had a daughter born in 1859? We do not think so. There is evidently some mistake in the identity of this Lewis or Louis K. Osborne.

With respect to Abraham Osborne, the alleged father of James Osborne, the same uncertainty exists in his identification as the father of Lewis K. Osborne, the relative of the complainants, and the father of James Osborne by a second wife. The evidence, as before stated, tends to show that James Osborne was born in 1835. His declarations were that he was from Westchester county, N. Y. The locality of the Bronx was mentioned, and also of Morrisania.

Extracts from a copy of a letter were read in evidence by the complainants. The copy was identified as being in the handwriting of Lewis K. Osborne, and was found among his papers. It was dated at Mobile, August 8, 1835. Lewis K. Osborne was then 23 years of age, and this is the year in which James Osborne was born. Following the date of the letter is this indorsement: "Copy of a letter written to my father residing in St. Louis, Missouri." Certain extracts from this letter are printed in the record, but the entire document was introduced in evidence, and is in the record filed in this court. Certain other portions of this copy of a letter are relevant to the question under consideration. After the indorsement as above, the letter proceeds:

"Dear Father: Years have rolled away in quick succession since I have been permitted to gaze upon that countenance whose very expression (to me) was always love. \* \* \* I have since I wrote to the postmaster for information respecting you been looking with anxious eyes and waiting heart for an answer from you, but as yet have received none. I received a letter a few days ago from my dear brother Horace, and the anxiety of himself and friends for your welfare was of no small amount. They expressed a desire to hear from you, but still greater to see you. We anticipate and I hope we shall soon realize our present hopes of receiving some intelligence from you that will gladden our hearts. I want you to write to me as soon as you receive this and let me know what you are engaged in; also whether you are in prosperity or adversity, sickness or in health, &c-&c—and then I can communicate such intelligence to the friends at the north. I expect to remain in Mobile till next spring, and then if I am spared return home. The friends at the north are all well. I believe Caroline has lost one of her little girls. She has now a son and a daughter left, Lewis and Electa. She and Doty live together in harmony and love and are both members of the Baptist church. Aunt Clarriss makes it her home with them. If you should want to write to them, they live 117 Stanton St. Uncle Northrop has been buying and selling property almost every year since you left. He has now bought Landlord Close's place, farm and all, and is now living on it. All three of the boys are with him, and he has acted in the capacity of a father to us all for which he deserves the highest praise. Aunt Rosalinda also has been as a mother to us. Heaven award them for their deeds of charity.

[Signed] Lewis K. Osborne."

If James Osborne was the son of Abraham Osborne by his second wife and was born in Morrisania, N. Y., in 1835, as claimed by the complainants, how is it that the children of Abraham Osborne by his first wife did not know of his whereabouts at that time? His son

Lewis K. Osborne had not seen him for years, but apparently supposed he was in St. Louis in 1835. This son certainly had no knowledge of his father's second marriage. But if this Abraham Osborne had married a second time and lived in Morrisania, or in that neighborhood, would not his son Lewis K. and his other children have known that fact? Their old home was either there or in that neighborhood, and they would naturally have known if their father was there or in that vicinity, and if he had married a second time they would undoubtedly have known that fact. But he was not there if any reliance is to be placed in the statements contained in the copy of the letter written by Lewis K. Osborne to his father in 1835, and addressed to St. Louis, Mo. Years had rolled away since the writer had seen his father, and he was anxious about him. His children wanted to hear from him, still more to see him, and in the letter it is stated: "Uncle Northrop has been buying and selling property almost every year since you left." This must mean that Abraham had left his former residence in New York several years before, and was not in 1835 living in Morrisania, or in that neighborhood.

The deposition of Emma C. Osborne, the daughter of Clark H. Osborne, was read in evidence upon the hearing. She testified that her father told her that his father, Abraham Osborne, married a second time, and that when his stepmother was dying she sent for him, but he did not go. She was asked if from what her father told her she could determine her father's age at the time his stepmother sent for him. The witness replied that he was very young. She said it was before he was married; she could not tell just when. On cross-examination she was asked if she could approximate as to how old her father was at that time. The witness said: "No, but he was very young." She was asked: "Perhaps eight or ten?" She replied: "I don't know. He did not tell me his age, but it must have been when he was very young that she died." The witness was asked where her husband's stepmother was at that time. The witness replied: "No, I have heard she lived in New York City." Clark Osborne was born in 1819. James Osborne was born in 1835. If the latter was the son of Abraham Osborne by his second wife, she did not die until after the birth of James Osborne in 1835, and, if she sent for Clark Osborne when she was dying, Clark Osborne was at that time at least 16 years of age, and he was living with his Uncle Northrop at North Salem, Conn. It could hardly be said that he was very young in 1835; but the residence of Abraham Osborne, the father of Clark H. Osborne and Lewis K. Osborne, was unknown to the family at that time. He had been gone from New York for years. It was supposed by Lewis K. Osborne that he was in St. Louis; but his residence there was unknown, and the postmaster had been written to for information concerning him.

But the death of the second wife of Abraham Osborne may have occurred at a later date. The difficulty in the way of this supposition is that Clark Osborne would cease to be very young, if he had not already passed that period in 1835. Moreover, the witness had heard that this second wife of Abraham Osborne's lived in New York City,

while the claim is that James Osborne was born in Morrisania. It is manifest that the incident which this witness relates as coming from her father concerning the second wife of Abraham Osborne cannot be reconciled with the other facts in the case.

In the deposition of Miranda M. Osborne, the wife of S. Wallace Osborne, who was a son of Solomon E. Osborne, the witness testified that from information derived from statements made by Solomon E. Osborne and Lewis K. Osborne their father, Abraham Osborne, married a second time. Being asked how many children were born by the second marriage, she replied she never heard of more than one boy. She did not know his Christian name. Heard he ran away and went to sea. This witness resided at East Norwalk, Conn.

In the deposition of Mrs. Henry T. Burtis, the daughter of James H. Burtis and the granddaughter of Horace Osborne, the witness testified that she had heard in her father's family that her grandfather, Abraham Osborne, married a second time, and had issue a boy named James, who ran away and went to sea. This witness resided at West Norwalk, Conn.

In the deposition of Mrs. Elbert Brinckerhoff, a stepdaughter of James H. Osborne, the witness testified that she was acquainted with Rosalinda, the widow of Northrop Osborne. She was asked if she had heard from Rosalinda Osborne, or any of the direct members of the Osborne family, that Abraham Osborne married a second time. She replied that she had. She heard Rosalinda Osborne make such a remark, and relates the circumstances. She says:

"The occasion of the conversation between mother and Rosalinda Osborne was the old lady's straitened circumstances, she having lost her property, and being dependent upon her own resources, and she wanted to know why some members of the family which she had reared, meaning the Osborne brothers, did not help her. Her own family were all girls, but Northrop Osborne brought up the boys and taught each one their trade. She said they were all well to do, and it seemed as though they could help her so that she would not have to work in her old age. Then there was another child, and she, speaking confidentially to my mother, wanted to know how he was situated. She had heard that he went west, and, if my brother knew where he was, she would like to know whether he was doing well."

This witness lived at New Canaan, Conn.

In the deposition of Mrs. Dena Osborne, the wife of William E. Osborne, who was the son of Solomon E. Osborne, the witness testified that she had heard her father-in-law say that his father had a second wife; heard him talk of a son of his father by this second marriage; heard him say his name was James. This witness resided in Brooklyn, N. Y.

In the deposition of William E. Osborne, a son of Solomon E. Osborne, the witness testified that, from information obtained from his family, his grandfather, Abraham Osborne, married a second time. There was a child born from this second marriage, and he heard him spoken of as James. Heard his father say that his boy went away when he was about 16 years of age—between 16 and 17—and that nothing was heard of him from that time to the time he was telling the story. This witness resided at Brooklyn, N. Y.

In the deposition of James R. Gray, who was not a member of the family, the witness testified that he formerly lived in Morrisania, and that he knew a Louis K. Osborne who lived in Morrisania during 1850 and 1860. He had a wife who was crippled by being scalded, and she could not get out of the bed without help. It was part of the duty of the witness to help lift her, and he used to go and help the husband lift her out of bed. This Louis K. Osborne had a brother named James, who traveled a good deal. Witness believed he went a number of times; but would come back and stay a while, and then go again. This witness was not certain that he had ever been introduced to him.

Were the Osbornes referred to in the testimony of the witness Gray the same Osbornes referred to in the testimony of the witness Cauldwell? Both witnesses said that the Louis K. Osborne they knew lived in Morrisania between 1850 and 1860. But the Louis K. Osborne referred to in the testimony of the witness Gray had a wife who was crippled by being scalded so that she could not get out of bed without help, while the Louis K. Osborne referred to in the testimony of the witness Cauldwell was a young man of 25 or 26 years of age, and, the witness thought, was unmarried. The first Louis K. Osborne had a brother who traveled a great deal. The witness believed he went a number of times. He would come back, stay a while, and then go again. The second Louis K. Osborne had a relative whom the witness Cauldwell thought was a half-brother. This half-brother went away in 1852 and returned in 1857. He never made any other trips away from there but this one. He afterwards went away. Said he was going to California. In the testimony of William E. Osborne he referred to a James Osborne, who, his father said, went away when he was about 16 or 17 years of age, and nothing was heard of him from that time until the time his father was telling the story.

Conceding that in a case of this character the law is most liberal in admitting and construing evidence of a reputation of marriage and kinship of decedents, nevertheless this evidence by reputation must be reasonably certain as to the identity of the individuals with respect to whom the reputation of kinship is sought to be established. In this case the testimony is clearly insufficient to establish the identity of the Lewis or Louis K. Osborne who was a relative of the complainants, or the identity of James Osborne, who was the half-brother of Lewis or Louis K. Osborne, the relative of the complainants; and the testimony is equally insufficient if it does not positively refute the claim of the complainants that their ancestor, Abraham Osborne, was by a second wife the father of James Osborne who was born in Morrisania in 1835 and died in Seattle in 1881. We know nothing whatever of this second wife. Her name is not given, and there is no information concerning her marriage to Abraham Osborne, nor is there any evidence of cohabitation or a reputation in the community where they resided or had their home that they were husband and wife, or that they were generally recognized and received as such by their neighbors and acquaintances. What there is at most is a mere tradition that Abraham Osborne was married a second time, and that by this second marriage there was issue a boy named James. In *Stein v.*

Bowman, 13 Pet. 209, 10 L. Ed. 129, the Supreme Court of the United States had before it a question as to the admission of testimony concerning such a tradition. The court said:

"It is not every statement or tradition in a family that can be admitted as evidence; the tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken."

In this case we are asked to give credence to a tradition without any substantial identity as to the person who is supposed to have become the second wife, and there are no facts stated from which we can infer that the tradition comes from persons who could not be mistaken.

In any view of the testimony, we are of the opinion that the complainants have failed to establish their right to be adjudged the legal heirs to the estate of James Osborne herein. The decree of the Circuit Court is, therefore affirmed.

### PERRY v. LONDON ASSUR. CORPORATION.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1909.)

No. 1,621.

**INSURANCE (§ 282\*)—AVOIDANCE OF POLICY FOR BREACH OF CONDITIONS—MISREPRESENTATION AS TO TITLE AND INCUMBRANCES.**

Policies of insurance on sawmill property, machinery, etc., contained the usual provision that they should be void if any misrepresentation was made as to the title or ownership of the property, if it should be incumbered by any mortgage, or if there should be any fraud or false swearing either before or after any loss. The insured represented the property to be free of incumbrance, and in proofs made after a loss swore that there had been no change in the title or possession of the property since the issuance of the policies. In fact there had been a decree foreclosing a chattel mortgage on the property, and an order of sale, under which the master had taken possession of the property, and the insured had taken an appeal from such decree, and had given a supersedeas bond, in which he stipulated that the property should be held by him subject to the order of the appellate court, which subsequently affirmed the decree of foreclosure. *Held*, that the policies were avoided by a breach of their conditions.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 601-635; Dec. Dig. § 282.\*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

The pleadings of the parties present the questions to be decided. From those pleadings these, among other, facts appear:

The action was upon three certain policies of insurance, all of which were issued in pursuance of an arrangement made between the parties in the month of June, 1904, when the first of the policies was issued. Each of the policies contain, among others, these conditions: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereof, or if the interest of the insured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. \* \* \* This entire policy \* \* \* shall be void \* \* \* if the hazard be increased by any means within the control or knowledge of the insured, \* \* \* or if the interest of the insured be other than unconditional and sole ownership, \* \* \* or if the insurance be personal property and be or become incumbered by a chattel mortgage, or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or if any change other than by the death of an [the] insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

Each of the policies also contain this clause: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this corporation shall have power to waive provision of condition of this policy, except such as by terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provision or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The plaintiff paid the defendant a premium of \$390 on the first policy, and a premium of \$150 on each of the other two, all of which were issued upon the representation of the plaintiff that the property covered by them was not mortgaged. The property insured consisted of a certain sawmill, with the appurtenant and incidental buildings, tramways, engines, boilers, and other machinery and fixtures, all of which property was involved in a certain suit brought in the court below in the year 1903, by the Tacoma Mill Company, a corporation, against the plaintiff in the present action, wherein the Tacoma Mill Company sought to foreclose a certain chattel mortgage executed to that company on the 14th day of May, 1900, by one George Lawler, in which foreclosure suit Perry appeared and answered, and set up in defense that the property upon which he subsequently obtained the insurance here in question was not covered by the mortgage executed by Lawler to the Tacoma Mill Company. But the court below, in the foreclosure suit, adjudged that it was, and entered a decree directing the sale of the said property to satisfy the said mortgage, attorney's fees, and costs, and further directed such sale to be made by and under the supervision of its master in chancery, in pursuance of which decree, and of an order of sale issued by virtue of it, on the 3d day of October, 1904, the said master levied upon the property covered by the insurance policies here in question, dispossessed the said A. P. Perry thereof, and as such master took actual and physical possession of the property, and placed it in charge of a custodian by him appointed, and gave due notice that he would, in pursuance of the said decree and order of sale, on the 7th day of November, 1904, at the hour of 11 o'clock a. m., sell the said property at public auction to the highest bidder.

Subsequently, to wit, October 7, 1904, Perry took an appeal from the aforesaid decree of foreclosure to this court, filing, among other things, in the court below, a supersedeas bond, wherein he agreed, among other things, as follows: "Now, therefore, if the said A. P. Perry, principal herein, shall well and truly prosecute the said appeal, and shall pay all costs and damages that may be adjudged against him by reason of said appeal, or the dismissal thereof, and if the said A. P. Perry, principal herein, shall hold all of the property levied on and seized by the United States marshal and the master in chancery under and pursuant to said decree subject to the proper order and decree that may be entered finally in said cause by said Circuit Court of Appeals of the United States, and shall not waste or destroy any part thereof, but shall hold the same, as above stated, subject to the order and disposition of this



court, or of the said Circuit Court of Appeals, then this obligation shall be null and void, otherwise it shall have full force and effect."

While the said appeal was pending, and the said supersedeas bond was in full force and effect, all of the property covered by the policies of insurance was destroyed by fire. In November, 1904, Perry represented to one Thornton, an adjuster of the defendant company, that there was no mortgage or incumbrance upon the insured property at the time of its destruction, and in his proofs of loss, which were delivered to the defendant, and which proofs were duly verified by Perry on November 26, 1904, he stated, among other things, this: "That there had been no changes in the title, use, occupation, location, possession, or exposures of said property since the issuance of said policies, and that no incumbrances existed on any portion of the premises or property at the date of said fire."

On or about December, 19, 1904, and prior to the commencement of the present action, a writ of garnishment was issued out of the court below in the foreclosure suit of the Tacoma Mill Company against Perry, and served upon the defendant insurance company, which writ recited that the Tacoma Mill Company had recovered a judgment against Perry in the sum of \$1,000, besides interest and costs, and which said writ of garnishment required the defendant company to appear in the court below and there answer upon oath what, if anything, it owed Perry when the said writ was served upon it, and what personal property or effects, if any, of the said Perry, it had in its possession or under its control, which garnishment proceedings are still pending, and the judgment upon which they are based is still unpaid.

The defendant company, contending that the policies in suit were void from the beginning by reason of the representations made by the insured to it, and by reason of the breach of their conditions, admits and concedes that Perry is entitled to receive back the \$520 paid to it as premiums upon the first and third policies issued, and avers that it would have tendered the same to him, and would have brought the said premiums into court, but for the aforesaid garnishment proceedings, and is ready, and willing, and able to pay the same "to the said A. P. Perry, or to the said Tacoma Mill Company under said garnishment for the said A. P. Perry, as the facts, and the law, and the rights of the parties, respectively, may be determined."

Vance & Mitchell and J. W. Robinson, for plaintiff in error.

H. T. Grainger, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). Although the plaintiff in error, in his reply to the defendant's answer filed in the court below, denied that the property insured was covered by the mortgage foreclosed in the suit of the Tacoma Mill Company against Perry, his pleading admitted that the property covered by the policies in suit was taken from him under and by virtue of the process of the court in the foreclosure suit as property embraced by the decree of foreclosure, and that he recovered possession from the court's officer by giving a supersedeas bond in connection with an appeal to this court from the decree, by which bond he obligated himself, among other things, to hold the property "subject to the proper order and decree that may be entered finally in said cause." He so held it at the time of its destruction by fire. It was adjudged by the court below and by this court, in the foreclosure suit, that the bond so given by Perry was a forthcoming bond. 152 Fed. 115, 81 C. C. A. 333. By its execution Perry subjected the insured property to the satisfaction of the mortgage there in suit, in the event it should be finally adjudged

to have been embraced by that mortgage. It was so finally adjudged in the case referred to.

Moreover, it appears from the pleadings that in the verified proofs of loss furnished the defendant company by Perry he stated "that there had been no change in the title, use, occupation, location, possession, or exposure of said property since the issuance of said policies, and that no incumbrances existed on any portion of the premises or property at the date of said fire"; whereas, it distinctly appears from the pleadings that, intermediate the issuance of the first and last policies sued on, the physical possession of the property insured was taken from Perry by the master in chancery, and subsequently held for a time by a custodian appointed by the master, which possession was regained by Perry by virtue of the forthcoming bond executed by him, after the giving of which he held the property subject to the court's decree that it be sold for the payment of the mortgage indebtedness.

We agree with the court below that the policies were avoided by a breach of their conditions by the plaintiff. That by the acceptance of the policies he assented to all of the conditions therein expressed, and that the defendant company is entitled to stand upon the terms of the contracts as written is the well-established law. *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

The judgment is affirmed.

NOTE.—The following is the opinion of Hanford, District Judge, in the court below.

HANFORD, District Judge. This action is founded upon three policies insuring property against loss by fire. The policies are annexed to the complaint, and the execution and delivery thereof admitted by the defendant, and it is admitted that the property insured, consisting of a sawmill plant, was destroyed by fire within the time covered by the policies, and that the defendant received the premiums. By its answer the defendant pleads affirmatively that the policies are conditional, and that they are void ab initio by reason of breaches of the conditions. The plaintiff served upon the attorneys for the defendant a reply, but has neglected to file the same. The defendant has filed a motion for judgment on the pleadings, which refers to the reply as though it were a part of the record, and I have accordingly given it consideration. By expressly admitting, or failure to traverse the same, the following allegations of the answer are fully admitted:

"(2) That all three of the policies of insurance referred to and set out in plaintiff's complaint were issued by the defendant in pursuance of an arrangement by and between the plaintiff and the defendant, about the month of June, A. D. 1904, at the time when the first policy of insurance was issued by the defendant to the plaintiff.

"(3) That each and all of the three policies of insurance referred to in plaintiff's complaint, amongst other things, provided as follows: 'This entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured, or if the interests of the insured be other than unconditional and sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage, or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or if any change other than by the death of the insured takes place in the interest, title, or possession of the subject of insurance (except change of occupancy without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise.' \* \* \*

"(5) That on or about July 1, A. D. 1903, the Tacoma Mill Company, a corporation, of Tacoma, Wash., commenced an action in the United States Circuit Court of the District of Washington, Western Division, against A. P. Perry, the plaintiff herein, wherein the said Tacoma Mill Company sought to foreclose the said chattel mortgage hereinbefore referred to, given and executed to the said Tacoma Mill Company by the said George Lawler; that on or about August 3, A. D. 1903, the plaintiff herein, A. P. Perry, appeared in said foreclosure proceedings, and on or about December 23, A. D. 1903, filed his answer in said foreclosure proceedings as a defendant therein; that the said cause in due course of proceedings proceeded to trial, and that on or about October 3, A. D. 1904, the said United States Circuit Court of the District of Washington, Western Division, made and entered in said cause of Tacoma Mill Company against A. P. Perry, its decree of foreclosure, in which decree the said court adjudged that the said mortgage hereinbefore referred to, dated May 14, A. D. 1900, and executed by George Lawler to the Tacoma Mill Company et al., was a valid and subsisting lien upon the property therein described; \* \* \* that said United States Circuit Court further adjudged and decreed that the said George Lawler's mortgage should be foreclosed; and that the property therein described, together with all of its appurtenances, should be sold for the satisfaction of said mortgage; that said United States Circuit Court further ordered, adjudged, and decreed, in said cause, that there was due upon the said George Lawler mortgage the sum of eighteen thousand eight hundred fourteen dollars and fifty-five cents (\$18,814.55), together with attorney's fees in the sum of nine hundred forty dollars and seventy cents (\$940.70), and costs and disbursements in said action in the sum of one hundred ten dollars and thirty-two cents (\$110.32); that said United States Circuit Court in said cause further ordered and decreed that a sale of said property should be conducted by and under the supervision of the Honorable Warren A. Worden, master in chancery of the said United States Circuit Court.

"(6) That in pursuance of said decree of the said United States Circuit Court, and also in pursuance of a writ of sale issued under and by virtue of said decree and out of said court, on October 3, 1904, the said Warren A. Worden, on or about the 4th day of October, A. D. 1904, levied upon the said mill plant, together with the fixtures, appurtenances, machinery, tools, and other property connected therewith, being the property covered by and described in the said policies of insurance as the property of the said A. P. Perry, and that the said Warren A. Worden, as master in chancery of the said United States Court for the District of Washington, Western Division, on or about October 4, A. D. 1904, gave notice, as required by said decree and the laws of the United States, that he as such master in chancery, and in pursuance of said decree and writ of sale, would, on the 7th day of November, A. D. 1904, at the hour of 11 o'clock in the forenoon of said day, sell at public auction to the highest bidder the said sawmill plant, with its appurtenances, fixtures, machinery, and tools, the same being the property described in and covered by each of the said three policies of insurance.

"(7) The said master in chancery, in pursuance of said decree and writ of levy, on or about October 4, A. D. 1904, caused due and legal notice of said sale to be given by publishing said notice in the Weekly Olympia Recorder, a newspaper published in the city of Olympia, Thurston county, Wash., as provided by law.

"(8) That subsequently and on or about the 7th day of October, A. D. 1904, the said A. P. Perry, a defendant in the said above-entitled cause of Tacoma Mill Company against A. P. Perry, gave notice of his appeal from said decree to the Circuit Court of Appeals of the United States, and also executed and filed in said cause in said United States Circuit Court his certain appeal bond and supersedeas bond wherein the said A. P. Perry agreed, amongst other things, as follows, to wit: "Now, therefore, if the said A. P. Perry, principal herein, shall well and truly prosecute the said appeal, and shall pay all costs and damages that may be adjudged against him by reason of said appeal or the dismissal thereof, and if the said A. P. Perry, principal herein, shall hold all of the property levied on and seized by the United States marshal and the master in chancery under and pursuant to said decree, subject to the

proper order and decree that may be entered finally in said cause by said Circuit Court of Appeals of the United States, and shall not waste or destroy any part thereof, but shall hold the same as above stated, subject to the order and disposition of this court, or of said Circuit Court of Appeals, then this obligation shall be null and void; otherwise it shall have full force and effect."

"(9) That on or about October 3, A. D. 1904, when the said master in chancery levied the said writ for the sale upon said described property, he took actual and physical possession thereof, and as such master in chancery dispossessed the said A. P. Perry of possession thereof, and placed the actual possession of said property in a custodian thereof, thereunto duly appointed by the said master in chancery.

"(10) The defendant further alleges that the said supersedeas and appeal bond herein referred to was in full force and effect at the date of the destruction of said property by fire, as alleged in plaintiff's complaint, and that the said bond is still in full force and effect.

"(11) That the fact of the commencement of and the trial of the said cause of Tacoma Mill Company v. A. P. Perry, together with the fact of the entry of said decree of said court in said cause, and the levy of said writ of sale upon said property, and the taking possession thereof by the said master in chancery, and the placing in possession thereof a custodian by the said master in chancery, and the giving of said notice of sale, together with the fact of the publication of said notice of sale, were all known to the said A. P. Perry at the times, respectively, of the occurrence thereof; \* \* \* that all three of said policies were issued in pursuance of an arrangement made therefor by and between the plaintiff and the defendant in the month of June, A. D. 1904."

"(2) That amongst other things, the said policies, and each thereof, provides as follows: 'This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.'

"(3) That in the month of June, A. D. 1904, and prior to the issuance of any of the policies sued upon in this cause, or either thereof, \* \* \* the plaintiff, A. P. Perry, stated to the defendant and its agents that the property described in said insurance policies was not mortgaged. \* \* \*

"(4) That on or about November 22, 1904, the said A. P. Perry \* \* \* stated and represented to A. W. Thornton, the said A. W. Thornton at the time being the adjuster acting for this defendant, that there was no incumbrance or mortgage upon the said insured property at the time of the destruction thereof by the fire referred to in plaintiff's complaint. \* \* \*

"(5) That on or about November 26, A. D. 1904, the said A. P. Perry made his certain proofs of loss, which said proofs of loss were delivered by the said A. P. Perry to this defendant for the purpose of inducing this defendant to pay to the said A. P. Perry the amount which the said plaintiff claimed under and by virtue of said policies of insurance and the fire referred to in plaintiff's complaint, and which said proofs of loss, and each thereof, were duly sworn to and verified by the said A. P. Perry, before a notary public on November 26, A. D. 1904; that in said proofs of loss, and each thereof, so sworn to and furnished to this defendant as aforesaid, the said A. P. Perry stated, amongst other things, as follows: That there had been no change in the title, use, occupation, location, possession, or exposures of said property since the issuance of said policies, and that no encumbrances existed on any portion of the premises or property at the date of said fire. \* \* \*"

"(1) That on or about the 19th day of December, A. D. 1904, and prior to the commencement of this action, a certain writ of garnishment issued out of the United States Circuit Court of the District of Washington, Western Division, in cause No. 860 of said court, said cause being entitled Tacoma Mill Company, Plaintiff, v. A. P. Perry, Defendant, was served upon this defendant, which said writ of garnishment recited that the said Tacoma Mill Company had recovered a judgment against the said A. P. Perry in the sum of one thousand dollars (\$1,000.00), besides interest and costs of suit in the Circuit

Court of the United States for the District of Washington, Western Division, and which said writ of garnishment notified this defendant to appear in said court, and there answer upon oath what, if anything, it was indebted to the said A. P. Perry when the said writ of garnishment was served upon it, and what personal property or effects, if any, of the said A. P. Perry, it had in its possession or under its control, when said writ was so served.

"(2) The defendant further alleges that the said garnishment proceedings are still pending against this defendant as a garnishee defendant in said cause, and the defendant is informed and believes, and so alleges the fact to be, that the judgment upon which said writ of garnishment was based was, at the time of the commencement of this action, and still is, unpaid.

"And for a further answer, and in connection with and as a part of the foregoing affirmative defenses, the defendant states:

"(1) That the plaintiff paid to this defendant, as the premium upon the policy of insurance referred to in the first count of plaintiff's complaint, the sum of three hundred and ninety dollars (\$390.00), and the defendant further alleges that the plaintiff paid to this defendant, as the premium upon the policy of insurance referred to in the third cause of action set out in plaintiff's complaint, the sum of one hundred and thirty dollars (\$130.00), and this defendant here admits and concedes that the said A. P. Perry, plaintiff herein, is entitled to receive from this defendant the sum of five hundred and twenty dollars (\$520.00), being the amount so paid to this defendant as premiums upon said policies; the said policies being void from their inception, for the reasons hereinbefore stated.

"(2) That this defendant would have heretofore tendered the said sum of five hundred and twenty dollars (\$520.00) to the said A. P. Perry, and would now bring said sum into this court in this cause, and deposit the same as a tender for the use and benefit of the said A. P. Perry, but for the fact, as the defendant alleges, that on or about December 19, A. D. 1904, a writ of garnishment issued out of the Circuit Court of the United States for the District of Washington, Western Division, in cause No. 860, being Tacoma Mill Company v. A. P. Perry, was served upon this defendant, wherein it was stated that the said Tacoma Mill Company held a judgment against the said A. P. Perry for the sum of one thousand dollars (\$1,000), besides interest and costs, and which said writ of garnishment commanded this defendant to appear in said Circuit Court of the United States then and there to answer upon oath, what, if anything, it was indebted to the said A. P. Perry when the said writ of garnishment was served upon it. And defendant alleges that said garnishment proceedings are still pending in said court, and that the said judgment upon which writ of garnishment was issued is still unpaid, and this defendant is ready and willing, and at all times since the said garnishment has been ready and willing, and able, to pay the said sum of five hundred and twenty dollars (\$520.00) to the said A. P. Perry, or to the said Tacoma Mill Company, under said garnishment for the said A. P. Perry, as the facts and the law and the rights of the parties respectively may be determined."

The reply contains no affirmative plea in avoidance of the facts confessed, except in running comments interwoven with its admissions and denials, which merely suggest a dispute as to whether the property mortgaged was the identical property insured, and as to whether the court which rendered its decree in the case of the Tacoma Mill Company against the plaintiff, in which case the mortgage was foreclosed, had jurisdiction. By the rules of pleading all these affirmative statements of the reply should be treated as surplusage, and the same would be disregarded if the case were to be submitted to a jury upon issues to be decided, but upon this motion for judgment on the pleadings every material fact alleged by the plaintiff, whether in proper form or otherwise, will be considered, for the reason that mere formal defects may be cured by amendments.

Each of the policies contains the following clause: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed or added hereto, and no officer, agent, or other representative of this corporation shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of this agreement

indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be decreed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto. Nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The policies speak for themselves. Each is a conditional contract in writing, by acceptance of the policies the plaintiff assented to all the conditions therein expressed, and the defendant has a legal right to stand upon the terms of the contracts as written. *North-ern Assurance Company v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213.

By these policies the defendant did not insure mortgaged property. By a decree of this court in a case to which the plaintiff was a party, a mortgage upon a sawmill then in possession of the plaintiff was foreclosed, and pursuant to that decree the property insured was seized and the plaintiff dispossessed. By the reply he denies that the property insured was covered by the mortgage; but he expressly admits that the property insured was seized by an officer of the court pursuant to its process, and that he regained possession by giving a forthcoming bond in connection with an appeal from the decree, by which bond he obligated himself to hold the property "subject to the proper order and decree that may be entered finally in said cause." And he held the property subject to that litigation at the time of its destruction by fire. In a subsequent proceeding it was adjudged that the supersedeas bond was a forthcoming bond, and that by his failure to apply to the court for a release of the property after seizure thereof, or take other appropriate proceedings to contest the question as to the identity of the mortgaged property, the plaintiff became estopped from disputing the identity. *Perry v. Tacoma Mill Co.*, 152 Fed. 115, 81 C. C. A. 333.

I hold that the question as to the identity of the property cannot be litigated in this case, for the reason that the property insured is admitted to have been seized under judicial process, and advertised for sale pursuant to a mortgage, and the course of procedure in that litigation resulted in the plaintiff becoming estopped to further contest against the mortgagee the question as to the identity of the property and whether it was or not subject to the mortgage. The judgment in the foreclosure suit, and the decision of the appellate court, above cited, determined absolutely the rights of the mortgagee and this plaintiff, respectively, with respect to the property which was seized, which is admitted to be the identical property covered by the policies now in suit, and of that decision this court is bound to take judicial notice. The mortgagee having prevailed in litigation with this plaintiff as I have indicated, he cannot now be heard to say in this action that the property insured was not mortgaged at the time when the insurance was written; and, as the defendant did not insure mortgaged property, the policies were void ab initio as the defendant asserts. No facts are alleged or suggested which in any way impair the jurisdiction of the court to foreclose the mortgage.

It is unnecessary to discuss other questions. For the reasons above stated, the motion for judgment on the pleadings will be granted; and upon the bringing into court the amount of premiums admitted to have been received, to be disbursed by the court when the garnishment proceedings referred to shall have been determined, the case will be dismissed.

**AMERICAN BONDING CO. OF BALTIMORE v. UNITED STATES,\***

(Circuit Court of Appeals, Ninth Circuit, February 1, 1909.)

No. 1570.

**UNITED STATES (§ 67\*)—PRINCIPAL AND SURETY—EXTENT OF LIABILITY OF SURETY—DREDGING CONTRACT—PROVISION FOR COMPLETION OF WORK BY EMPLOYER.**

A contract let by the United States for dredging work in a harbor required the contractor to deposit the dredged material in a specified place, and provided that he would not be paid for any material deposited elsewhere; that if any changes should be found necessary in the specifications they must be agreed to in writing; and gave the United States, in case the work should not be prosecuted faithfully and diligently, the right to annul the contract and recover from the contractor whatever sums might be expended "in completing the said contract in excess of the price herein stipulated to be paid. \* \* \* for completing the same." The contract was annulled under said provision, and the United States brought suit against the contractor and his surety to recover thereon. *Held*, that as against the surety the contract itself provided the only measure of liability, and that the surety was not liable where the contract, subsequently let to another, requiring the dredged material to be dumped in a different place was neither agreed to between the parties to the original contract nor assented to by the surety.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 67.\*]

**In Error to the Circuit Court of the United States for the Northern District of California.**

This was an action at law brought by the United States against Rudolf Axman on an agreement dated November 21, 1902, and entered into between Lieutenant-Colonel W. H. Heuer of the Corps of Engineers, for and on behalf of the United States, and Rudolf Axman, for the dredging of a channel through the shoal in San Pablo Bay in California. The action was also against the plaintiff in error on a bond of the same date guaranteeing the fulfillment of the contract. The guaranty bond is in the sum of \$50,000. The action was brought to recover from Axman the full sum of \$65,500.94, and from the plaintiff in error the sum of \$50,000, for the alleged failure on the part of Axman to prosecute faithfully or diligently, or at all, the work in accordance with the specifications and requirements of said contract, and for his refusal to complete or perform the same. The case was tried before the court and jury, and a judgment entered in favor of the defendant in error, and against Axman and the plaintiff in error for the sum of \$39,902.59 and costs. The case is here on writ of error sued out by the American Bonding Company.

Jesse W. Lilienthal, for plaintiff in error.

John R. Aitken (Chas. A. Shurtleff and Frank W. Aitken, of counsel), amicus curiæ.

Robt. T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The dredging contract entered into between Colonel Heuer, of the Corps of Engineers, for and on behalf of the United States, and Rudolf Axman, on November 21, 1902, provided, among other things, in paragraph 1, that:

"The said Rudolf Axman will do such dredging in San Pablo Bay, California, as may be required by the said W. H. Heuer, in accordance with the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†P-bearing denied February 23, 1909.

specifications hereunto annexed, and that he, the said W. H. Heuer, or his successor, will pay to the said Rudolf Axman the sum of eleven and forty-four one hundredths cents per cubic yard for all such dredging as shall be done in strict accordance with the said specifications hereunto annexed, and is ordered and accepted by the said W. H. Heuer, or his agent."

In paragraph 3 of the agreement it was provided:

"The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraphs 31 and 46 of the attached specifications."

In paragraph 4 of the agreement it was provided:

"If, in any event, the party of the second part (Axman) shall delay or fail to commence with the delivery of the material, or the performance of the work, on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power with the sanction of the Chief of Engineers to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same."

It was provided in paragraph 6 of the agreement that:

"If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

The specifications referred to in the agreement provided in paragraph 31 that:

"The contractor will be required to commence work under the contract within sixty days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army; to prosecute the said work with faithfulness and energy, and to complete it within twenty-eight (28) months, after the date of the commencement."

In paragraph 35 it was provided that:

"The shoal to be dredged is in San Pablo Bay, California, is about 5 miles in length, and has a least depth of 19 feet at low water. It extends from Pinole Point to Lone Tree Point, and is distant  $1\frac{1}{4}$  to  $1\frac{1}{2}$  statute miles N. W. of the points referred to. The average depth of the excavation is about 9 feet."



In paragraph 36 it was provided:

"The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pinole Point and Lone Tree Point, at such places as may be designated by the engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract."

In paragraph 38 it was provided:

"Material dredged outside the designated lines of excavation, below the depths provided in paragraph 37, or deposited otherwise than as herein specified, directed and agreed upon, will not be paid for. The total amount to be dredged is estimated at 2,721,000 cubic yards, more or less."

In paragraph 39 it was provided:

"All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the engineer officer in charge."

In paragraph 40 it was provided:

"The part of the area available for the deposit of material from scows has an average width of about  $\frac{3}{4}$  of a mile. Its distance from the site of dredging varies from 1 to 2 miles. The location of the place of deposit, the depths of the water therein, and the location of the dredging, are shown on maps on file in this office."

In paragraph 46 it was provided:

"The work must progress at the rate of at least 100,000 cubic yards per month, and to entitle the contractor to the monthly payments provided for in paragraph 30 of these specifications, an average of not less than 100,000 cubic yards per month must have been dredged and deposited; the calculation of averages to be made from the day on which the contractor requires the work to be commenced."

In paragraph 48 it was provided:

"If at any time after the date set for beginning work it shall be found that the required minimum rate of progress is not being maintained, the engineer officer in charge shall have the power, after due notice in writing to the contractor, to employ such additional plant or purchase such materials as may be necessary to ensure the completion of the work within the time specified, charging the cost thereof against such sums as may be due or become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into."

In paragraph 49 it was provided:

"Work must be pushed continuously, except on Sundays and legal holidays. Night work will be permitted, when proper provision must be made, in all cases by the contractor at his expense, for the comfort of the inspectors and other United States employees who may be on the work."

On January 3, 1903, Colonel Heuer notified Axman that his contract had been approved by the Chief of Engineers, U. S. Army, and that, in accordance with its terms, work must be commenced within 60 days from the date of the notification. This was March 3, 1903.

Axman actually began work on February 24, 1903, but he did not dredge and remove the minimum of 100,000 cubic yards as required by paragraph 46 of the specifications. On December 24, 1903, Colonel Heuer sent Axman the following notice:

"I hereby notify you that the contract entered into by you with me on November 21, 1902, for dredging in San Pablo Bay, California, is this day annulled, as provided for in paragraph 4 of the contract, on account of failure to comply with the requirements of the specifications."

On the same day a similar notice was sent to the plaintiff in error. On June 21, 1904, Colonel Heuer entered into a contract with the North American Dredging Company to—

"do such dredging in San Pablo Bay, California, as may be required by the said W. H. Heuer, in accordance with the specifications hereunto annexed and deposit the spoils in place of deposit (b) as described in paragraph numbered thirty-six in said specifications hereunto annexed; and that he the said W. H. Heuer, or his successor, will pay to the said North American Dredging Company the sum of fourteen and forty-eight one hundredths cents per cubic yard for all such dredging as shall be done in strict accordance with the specifications hereunto annexed."

Paragraph 36 (b) of the specifications referred to in the agreement with the North American Dredging Company provided as follows:

"To deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from The Sisters to Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40 feet below the level of low tide."

Paragraph 39 provides as follows:

"Material dredged outside the designated lines of excavation, below the depths provided in paragraph 38, or deposited otherwise than as herein specified, directed and agreed upon, will not be paid for. The total amount to be dredged is estimated at 2,285,000 cubic yards, more or less."

Paragraph 40 provides as follows:

"All dredged material is to be deposited within the limits of the area described in paragraph 36. The method of deposit will be subject to approval by the engineer officer in charge."

Paragraph 41 provides as follows:

"\* \* \* In place of deposit (b) the deep part of the area available for the deposit of material from scows is triangular in shape, covering an area of about one square mile. Its distance from the nearest point of the dredging is about 5 statute miles. The location of the places of deposit, the depths of water therein, and the location of the dredging, are shown on maps on file in this office."

Paragraph 42 provides as follows:

"Any deposit outside of authorized dumping grounds will render the contract liable to be annulled."

The complaint set forth the provisions of the dredging contract entered into by Colonel Heuer with Axman and the guaranteeing of the contract by the plaintiff in error.

It is alleged that Axman failed to prosecute faithfully or diligently, or at all, the work in accordance with the specifications and requirements of said contract, and did refuse to complete and perform the

same, or any part thereof, and did abandon said contract and refuse to do the work in said contract provided, or any part thereof; that, by reason of Axman's violation of the provisions of the contract, Colonel Heuer annulled the same; that after the annulment the work was readvertised, and a contract was made with the North American Dredging Company "to do the work left undone" by Axman; that the North American Dredging Company carried out the work and completed the contract at the cost of \$311,991.29, while the cost of the same work at the price for which Axman contracted to do it would have amounted to \$246,490.35, or a difference of \$65,500.94; that by reason of Axman's failure to carry out his contract the United States was compelled to pay and did pay the sum of \$65,500.94 more than it would have cost had Axman carried out his contract according to its terms and conditions. Judgment was asked against Axman in the sum of \$65,500.94, and against the American Bonding Company in the sum of \$50,000. The plaintiff in error interposed a demurrer to this complaint on the grounds, among others, that the complaint did not state facts sufficient to constitute a cause of action, and that the complaint was uncertain in the following particulars; among others, that it did not appear therefrom: (1) Whether any of the sums alleged to have been paid said North American Dredging Company were expended by said Heuer in the completion of said contract of November 21, 1902, between Axman and Heuer. (2) Whether the work alleged in the complaint to have been done by the North American Dredging Company was done under the same specifications attached to said Axman contract and in said complaint referred to.

The demurrer was overruled, and thereupon the plaintiff in error filed its separate answer, in which it denied generally the allegations of the complaint, and specifically denied that Axman abandoned his contract, and denied that a contract was made with the North American Dredging Company "to do the work left undone" by Axman as provided in his contract, and by way of a further answer and defense it was alleged that:

"Said North American Dredging Company did not deposit, nor did any other person or corporation deposit any part of said material or 'spoil' as near the south shore as practicable within lines drawn between said Pinole Point and Lone Tree Point at the place designated by the engineer officer in charge, or impound the said material between bulkheads or dykes of suitable construction, or otherwise, as provided for and required by the contract made between the said W. H. Heuer and Axman."

For a further answer and defense, it was alleged that Colonel Heuer was openly hostile and unfriendly to Axman, and specific acts are alleged which it is charged had for their purpose the impeding and delaying of the work with the intent to prevent Axman from carrying out his contract and performing the work as required in the specifications. The substance of these charges is that Colonel Heuer acted arbitrarily and without just cause in the conditions and requirements imposed upon Axman during the progress of the work and in finally annulling the contract.

The case was tried before the court and a jury, and among other instructions given to the jury was an instruction to the effect that Ax-

man had excavated 196,000 cubic yards for which he should be allowed a credit of \$22,422.40. The verdict was for the United States for the sum of \$39,902.59.

No evidence was introduced tending to show that Axman abandoned his contract, or that he refused to do the work in said contract provided. The defense that Colonel Heuer acted arbitrarily and without just cause in imposing conditions and requirements upon Axman in executing the work, and in finally annulling the contract, involved questions of fact which we think were submitted to the jury with proper instructions. A number of assignments of error relate to the action of the court in admitting evidence concerning the contract with the North American Dredging Company, and the instructions of the court with respect thereto. They all present the single question whether, in the contract entered into by Colonel Heuer with the North American Dredging Company "to do the work left undone" by Axman, there was a material departure from the contract.

This is not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract, which are set forth in the complaint and made the basis of the action. These stipulations are:

"If \* \* \* the party of the second part \* \* \* shall in the judgment of the engineer in charge fail to prosecute faithfully the work in accordance with the specifications and requirements of this contract \* \* \* the party of the first part \* \* \* shall have power to annul this contract \* \* \* and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same \* \* \* and the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials."

The allegations of the complaint are that Axman had failed to prosecute the work faithfully and diligently, and that Colonel Heuer thereupon annulled the contract, and entered into a contract with the North American Dredging Company "to do the work left undone" by Axman, and that the North American Dredging Company carried out the work and completed the contract.

In the Axman contract it was provided that:

"The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil as near the south shore as practicable, within lines drawn between Pine Point and Lone Tree Point, at such places as may be designated by the engineer officer in charge; and to impound the material behind bulkheads or dykes of suitable construction, subject to approval by the engineer officer in charge, which must be built and maintained by and at the expense of the contractor during the life of the contract."

In the contract with the North American Dredging Company it was provided that:

"The work to be done is to excavate a channel through the shoal, to have a bottom width of 300 feet, a depth of 30 feet at mean low water, and a length of about 27,000 feet; to deposit the spoil in water exceeding 50 feet in depth, lying within the area bounded by lines drawn from The Sisters to

Point San Pablo, thence to Marin Islands, and thence back to The Sisters. The top of any pile shall not be higher than 40' feet below the level of low tide."

In the Axman contract the place for the deposit of the material was designated as follows:

"The part of the area available for the deposit of material from scows has an average width of about  $\frac{3}{4}$  of a mile. Its distance from the site of dredging varies from 1 to 2 miles. The location of the place of deposit, the depths of water therein, and the location of the dredging, are shown on maps on file in this office."

In the contract with the North American Dredging Company the place for the deposit of the material is designated as follows:

"In place of deposit (b) the deep part of the area for the deposit of material from scows is triangular in shape, covering an area of about one square mile. Its distance from the nearest point of the dredging is about 5 statute miles. The location of the places of deposit, the depths of water therein, and the location of the dredging, are shown on file in this office."

Evidence was admitted, over the objection of the plaintiff in error, tending to show that it would cost less to deposit the dredged material at the place designated in the contract with the North American Dredging Company than it would cost to deposit it at the place designated in the Axman contract. It was thereupon contended on the part of the United States that the departure from the Axman contract was immaterial, but it was provided otherwise in the specifications accompanying the Axman contract. It is provided in paragraph 38 that:

"Material \* \* \* deposited otherwise than as herein specified, directed and agreed upon will not be paid for."

Colonel Heuer in his testimony said Mr. Axman was not allowed to deposit material elsewhere than behind the bulkheads. Axman testified that after the place designated for him to deposit the dredged material behind the bulkheads had filled up so that he could only get in at high tide he applied to Colonel Heuer to allow him to deposit the dredged material anywhere else than behind the bulkheads. He also asked permission to be allowed to dump either on the north side of the channel or down at "The Sisters" (the latter place being the place subsequently designated in the contract with the North American Dredging Company for the deposit of the dredged material), but Colonel Heuer refused to allow Axman to deposit the material anywhere else than that specified in the contract. He said to the witness:

"I will not allow you to dump any place else, and if you do I will not pay you a cent for anything."

Colonel Heuer also testified:

"I think the contract specified that he was not to distribute any material above low-water mark. I am not certain about that, but it was my intention anyway that he should not."

Axman testified that Colonel Heuer would not permit him to bring the dumped material up too high. He only wanted it up to the low-water mark. Colonel Heuer testified in explanation of this requirement:

"I prevented the depositing of the spoil above the low-water mark for the following reasons: The tidal area of San Francisco Bay covers about 480 square miles. The volume of tide between high water and low water, or tidal prism, is what maintains the depth of water in our bar of San Francisco; therefore, the government does not let anybody put anything above low-water mark."

It thus appears from the contract and from this testimony that the depositing of the dredged material at the place designated in the contract was, under the express terms of the contract and the requirements of Colonel Heuer, the engineer in charge, an independent and material feature of the contract, so material, indeed, that a failure to comply with its terms would deprive the contractor of all compensation for his work. But it is contended on behalf of the United States that, as the contract itself provided that a change might be made in the project, during the prosecution of the work, with the consent of the contractor, the same thing might be done by the government, after the annulment of the original contract, without the consent of the original contractor. But the contract also provided that:

"Such change or modification must be agreed upon in writing by the contracting parties. The agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

No such agreement was ever entered into by the original contracting parties in writing or otherwise, and therefore no provision or agreement for a change or modification of the contract ever went into effect; but this provision of the contract supports the contention of the plaintiff in error that, in completing the contract and in doing the work Axman left undone, there could be no departure from the terms of the original contract without such an agreement, and, further, that the surety could not be held liable unless it also agreed in writing to the change.

It is contended on behalf of the United States that the plaintiff in error was not injured by the change in the project made in the contract with the North American Dredging Company, and that it is therefore no ground for complaint. But the plaintiff in error objects that it did not guarantee the contract with the North American Dredging Company under any conditions; that its guaranty was that Axman would perform the conditions of his contract, and in case of failure its liability extended to the completion of the Axman contract and in doing the work he left undone; but it did not agree to become liable for any other contract, or for doing any work other than that left undone by Axman under his contract. A contract similar to the one under consideration was the subject of controversy in the case of *American Surety Co. v. Woods*, 105 Fed. 741, 45 C. C. A. 282. In that case the contractors abandoned the contract, and the work was never completed. The action was to recover of the contractors the difference between the amount the employer would have paid the contractors under the contract for the completion of the work and the

amount it would cost the employer to complete the work left undone by the contractors. The Circuit Court of Appeals for the Fifth Circuit stated the question for determination, as follows:

"The question to be considered is the charge of the court on the measure of damages. The instruction, in effect, was that the measure of damages was the difference between the contract price and what it would have cost to finish the sewers, and that to recover this difference it was not necessary for the sewerage company to complete the work."

Referring to a provision of the contract providing that, in the event the contractor was delayed or failed to do the work, the employer could take charge of the work and finish it, the court said:

"The company is authorized to charge the expense of labor to the contractors. Such cost is to be paid out of the money due to the contractors or to become due by the contract. If the expense of doing the work was less than the sum that would be due and payable under the contract, the contractors were to receive the difference; and, if the expense was greater, the contractors should pay the amount of such excess. It is clear, therefore, that the parties to the work anticipated that the contractors might not finish the work, and provided for the measure of damages on the completion of the work by the sewerage company at a cost greater than the contract price. \* \* \* This provision of the contract cannot be ignored in deciding this question. The provision seems to have been made for the benefit of both parties. It gave to the sewerage company the right and power to take charge of the sewers and finish them on account of the delay or failure of the contractors. On the other hand, it secured to the contractors any sum that might be left of the unpaid contract price after the sewerage company had paid for the completed work. It also fixed and limited their liability for damages on account of their failure to finish the work, so far as this item of damages is concerned, to such excess as the sewerage company would have to pay over the contract price. This clause of the contract, conceding a different rule to prevail in its absence, rescued the case from the uncertain and speculative control of expert witnesses, and applied it to the practical test of actual cost. This secured to the contractors and their surety a valuable right. They should not be deprived of it. From the contract in this case, having due regard to section 19 of it, we do not think it can be reasonably supposed that the parties contemplated that for a failure by the contractors to finish the work they were to be held liable for any outlay which might be required to complete it, before the sewerage company was at any expense on that account."

It was accordingly held that the surety was not liable under the contract. So, in this case, the suit is upon the contract, which provides the conditions of its fulfillment, and the measure of damages for its nonfulfillment, and if, under its terms, the United States has not completed its contract with Axman and has not completed the work he left undone in a substantial particular, no liabilities have been established against the surety. In *American Bonding & Trust Co. v. Gibson County*, 127 Fed. 671, 62 C. C. A. 397, the Circuit Court of Appeals for the Sixth Circuit had before it a contract for the completing of a courthouse. The contract provided that if the contractor failed in any respect to prosecute the work with promptness and diligence, or failed in the performance of any of the agreements contained in the contract, such failure being certified by the architects, and if the architects further certified that the failure was sufficient ground for the action, the county might terminate the contract and enter upon the premises and take possession for the purpose of completing the work. It was further provided that, if the contract was terminated and com-

pleted by the county, the excess paid by the county to other contractors over the contract price should be paid by the contractors and his surety, and that such expense for finishing the work and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties. The architects notified the building committee of the county that the contractors had failed to prosecute the work with promptness and diligence, and certified that the failure, refusal, and neglect was such as to warrant the termination of the contract. Accordingly, after notice, the employment of the contractors was terminated, possession taken, and the building completed by the county. The contractors did all of the work except that covered by the final payment. The action was brought to recover the expense incurred by the county over the contract price in completing the courthouse, but it was not alleged or proved that the architects had audited and certified the expense for the damage incurred by the county in completing the contract. Notwithstanding the lack of this certificate, the lower court directed a verdict against both the contractors and their surety, the bonding company. In this action the Circuit Court of Appeals held that the lower court was in error, saying:

"In instituting this suit, the county planted itself upon the contract, and the bond given for its faithful performance. It alleged that, in terminating the employment of the contractors, it had faithfully observed all the conditions of the contract, and it sought to recover, not only the cost of completing the building, but the per diem damages for delay provided in case of default. The distinction sought to be drawn by the plaintiff, that the suit is not one on the contract, but one for damages on account of the abandonment of the contract, does not appeal to us. This is not a case like *Fuller Company v. Doyle* (O. C.) 87 Fed. 687, where the contractor, without doing any substantial work, abandoned his contract, but a case where the contractor, having done all the work except that covered by the last payment, had his employment terminated under article 5, through a strict compliance with its provisions. The damages sought to be recovered here are not damages outside the contract, but damages under the contract, resulting from a violation of its provisions. Accordingly, the surety is also sued. Now, the surety guaranteed the faithful performance of the contract, and the measure of the damages for which it can be held responsible must be found in the contract itself. If there be in the contract a provision for ascertaining the amount of damages incurred through a violation of any of its provisions, the surety has a right to insist on its observance before being held responsible. Under the contract, the contractors agreed to construct a building according to certain specifications. The surety guaranteed the faithful performance of the contract. Architects were selected to supervise the work, and the contractors had to present their certificates before receiving any pay. In case the contractors failed to finish the work, the owner might take over the job by complying with certain provisions. But if he did not, he was obliged to complete the work in accordance with the specifications, and, before he could collect what it cost beyond the contract price, he had to have the certificate of the architects showing the expense and damage incurred. In the case of *International Cement Co. v. Beifeld*, 173 Ill. 179, 50 N. E. 716, where a building contract contained a clause identical in terms with that before us, the court held that the certificate of the architect was a condition precedent to the recovery from the contractor of the additional expense incurred in finishing the work. It was urged that the contractor abandoned the contract, but the court overruled the contention, holding that the case was tried upon the theory that the owner was entitled to such damages as were provided for by the contract, not damages outside of the contract."



The recent case of *United States v. Freil*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177, is more in point, and is authority upon all the questions involved in this case. The action was against the principal and sureties on a contractor's bond, given to secure the performance of contract to construct a dry dock at the Brooklyn Navy Yard. The contract was between the contractor and the Chief of the Bureau of Yards and Docks in the Navy Department. It provided for the construction of a dry dock—

"to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part."

The seventh paragraph of the contract provided (substantially as in the contract before the court) that:

"If at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract."

It was further provided:

"That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of the dry dock, that the actual cost thereof shall be ascertained, established and determined by a board of naval officers to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract."

It was further provided:

"That no change herein provided for shall in any manner affect the validity of this contract."

A supplemental contract in writing was entered into between the contractor and the Chief of Yards and Docks, providing that the location of the dry dock should be—

"one sixty-four (64) feet further inland than laid down and staked out when the said contract was entered into."

This supplemental contract provided full compensation to the contractor for the additional work, and it recited that it was under the provisions of and in accordance with article 7 of the original contract, but the surety was not a party to the supplemental contract. The contractor proceeded with the work under the original and supplemental contract, but so slowly, negligently, and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the contract forfeited on the part of the contractor, and thereafter, under the provisions of the contract, the Secretary of the Navy proceeded to complete the dry dock and appurtenances in accordance with the contracts, plans, and specifications, at a cost to the United States of the sum of \$370,000. The sum of \$72,414.16 represented the damage sustained by the plaintiff in completing the contract. The suit was brought to recover from the contractor and his sureties the damages alleged. The sureties interposed a demurrer, on the ground that the plaintiff did not state facts sufficient to constitute a cause of action, and the question was whether a surety on a contractor's bond conditioned for the performance of a

contract to construct a dry dock was released by subsequent changes in the work made by the principals without the consent of the surety. It was claimed on behalf of the United States that the change made in the original contract by the supplemental agreement was within the contemplation of that contract, and must be deemed to have been assented to in advance by the surety. The trial court held that this change was not within the scope of the original contract, but was such a change that exonerated the surety from liability for the subsequent dereliction of his principal. This view of the contract was affirmed by the Supreme Court, which, after citing authorities relating to the liabilities of sureties, said:

"The proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. *United States v. Freely* (C. C.) 92 Fed. 299."

It will be observed that, unlike the case before this court, the change in the original contract was made in accordance with the terms of the contract and the change agreed to by the parties to the contract in writing, but, like the present case, the consent of the surety to the change was not obtained, and it was upon that fact that the surety was held not liable. It will be observed further that the contractor was to be compensated for the additional expense in making the change, so that the surety was in no way injured by the change in the contract. The surety was, nevertheless, held discharged from liability. This case is a sufficient answer to the contention of the United States in the present case, that the change in the contract was not material to the plaintiff in error. It is not necessary to review the cases bearing upon this last question. They are numerous, and the law has been authoritatively determined. The surety has the right to stand upon the very terms of his contract. If the conditions of the liability have not accrued under the terms of the contract, the surety is not liable, and if a change is made in the contract without his consent his liability is at an end, even though it may appear that the change is for his benefit. The law as declared by the Supreme Court in *Miller v. Stewart*, 9 Wheat. 680, 701, 6 L. Ed. 189, is clear and distinct upon this question. It says:

"Nothing can be clearer, both upon principle and authority, than the doctrine, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and, if he does not assent to any variation of it, and a variation is made, it is fatal."

In *Reese v. United States*, 9 Wall. 13, 21, 19 L. Ed. 541, the same court said:

"Any change in the contract on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious

reasons. When the change is made they are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

In the present case there was a substantial change in the work required to be done under the original contract. The North American Dredging Company did not under its contract complete the Axman contract, and did not do the work he left undone. The surety did not consent to this change, and is, therefore, not liable for the additional cost arising out of the contract for work done in lieu of that provided for in the Axman contract.

The judgment of the Circuit Court is reversed, and the case remanded for a new trial.

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#### AXMAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1909.)

No. 1,653.

In Error to the Circuit Court of the United States for the Northern District of California.

Aitken & Aitken and Chas. A. Shurtleff, for plaintiff in error.  
 Robt. T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty.  
 Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. In this case it was stipulated by the parties to the action that it should be submitted upon the record and briefs in the case of the American Bonding Company of Baltimore (a Corporation) v. United States of America (No. 1,570) 167 Fed. 910. In accordance with the opinion of the court in that case, the judgment of the Circuit Court is reversed, and the case remanded for a new trial.

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#### INTERNATIONAL PAPER CO. v. ROBIN.

(Circuit Court of Appeals, First Circuit. February 18, 1909.)

No. 779.

MASTER AND SERVANT (§ 155\*)—LIABILITY OF MASTER FOR INJURY TO SERVANT  
 —FAILURE TO WARN SERVANT OF DANGER IN WORK.

Plaintiff had been working in defendant's paper mill for seven weeks, engaged with others in trucking rolls of paper from the mill to the cars, when a roll which he and a helper were taking through a doorway struck the top, and fell upon and injured him. The doorway was 93 inches high, while the roll was 96 inches long and weighed 1,350 pounds. The iron edge of a two-wheeled truck was run under one end of the roll, and it was tilted back at an angle, resting upon the shoulders of the two men. Several thousand rolls had been taken out during plaintiff's service, but very few were so long. He did not know the height of the doorway nor the length of the roll, and there was evidence that it was not easy to estimate the length within a few inches without measuring. *Held*, that the danger and the need of special care in that particular instance were not obvious to plaintiff, but should have been known to defendant, which was chargeable with negligence in not warning him, justifying a verdict in his favor for damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.\*]

Brown, District Judge, dissenting.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the District of New Hampshire.

John Kivel, for plaintiff in error.

Henry F. Hollis, for defendant in error.

Before COLT and LOWELL, Circuit Judges, and BROWN, District Judge.

COLT, Circuit Judge. This was an action on the case to recover damages for injuries sustained by the plaintiff while in the employ of the defendant. The plaintiff was injured while engaged in trucking a long, heavy roll of paper through the door of the finishing room in defendant's mill to the cars. The injury was caused by the top of the roll striking against the top of the door, whereby the roll fell upon the plaintiff. The jury returned a verdict for the plaintiff.

The exceptions taken by the defendant during the trial in the court below to the admissibility of evidence, to portions of the judge's charge, and to his refusal to give certain instructions have been expressly waived. The only exceptions which have been urged in this court, and which are contained in the assignment of errors, are to the refusal of the court below to grant the defendant's motion for a nonsuit at the close of the plaintiff's evidence, and to the refusal of the court below to grant the defendant's motion to direct a verdict for the defendant at the close of the entire evidence.

These alleged errors present for our consideration the single question whether there was any evidence that would warrant the jury in finding a verdict for the plaintiff.

The evidence in the case tended to prove the following facts:

On December 21, 1906, about 7 o'clock in the evening, the plaintiff and a helper were conveying a roll of paper upon a two-wheeled truck from the finishing room, through the beater room, to the cars, in the defendant's mill. In passing through the door between the finishing room and the beater room, the top of the roll struck against the top of the door, in consequence of which the roll came down upon the plaintiff and injured him. The roll was 96 inches long, 29 inches wide, and weighed about 1,350 pounds. When upon the truck the lower end of the roll was raised about 10 inches above the floor. The door was 93 inches high. The roll was trucked in a canting position, and rested on the shoulders of the plaintiff and the helper. When carried at an angle of 42 degrees, the top of the roll would clear the top of the door by 2 inches, and at this angle 150 pounds weight would rest on the shoulders of each of the truckers. During the time of the plaintiff's employment, about seven weeks, 4,500 rolls had been trucked through this door. The rolls varied in length from 17 $\frac{3}{8}$  inches to 96 inches. Of these 4,500 rolls, about 40 were 96 inches in length, 8 were 89 inches, 135 were 87 inches, and 7 were 86 inches. To keep the iron plate of the truck from rubbing the floor, it was necessary to tip the roll backward after it was placed on the truck. There were eight men engaged in trucking, or four crews of two each. The usual and customary truck used for conveying all the rolls, including the 96-inch rolls, was the two-wheeled truck. There were also furnished

some four-wheeled trucks, which were occasionally used. It was more economical to use the two-wheeled truck. The floor of the beater room was three inches lower than the floor of the finishing room, so that there was a downward slope for 6 feet 10 inches in passing from the finishing room to the beater room. The passageway in the beater room, at a distance of 6 feet 10 inches from the doorway, was 4 feet in width. The plaintiff had passed quite through the doorway when the top of the roll hit the top of the door. Some witnesses testified that they had never known the top of the roll to strike the top of the door. One witness, however, testified that he had known the rolls to strike twice before, while another witness testified that he had known the rolls to brush the top of the door a few times. Upon this point the foreman, Montminy, testified as follows:

"Q. Now, did you know that a 96-inch roll was likely to hit the top of that door? A. Yes, sir. Q. And just before the accident you saw that it was likely to hit the top, didn't you? A. Yes, sir. Q. And you were just about to speak and warn them when it did hit, weren't you? A. Yes, sir. Q. How did it happen that you didn't see it hit in time to warn? A. It came to my mind. Q. How did you happen to be looking that way? A. I saw him going through. Q. How high above the top of the door was the top of the roll when it did strike? A. I cannot tell. Q. And it came over your mind that you ought to warn the men? A. Yes, sir. Q. And you didn't have time to do it? A. I didn't have time to do it; it was too late."

On the day of the accident the plaintiff was ordered by the foreman to truck this 96-inch roll. The plaintiff and his helper, Gauvin, put the iron edge of the truck under the bottom of the roll, which stood upright, and then two other men pushed the roll over onto the truck.

The plaintiff and Gauvin then proceeded with the truck and roll towards the doorway. The plaintiff was on the left side, assisting in the handling of the truck, and was supporting a portion of the weight of the roll on his right shoulder. While going through the doorway, the plaintiff was watching his side so as not to hit the sides of the run. He was cautioned against hitting the sides of the door lest it might injure the paper. The plaintiff did not know the dimensions of the roll, nor the height of the door, nor that there was any danger that the top of the roll would hit the top of the door.

No orders or instructions were given as to how the work should be done, nor any rules as to the manner of doing it. The plaintiff was not warned to lower the roll so as not to hit the top of the door. The plaintiff did not remember that he had previously trucked any 96-inch rolls. The foreman, however, testified that he had trucked several of these rolls. The plaintiff was 34 years of age, and a man of ordinary intelligence, and he had previously worked in the woods, logging, and in a sawmill.

On the question of judging the height of a roll, the foreman testified as follows:

"Q. Can't you tell how high that roll of paper is without measuring it? A. No, sir; I cannot tell exactly. Q. Well, are you sure that it is more than 84 inches? A. Yes, sir, I am. Q. Are you sure that it is more than 90 inches? A. I am positively sure. Q. You think it is more than 90 inches? A. I cannot prove it. Q. And it may be 92, and it might be 94? A. Ninety-

four—I cannot tell. Q. And it may be 96? A. I have not any rules with me. Q. And it may be 98? A. It cannot be 98. Q. Cannot be? Well, can it be 96 possibly? A. Perhaps. Q. But you think it is not as high as 96? A. I don't believe by the looks of it it is 96 inches. Q. Can't you tell within half a foot without measuring it? A. No, sir."

The plaintiff insists that the negligence of the defendant was two-fold:

(1) In furnishing a door too low for the safe passage of 96-inch rolls.

(2) In failing to warn the plaintiff of the concealed, or not obvious, danger.

On the other hand, the defendant contends:

(1) That the plaintiff's injuries happened through his negligence, and not that of the defendant.

(2) That the defendant furnished four-wheeled trucks upon which 96-inch rolls could be safely transported through the door of the finishing room to the cars.

Upon full and careful consideration of the evidence, we think this is one of those cases in which it was the duty of the defendant to warn the plaintiff of the danger of the top of the roll hitting the top of the door. In other words, we think, upon this evidence, the jury might properly have found that the danger was not obvious, and hence that the defendant was guilty of negligence in not warning the plaintiff. This conclusion is founded upon the following considerations:

The roll in question was 96 inches long, 29 inches wide, and weighed 1,350 pounds. The door was 93 inches high. It appears that this roll would strike the top of the door unless it was tilted on the truck at an angle of about 42 degrees. The foreman testifies that he could not tell the height of a roll within half a foot. It was impossible, therefore, for the plaintiff to measure accurately the relative heights of the roll and the door, and so determine the angle at which the roll should be carried in order to clear the top of the door. Further, the plaintiff's position was such as he approached the door with the roll on the truck that he could not judge of the angle at which the roll must be carried in order to clear the top of the door. He was of necessity in a position in which the end of the roll was back of him, with a portion of the weight of the roll resting on his shoulder, with his head at one side of the roll, and with his attention directed to clearing the sides of the doorway. It is also apparent that the more he tilted the roll the greater would be the weight upon his shoulder.

Again, all the 4,500 rolls which were trucked during the time of his employment would clear the top of the door when tilted in the ordinary way in which they were carried on the truck, except these few 96-inch rolls; and the plaintiff had no reason to apprehend that these rolls would not pass safely through the door when trucked in the usual method of conducting this work.

In view of the general method of carrying on this work, it may be said that a dangerous situation was created with respect to this roll into which the plaintiff was led without any warning.

This is not a case in which the plaintiff was called upon to truck a solitary roll 96 inches long through this doorway, in which case

he might be called upon to exercise great caution; nor is it a case in which all the rolls were of a uniform size of 96 inches, in which case the conditions would have been better understood and guarded against; but it is a case where a situation was created that was calculated to throw him off his guard by reason of the fact that there were several thousand rolls, and that 99 per cent. of the rolls would pass safely through the door when handled in the ordinary way, and he had no reason to suppose, and from his position could not tell, that any greater precaution should be exercised on his part with respect to this roll than was exercised with respect to the other rolls.

It is suggested that there were four-wheeled trucks, and that the plaintiff should have selected a four-wheel truck. The answer to this contention is the uncontradicted evidence that the usual and customary truck for this purpose was the two-wheeled truck. The plaintiff, therefore, had no reason to suppose that the two-wheeled truck was not perfectly safe; and, since it was the usual and proper truck for this purpose, its use was presumably sanctioned by the defendant.

Nor can it be said that the plaintiff had the same means of knowledge of this danger as the defendant, and therefore assumed the risk. The facts in evidence do not warrant this conclusion. The plaintiff had been in the defendant's employ only six weeks. He was not aware of this danger, and it was not a matter of ordinary observation. On the other hand, it was a danger which the defendant knew, or in the exercise of reasonable care should have known.

It may also be observed that at the trial the manner of trucking and the position of the plaintiff were fully illustrated by witnesses, and the trial judge, therefore, had better means of comprehending the entire situation than this court. Under these circumstances, the conclusion of the trial judge is entitled to great weight, and it should not be disturbed unless it clearly appears that it was erroneous.

The recent case of *Charrier v. Boston & Maine Railroad Company* (decided by the Supreme Court of New Hampshire) 70 Atl. 1078, seems to be in point. In that case the plaintiff was engaged with a number of other workmen in pushing a coke car through a door into the shop for repairs. Ordinary coke cars which he had been accustomed to push were from 8 feet 2 inches to 8 feet 8 inches in width. The car by which plaintiff was injured was 9 feet 4 or 5 inches in width, and he was caught between the side of the car and the door.

In the opinion the court said:

"It appears that \* \* \* he [the plaintiff] had no opportunity to measure its width, and that during a part of the brief interval he was pushing the car his view of the shop door was obstructed by a workman, and the balance of the time his work required him to take such a position, and his attention was so preoccupied in endeavoring to avoid obstacles in his path beside the track, that he did not learn of the danger to which he was subjected until he was caught between the car and the door. It also appears that the defendants knew, or ought to have known, that it was customary for the men, in pushing cars into the shop, to pass between the car and the door; and that they knew, or ought to have known, of the extra width of this car, and the danger to be encountered in pushing it into the shop by one standing at its side, and failed to inform the plaintiff of it. Under these circumstances reasonable men might properly conclude that the defendants were negligent in not informing the plaintiff of the danger, that he exercised

the care of a reasonably prudent man in doing what he did, and that he did not know and appreciate the danger to which he was subjected and assume the risk of injury."

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

BROWN, District Judge (dissenting). This is a writ of error for review of the rulings of the Circuit Court in an action of the case for personal injuries sustained by Arthur Robin, an employé of the International Paper Company, in its paper mill at Berlin, N. H., on December 21, 1906. The verdict was for the plaintiff.

The plaintiff was engaged in trucking paper from the finishing room to the cars of a railroad. It was necessary to pass through a doorway 7 feet 9 inches high. The plaintiff and a helper on the day of the accident were trucking a roll of paper 8 feet high and 2½ feet in diameter, weighing about 1,300 pounds. A two-wheeled truck with wheels about 10 inches in diameter was used. Standing on end upon the floor the roll was 96 inches in height, or three inches higher than the door; mounted upon the truck in an upright position, about 13 inches higher than the door.

In loading the roll upon the truck, the iron edge of the truck was inserted under the bottom, and the roll was pushed over by other men until it rested against the shoulders of the truckmen, one on each side of the roll. When tipped at an angle of 42 degrees, its highest point was 7 feet 7 inches, giving 2 inches clearance. It has been estimated that in this position the weight supported by each man was approximately 150 pounds.

As the truckmen with their load were passing through the doorway the top of the roll struck the top of the doorway, and the roll fell upon the plaintiff, seriously injuring him.

The defendant in error contends that the negligence of the master was twofold: First, in furnishing a doorway too low for the safe passage of 96-inch rolls; and, second, in failing to warn the plaintiff of a concealed and not obvious danger, namely, that a roll of this character could not pass safely through the doorway.

I am of the opinion that the evidence entirely fails to show any negligence of the master in respect to the construction of the premises, or in a failure to provide suitable appliances. There is abundant testimony that there were supplied and used, not only two-wheel trucks, but also four-wheel trucks, upon which the rolls could be laid horizontally and carried through the doorway with a large amount of clearance. The injury arose not because of a defective doorway or of defective appliances, but because of the manner in which the work was done by the men. The fact that a roll of paper 96 inches long, standing on a truck 10 inches high, could not go through a doorway 7 feet 9 inches in height without being tipped to some extent was patent to ordinary observation. The judgment as to a matter of this character of a workman of mature years, who had been engaged in this business for seven weeks, was quite as good as that of the officers of the company.



While the duty rests upon the master to inform an ignorant workman of unknown and peculiar risks due to peculiarities in the business, I know of no rule of law which requires the master to inform the workman as to matters within the ordinary observation and ordinary judgment of the ordinary man. I cannot assent to the proposition that a workman who is told to move an object through a doorway is entitled to assume that he can do so without making an ordinary observation. The servant assumes not only the risks of the business, but also all such risks as are apparent to ordinary observation. The rule that a servant may rely upon a master's performance of his duties does not absolve the workman of the requirement of ordinary diligence.

The duty to give warning to a servant must be based upon a reasonable apprehension by the master that injury may follow to the servant if such warning is not given. The rule which requires of the master a reasonable foresight and apprehension of danger does not require that the master shall assume a lack of ordinary care or ordinary observation in the workman. The servant cannot justly demand that he shall be warned against risks that are as obvious to him as to the master. *Roessler & Hasslacher Chemical Co. v. Peterson*, 134 Fed. 789, 67 C. C. A. 295; *Mississippi Logging Company v. Schneider*, 74 Fed. 195, 201, 20 C. C. A. 390; *Baumler v. Narragansett Brewing Company*, 23 R. I. 430, 50 Atl. 841; *Thompson on Negligence*, §§ 4061, 4063, 4068, 4074, 4643; *James v. Rapides Lumber Co. (La.)* 44 L. R. A. 34, 42, 49, notes.

We have, therefore, in this case to inquire whether under the circumstances there was any matter of peculiar knowledge affecting this operation which it was the master's duty to convey to the plaintiff.

It is in evidence that the roll mounted on the truck and tipped at an angle of 42 degrees would be 7 feet 7 inches in height. There is no testimony tending to show that it was impractical to tip the roll to this angle, and there is evidence that during the plaintiff's employment many rolls of this size had been taken through this doorway; so that it may be fairly said that the cause of the accident was the fact that the roll was not tipped sufficiently, but was held in too upright a position when carried through the doorway.

It has been urged that in respect to rolls 96 inches in length there was a special and peculiar danger, owing to the unusual size of the roll. The testimony shows that during the seven weeks of the plaintiff's employment about 4,500 rolls had been shipped through this doorway, ranging from 17 $\frac{3}{8}$  inches to 96 inches long. Some 30 or 40 96-inch rolls had been trucked previous to the accident, 8 89-inch rolls, and 135 87-inch rolls. All rolls of these longer dimensions, when elevated upon a 10-inch truck, required to be tipped to some extent in order to go through the doorway. The plaintiff was unable to say whether he had ever handled 96-inch rolls before, but there was positive and uncontradicted testimony that he had done so. There was no testimony to show that the plaintiff had not trucked a number of rolls of this kind safely. There is testimony that he had, and the circumstances of the case show a high probability that he had.

The danger seems to have resided in the risk of momentary forget-

fulness, or in a failure of observation of the particular roll, rather than in any danger or impossibility of doing the work with reasonable attention and care. Was the master at fault for a failure to warn the plaintiff that he might encounter rolls which would not go through the door without being tipped more than others, and that it would be necessary for him to observe the difference between long and short rolls in this regard?

The case was submitted to the jury with the instruction that the duty would not be upon the plaintiff to experiment with the roll to see in what angle it would have to be placed in order to pass through the doorway, and that he would be justified in assuming it was reasonably safe. I think this instruction was erroneous.

It is quite common to charge a master with a neglect of a duty to provide a safe working place, where the only danger arises from an unsuitable way of doing the work. The proposition that a company is negligent in taking 96-inch rolls of paper through a 93-inch doorway, and that some duty arose either to have a higher door or shorter rolls of paper, is one that cannot be supported as a matter of common sense. It is a familiar fact that high objects can be put through low doors if properly handled, and where the difficulty is in improper handling the charge of negligence should not be shifted to the master by adopting a proposition so directly contrary to the ordinary usages of manufacturing enterprises. The broad proposition that under circumstances like these a workman who is told to move an article through a doorway is entitled to assume that the doorway is large enough for the article to go through, without attention on his part to the comparative size of the door and article, cannot be accepted. It is a matter of common knowledge that men of ordinary prudence, engaged in an occupation of this kind, look to see what they are doing. Part of this plaintiff's business was loading rolls upon the trains and through the low doors of freight cars. The plaintiff was 34 years of age, and had been at work since he was 13 years old. He had worked in the woods, logging, and had worked on the logging drives in the spring; he had worked in a pulp and sulphite mill, and in the employ of the defendant paper company he had loaded paper on cars. He was familiar, upon his own testimony, with the method of getting a large roll through the low door of a car by lowering the roll by bending the leg, and he testified that it was customary, when loading cars, for the helper to look out for the top of the door and tell him when to lower. It being a necessary part of his business to make calculations concerning the relative height of doors and rolls, how can it reasonably be said that he was released from the duty of observation as to this particular door, or that as to this particular door he was entitled to assume that he need take no care?

The plaintiff in error's brief states that the real cause of the accident was the plaintiff's ignorance of the danger, through the defendant's failure to warn him thereof.

The danger was one apparent to ordinary observation. I do not think there was any question for the jury upon this point. If the plaintiff was ignorant of this danger, it was through a failure to observe what ordinary observation would have disclosed. If it was the

master's duty to warn him, this must be because it was the master's duty to anticipate the failure of observation of a thing plainly observable.

As to the first proposition, that defendant was negligent in furnishing a doorway too low for the safe passage of 96-inch rolls, the evidence is ample to show that the doorway was entirely suitable for the purpose if a four-wheel truck was used, and, if a two-wheel truck was used, with care and with ordinary observation, to inform the workman how much he must tip his truck or bend his leg. For a failure to select a suitable truck the master is not liable. He fully performs his duty when he provides suitable appliances, and for any failure to select the proper appliances, either by the workmen or foremen, he cannot be held responsible. *New England Railroad Company v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181.

As to the second proposition, that warning was required because the danger was concealed, the answer is clear. There was no concealment. The roll and the door were open to observation; as open to the servant's observation as to the master's. The risk was as appreciable by one as by the other. It was in no way a risk peculiar to the special business, but a risk of a general character arising from the relative size of physical objects. The master was entitled to assume that concerning a matter of ordinary observation he and the servant were on equal terms. There is no rule of law which imposes upon a master the duty of reminding a servant of things which he knows as well as the master. So far as there was any fault in this occurrence, it was either in the selection of the wrong truck—a fault which cannot be attributed to the master—or in a failure of the servant to exercise the same care in relation to this door that he was required constantly by his occupation to exercise in relation to the car doors. The only warning which the master could have given was that the roll was so much higher than the door that it must be lowered somewhat more than other rolls which were higher than the door. It was a mere question of difference in degree, and not of difference in kind of work. The master is under no obligation to tell his servant to look and see what he is doing if that is the plain requirement of ordinary prudence.

For the above reasons, I am unable to concur in the opinion of the majority of the court.

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#### HERNAN v. AMERICAN BRIDGE CO.

(Circuit Court of Appeals, Sixth Circuit. January 9, 1909.)

No. 1,826.

#### 1. APPEAL AND ERROR (§ 959\*)—REVIEW—DECISIONS RELATING TO PLEADINGS.

The granting or refusing leave to amend pleadings is ordinarily a matter of discretion, not reviewable on appeal or error in the federal courts; but where it is shown that the court refused to exercise its discretion because of supposed lack of authority, the ruling is reviewable for error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 959.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## 2. PARTIES (§ 95\*)—POWER TO PERMIT AMENDMENTS—MISDESCRIPTION OF DEFENDANT.

Plaintiff brought an action in a federal court in Ohio against a bridge company to recover for a personal injury alleged to have been received by him while working as an employé of the company at its plant at a place named. The summons was served on an agent of the company designated by it for that purpose under the statute of Ohio. The summons did not designate the citizenship of the defendant, but the petition described it as a corporation of New York. An answer was filed admitting that defendant was a corporation of New York and containing a general denial of all other allegations of the petition. Subsequently a motion for more specific statement was made and sustained, and later, after a new action was barred by limitation, an amended answer was filed denying that defendant ever employed plaintiff or that it operated the plant referred to in the petition. In fact, there was a corporation of New York and one of New Jersey, having the same name and the same agent in Ohio, the latter being plaintiff's employer and the one intended to be sued. *Held*, that the New Jersey corporation was in fact the defendant, as the petition disclosed, and that, service having been properly made on its agent, the court had power under Rev. St. §§ 948, 954 (U. S. Comp. St. 1901, pp. 695, 696), to permit plaintiff to amend his petition by correctly stating its place of incorporation.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 164; Dec. Dig. § 95.\*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

George Edwards, for plaintiff in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. On the 6th day of April, 1906, Hernan, the plaintiff in error, brought suit in the court below against the American Bridge Company by filing his petition, taking out a summons, and delivering the latter to the marshal for service. The summons did not describe the citizenship of the American Bridge Company, but in his petition the plaintiff described it as "a corporation organized under the laws of New York." The complaint of the petition was of a personal injury sustained by him on September 8, 1905, while in the employment of the American Bridge Company, in its shop at Ambridge, in the state of Pennsylvania, in consequence of the negligence of the company in the particulars stated, whereby a heavy iron column fell upon him, causing the fracture of all the bones of both his feet and other injuries. The company operating the works at Ambridge, Pa., and in whose employment the plaintiff was, and by whose negligence he suffered the injury, was organized under the laws of New Jersey. There was, however, another corporation of the name of the American Bridge Company, organized under the laws of New York. It was a finding of fact by the court below that one Clarence E. Sanders, "having his office and location in Cleveland, Ohio, was at all of the times mentioned in said pleadings and return of said summons the person designated by said American Bridge Company, a corporation of New Jersey, and American Bridge Company, a corporation of New York, as the agent or officer in charge of the business of both of said corporations under

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

the provisions of section 148a of the Revised Statutes of 1908 of Ohio, and was at all of said times the proper officer upon whom to serve a summons issued against either or both of said companies."

The return of the marshal was as follows:

"Received this writ at Cleveland, Ohio, April 6, 1906, and on April 16, 1906, at Cleveland, Ohio, I served the same on the within named the American Bridge Company, a corporation, by handing a true and certified copy hereof with all the endorsements thereon to Clarence E. Sanders, designated under the statute in such cases made and provided to accept service for the aforementioned corporation in Ohio.

F. M. Chandler, U. S. Marshal,

"By. F. M. Fanning, Deputy."

The American Bridge Company of New York on May 19, 1906, filed the following answer:

"Patrick Hernan, Plaintiff, v. American Bridge Company, Defendant. No. 7076. Answer.

"Now comes the American Bridge Company, defendant herein, and admits that it is a corporation organized under and in pursuance of the laws of the state of New York, for the purpose of carrying on the business of bridge building.

"Further answering said petition, defendant denies each and every other allegation thereof.

"Wherefore, having fully answered, defendant asks to go hence with its costs."

And the cause was continued to the October term, 1906. At the October term the plaintiff, upon leave granted, filed an amended petition, and the cause was continued to the ensuing February term. At that term the cause was again continued to the next term; but meantime, and on March 19, 1907, the American Bridge Company filed a motion, as follows:

"Patrick Hernan, Plaintiff, v. American Bridge Company, Defendant. No. 7076. Motion.

"Now comes the defendant, the American Bridge Company, and moves the court to require the plaintiff to make his amended petition filed herein more definite and certain in the following particulars, to wit:

"(1) That he state therein in what particular or particulars the workmen employed by the defendant to assist the plaintiff were 'incompetent for the performance of the duty of the place assigned to them.'

"(2) That he state what tools were 'old and of insufficient numbers.'

"(3) That he state what tools were defective, and in what the defects consisted."

And the cause was continued to the April term. During the April term the court entered an order sustaining the motion to make his amended petition more definite and certain. On September 26, 1907, the American Bridge Company filed its answer to the second amended petition. An action against the New Jersey corporation was barred by the statute of limitations on the 8th of that month. This answer was the same as that above set forth to the original petition, except that it added to the first paragraph, which admitted its incorporation under the laws of New York, the following:

"Denies that it, as such corporation, at the times mentioned in the petition, was engaged in the business of bridge building, and was the owner and engaged in the operation of certain shops used in the manufacture of bridges in Ambridge, in the state of Pennsylvania; denies that on, and for some time prior to, September 8, 1905, plaintiff was in its employ."

Two days thereafter the cause was continued to the ensuing October term. At the October term, upon leave granted by the court, the plaintiff filed a third amended petition, amplifying the particulars of the accident described in the original petition, and describing the citizenship of the parties, as follows:

"Says: That he is a citizen of the state of Ohio and resident of the Eastern Division of the Northern District of Ohio, and that defendant, American Bridge Company, is a citizen of, and is a corporation organized under the laws of, a state other than Ohio, which plaintiff believes to be the state of New Jersey, but is uninformed as to the same, and as such corporation, defendant, at all of the times hereinafter mentioned and for some time prior thereto, was engaged in the business of bridge building, and was the owner and engaged in the operation of certain shops used in the manufacture of bridges, in Ambridge, in the state of Pennsylvania."

The cause was further continued to the February term. And on March 24, 1908, upon a finding of facts, that in regard to the agency of Sanders, above recited, and the further fact, "and that the bridge works at Ambridge, in the state of Pennsylvania, described in plaintiff's third amended petition, was operated, at all of the times mentioned in said pleadings and return, by said American Bridge Company, a corporation of New Jersey," the court ordered as follows:

"And the plaintiff, not desiring to plead further or have issued an alias summons, it is therefore considered, adjudged, and decreed by the court that said court is without jurisdiction to try this action, and that the petition and action of said plaintiff be, and the same hereby are, dismissed, at plaintiff's costs."

The reasons for this action of the court are more fully explained in an opinion of the learned judge which comes up with the record; and, as those reasons form the subject for discussion, it seems best to exhibit them in the judge's own language. He says:

"In this case a petition was filed against the American Bridge Company, a corporation organized under the laws of the state of New York. The description of the defendant in the second amended petition is as follows:

"American Bridge Company is a corporation, organized under the law of the state of New York, and is a citizen of the state of New York."

"The action is for personal injury sustained by the plaintiff."

"Service of summons was made upon the authorized representative of the defendant in this state."

"September 26, 1907, the defendant filed its answer admitting that it was a corporation organized under the laws of the state of New York and that it is a citizen of the state of New York, but denying all the other allegations of the second amended petition."

"Thereafter a motion was filed by the plaintiff asking leave to amend the second amended petition by making the American Bridge Company of New Jersey a party defendant."

"The right of the plaintiff to make this amendment is not disputed, but the contention of the plaintiff is that there would be no necessity for serving summons upon the American Bridge Company of New Jersey upon its representative in the state of Ohio, and that as against that defendant the date of the beginning of the action would not be at the time of serving the summons upon the new defendant, but the time of beginning the action against the American Bridge Company of New York."

"The claim is made and assumed in argument that a very close relation exists between the American Bridge Company of New York and the American Bridge Company of New Jersey, and that they both have the same representative in Ohio, upon whom service of process may be had, and it is therefore

contended that service upon the representative of the American Bridge Company of New York was a service upon the American Bridge Company of New Jersey, because the representative of the latter company was at the same time a representative of the former company:

"Of course, the largest latitude in this matter of amendment—that is, as to parties—ought to be allowed. If there had been a misdescription of the party where no question of its identity was really involved, such an amendment might be permitted; but there can be no question as to the separate identity of these corporations, and the suit that was originally brought against the American Bridge Company of New York cannot be, by any sort of substitution or logic, held to be a suit against the American Bridge Company of New Jersey. The identity of the representative of both companies as one person does not at all affect the situation. The American Bridge Company of New Jersey has never been sued, and, if brought into this case, it must be brought in as any other newly sued defendant must be, and the date of the bringing of the action against the newly sued defendant must be the date upon which summons is served upon it."

It would seem that, if the view taken of the case by the court was correct, the third amendment of the petition was in effect a discontinuance as to the former defendant and the substitution of an entirely new one. The defendant being the sole defendant, it was not the case of amending by bringing in another party, but an entire change of the party defendant, which could not, as must be conceded, be done upon any admissible theory in the practice of amending legal proceedings. If this be so, the amendment should not have been permitted at all. But it is possible that, when the judge said that "the right of the plaintiff to make this amendment is not disputed," he meant that it was not disputed by counsel.

The deeper and more vital question is whether the court had the power to authorize an amendment which should correct the description of the defendant in the first petition; for it is clear from its opinion that, if it had supposed it had the power, it would have exercised it by allowing the amendment. It is proper in this connection to observe that our authority to review the denial of the court below rests upon this ground, namely, that it is a question of power and not of discretion. The granting leave to amend is ordinarily a matter addressed to the discretion of the court, and its determination is for that reason not reviewable. This we have many times held. But where it appears that the court's discretion was not exercised because of a supposed lack of authority, it is shown that the party has been denied his legal right to require the court to entertain the question on its merits; and in such case the foundation for a writ of error is laid. *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321; *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917.

To resume: The question before us is, did the court, in the circumstances of the case, have the power to allow the amendment which was in substance and effect a correction of the misdescription of the defendant? The plaintiff was pursuing the company which was operating the plant at Ambridge, Pa., and in whose employment there he had been injured. That was the substance of the matter. The summons he sued out was in apt form for that purpose. The writ was served upon the proper agent of the party he was suing. So far, all was well. But he made a mistake in his petition in supposing it was

incorporated in New York and in so describing it. He had no claim to a cause of action against the New York corporation. He had no thought of suing it, even if he had known of the existence of such a corporation, which in all probability he did not. When the common agent of the two companies was served with the summons, he was bound to take steps to find out which company was intended. He was the agent or officer in charge of the business of both the corporations, and, doubtless because of that fact, had been designated under the statute to accept service of process. It may be said that he might settle that by referring to the petition, and would find that the defendant there described was the New York corporation. But he would also find there that the corporation intended to be charged was the corporation operating the plant at Ambridge, Pa., notwithstanding the description of it as a New York corporation. And it is scarcely to be believed that he was so oblivious to the affairs of his company as not to know which company was operating the plant at Ambridge. These companies, if there were two of them, and not one incorporated in each state, having, as they did, an identical name and an identical agent, exposed one bringing suit in Ohio to embarrassment and possible miscarriage of justice, which they should have taken measures to prevent. To one who, proposing to sue the New Jersey corporation, should be informed, and correctly, that Sanders was its agent, and should not be informed of the existence of another company for which he was also agent, the situation would be the same to him as if there were no other corporation having the name of American Bridge Company. In such a case there would be no dual agency. The single agent would understand that the statement of the place where his company was incorporated was a mistake; and especially would he have no doubt or hesitation when, on looking at the petition, he found that his company was the one complained of, and the service of process upon him would confirm that understanding. Then, again, before the filing of an answer, counsel must be employed and consultations must be had, when it would be inevitable that the mistake should be discovered, and that, as in the present instance, another company was the one intended by the writ and the petition. The New York company appeared and answered, and naively admitted its incorporation in New York, but by an otherwise general denial gave no sign of the mistake which was manifest to itself. The case was continued from term to term, because it was not reached, as we infer, for there is no statement that it was continued on motion of either party. There is only the usual statement which indicates the continuance of unfinished business. After the second amended petition was filed, and while the time when a new suit against the New Jersey corporation would be barred by the statute of limitations was approaching, the New York company craved an order that the plaintiff be more specific about the particular respects in which the workmen were incompetent, what tools were old and insufficient in number, and what tools were defective, and in what the defects consisted. These were matters of no consequence to it if it were not the corporation operating the plant, nor essential to its defense. Then, a few days after the expiration of the time when the statute of limitations would bar a fresh action against the



New Jersey company, the New York company filed an answer to the second amended petition, in which, besides the general denial, it denied that it was engaged in building bridges at Ambridge or in the operation of the shops there, or that the plaintiff was in its employ. Up to this time there had been only the general denial, and nothing to awaken the plaintiff to the knowledge that a corporation strange to him was defending the suit, but the amendment to the general denial in the final answer seems to have brought him to a realization of the situation. Then he tried to get the genuine defendant before the court by amending his petition. It is manifest that the New York company was simply personating the New Jersey company, and that the effect was, if such proceedings were given effect, to shield the real defendant until the latter was safely behind the statute of limitations. There is no direct proof that the New Jersey company actually sanctioned the proceedings of the New York company, except it be by the action of its agent in diverting the pursuit. But it is the beneficiary of the fruits, and if it objects to the amendment it must avail itself of the action of the New York company and its agent.

In these circumstances, was it rightly held by the court below that the correction of the petition by describing the defendant as a New Jersey corporation, instead of a New York corporation, was beyond the power of the court, in that it brought into the suit a new party? The authority vested in the federal courts to amend the process, pleadings, and proceedings in cases brought before them is ample; probably not less so than in any other system of jurisprudence. By section 32 of the judiciary act (Act Sept. 24, 1789, c. 20, 1 Stat. 91; Rev. St. § 954, [U. S. Comp. St. 1901, p. 696]) it was ordained that:

"Sec. 954. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such courts shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

And, again, by the act of June 1, 1872, c. 255, § 3, 17 Stat. 197, Rev. St. § 948 (U. S. Comp. St. 1901, p. 695), it was declared that:

"Sec. 948. Any Circuit or District Court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

Probably the limitation in section 948, that the amendment shall not injure the party defendant, exists by implication in section 954, for the court would not convert the means devised for promoting justice into a weapon for perpetrating a wrong. The object of these statutes is to give effect to the substance of things, lest that be smothered in matters of form. As, for instance, when it is made to appear to the court that the party who asks to amend has sought in good faith to bring suit against another for a cause of action stated, but by some mistake has

misdescribed the other, he should be allowed to correct the mistake if its correction will not injure the defendant. The proviso states the only limitation of the power, whether the limitation be expressed or implied. It is true that there was a person, a corporation, whom the description fitted, but it was not the corporation the plaintiff was suing. And to say that what he has done is to sue a stranger to the cause of action and to hold the plaintiff to it is to exalt the form and ignore the substance. It was the disposition to do this thing, whereby the course of justice was liable to be tied up by mistakes and incongruities in the procedure in causes before the courts, that induced the positive declarations of the statutes referred to. Even at common law, the rule is that:

"The power to amend in case of a misnomer depends not upon the question whether the amendment changes the name, but whether or not it changes the party. If it only cures a mistake in the name of the party by or against whom the suit is prosecuted, it may be made; but if it introduces a different party, it is inadmissible." 1 Encl. of Pl. & Pr. 535.

We think the statutes extend the power of the court to allow an amendment which shall correct the description of the cause of action and of the parties at any stage of the case and in respect to any proceeding in it, whether in the process or pleadings, and that it should be exercised in every case where right and justice require it, and the refusal of it will prevent an injured party from obtaining redress, subject, however, to the proviso that the amendment shall work no injury to the other party. The Circuit Court of Appeals for the Eighth Circuit expressed the opinion in *McDonald v. State of Nebraska*, 101 Fed. 171, 41 C. C. A. 278, that the defendant must have been misled to his prejudice, must have lost some right in consequence of the mistake of his adversary, to justify him in withstanding the amendment, and that his right to object stands on grounds similar to those of an estoppel. How universally this rule would hold good we are not prepared to say. But we think it safe to affirm that when the other party is not harmed, loses no right, the amendment should be allowed if justice is thereby promoted. The terms and conditions are subject to the order of the court.

The power to amend is not restricted to cases where the person suing or sued is continued in another character, as where by the amendment a person suing as an administrator is turned into his private character suing in his own right, or vice versa, the cause of action being in other respects the same, and cases where the representative of the real party is put out and the real party substituted in his place, as in the case of *Manufacturing Co. v. Vroman*, 35 Mich. 319, 24 Am. Rep. 558, but extends to cases of misnomer or misdescription of the parties intended to be made such, the cause of action remaining the same, and the other party not deprived of any substantial right, as in the case of *Welch v. Hull*, 73 Mich. 47, 40 N. W. 797, a case much like the present, where the action was brought by Welch against three defendants alleged to be members of a partnership, one of whom was called in the summons and the subsequent pleadings and proceedings Harry Hull, and there was a Harry Hull residing in the county. He was not served, but the appearance of counsel was for

Harry Hull, as well as for the other defendants. But George F. Hull, and not Harry Hull, was the person in the copartnership, and was the person intended to be described by the name of Harry Hull. The case came on for trial, and, it appearing upon the trial that Harry Hull was not a member of the partnership, the defendants moved for the direction of a verdict in their favor. The plaintiff asked leave to amend the proceedings in the cause by striking out the name "Harry" wherever it appeared and inserting instead the name of "George F." But the trial judge denied the motion, holding, as did the judge here, that the summons had been issued against "Harry Hull," that he had appeared in the case, and that to allow at that stage of the case a discontinuance as to "Harry Hull," or an amendment of the pleadings and the insertion of "George F. Hull," would be to admit a new party to the record, and that he had no authority to allow such an amendment. The verdict and judgment having passed for the defendants, the plaintiff took the case to the Supreme Court of Michigan, which reversed the judgment, directed the amendment which the court below had denied, and ordered a new trial. This case is peculiarly applicable, in that there was a person whom the name given in the process and pleadings fitted.

We turn, then, to inquire whether the American Bridge Company of New Jersey will suffer any injury if the course which we think is within the power of the court, and which we propose, is adopted. None has been suggested, and we can conceive of none, unless it be that the defendant will be deprived of the benefit of the statute of limitations. Perhaps it would be sufficient to say that in the circumstances of this case it is not entitled to the benefit of it. But, further, it is not in general regarded as a right to be protected against the justice on which the right to amend is given. On the contrary, it is deemed by the courts that the utter loss of his cause to the plaintiff is a strong reason for affording him relief. *George v. Reed*, 101 Mass. 378; *Sanger v. Newton*, 134 Mass. 308; *Miller v. Watson*, 6 Wend. (N. Y.) 506; *Shieffelin v. Whipple*, 10 Wis. 81; and the other cases cited in 1 Encl. of Pl. & Prac. 519, note 2.

The substantive cause of action remains the same, the plaintiff is the same, and the party who caused the injury to him is the same. The process sued out is right enough. The petition contains a mistake in describing the intended defendant, and the mistake is one easily condoned when it is learned that there were two corporations bearing the same name. It was in this knot of identity of name and the identity of agents that the suit became diverted. The description of the defendant did not touch the merits, but was made only for the purpose of showing federal jurisdiction. The added words of description were not part of the name of the corporation. If the American Bridge Company of New Jersey had executed an obligation by its proper corporate name, but had described itself as a corporation organized under the laws of New York, on the facts being made to appear, doubtless the misdescription of the state where it had been incorporated would have been held immaterial to the validity of the obligation. It would seem to us, independently of any intended diversion by the dual agent, or of any masking of the real defendant, and supposing there was a

mutual error on the part of the plaintiff and the defendant's agent, enough would remain to justify the amendment when the error became known, rather than to turn the plaintiff off without a trial, and with a lost cause of action. We have adverted to circumstances tending to show that the plaintiff's continuance in his mistake was due in part, at least, to the misleading dalliance of the counterfeit defendant, and, if our animadversions are well founded, they strengthen the reasons for correcting the error which occurred.

In *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907, the Supreme Court was confronted with a record in which it appeared that the cause had been tried upon false issues made by the pleadings of the parties, and the court, instead of passing on the merits on the record as it stood, reversed the judgment and sent the cause back for amendment and further proceedings, and, because it seemed necessary to the justice of the case, directed it to be reopened and new pleadings made, to the end that the real controversy might be prosecuted and determined.

We think we shall not exceed our authority if, as we propose, we reverse the judgment and direct the court below to entertain an application of the plaintiff, if he be advised to make one, for an order that the petition be amended by stating the citizenship of the plaintiff, and correcting the averment of the citizenship of the defendant by stating its incorporation to have been under the laws of New Jersey, instead of New York, and that thereupon the defendant, the American Bridge Company, have leave to plead anew to such amended petition; that the court make such order and direct that a copy thereof be served upon said defendant or its authorized agent within a time to be therein specified; and that thereupon the court proceed in due course. And it is so ordered.

Since filing the foregoing opinion we have observed that Buffington, District Judge, in a very similar case (*Bainum v. American Bridge Co.* of New York [C. C.] 141 Fed. 179), held that the court had the power to allow the amendment and permitted it to be made.

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### MALCOMSON v. REEVES PULLEY CO.

(Circuit Court of Appeals, Sixth Circuit February 23, 1909.)

No. 1,856

#### 1. SALES (§ 384\*)—REMEDIES OF SELLER—REFUSAL OF PURCHASER TO ACCEPT DELIVERY.

The measure of damages for the refusal of a purchaser to accept a completely manufactured article is not the purchase price, but the difference between the contract price and the market value at the time and place when acceptance is required.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1106; Dec. Dig. § 384.\*]

#### 2. SALES (§ 178\*)—DELIVERY—ACCEPTANCE BY PURCHASER.

Delivery by a seller to a carrier, selected by himself, of articles manufactured under a contract for their sale, without the authority or knowledge of the purchaser, does not constitute an acceptance by him under the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 178.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. SALES (§ 168\*)—DELIVERY AND ACCEPTANCE—INSPECTION AND APPROVAL—TIME AND PLACE FOR INSPECTION.**

Under a contract for the building of motor engines by plaintiff for defendant, which provided that they should be tested and accepted at plaintiff's plant, and that, in the absence of defendant's inspector, plaintiff's inspection should be accepted, inspection and acceptance at the plant before shipment were of the essence of the contract, and, unless waived, defendant had a right to make the inspection and test, and cannot be held to have accepted engines which were shipped without notice to him or an opportunity for inspection and test and before he knew whether any further deliveries were in fact to be made under the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-406; Dec. Dig. § 168.\*]

Contracts for sale of things to be produced or manufactured, see note to *Star Brewery Co. v. Horst*, 58 C. C. A. 363.]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

H. E. Spalding, for plaintiff in error.

S. T. Miller, for defendant in error.

Before SEVERENS, Circuit Judge, and KNAPPEN and SANFORD, District Judges.

KNAPPEN, District Judge. The defendant in error, plaintiff below (hereafter called the plaintiff), recovered judgment against the plaintiff in error (defendant below) for \$12,411.62, upon an alleged cause of action arising from these relations:

On November 1, 1905, defendant contracted with plaintiff for the purchase of 500 "air-cooled" automobile engines, to be built by the plaintiff, and to be shipped in specified quantities each month over a period of six months, at the price of \$320 per engine, net, f. o. b. plaintiff's works at Columbus, Ind. The engines were guaranteed to "develop approximately 20 H. P. brake test." The plaintiff's proposal (which, together with defendant's acceptance, made up the contract) contained this clause:

"Engines to be tested and accepted at our plant, Columbus, Indiana, and in absence of your inspector our statement of H. P. to be accepted by you, and in any event the conditions of this guarantee to cease and terminate with shipment of engines."

It was provided that defendant might transfer his rights under the contract to any company with "a credit and personnel satisfactory" to plaintiff. On January 5, 1906, defendant assigned his rights under the contract to the Aërocar Company, of Detroit, Mich., of which company defendant was president. Plaintiff consented thereto on condition that defendant "remain liable as surety thereon." The engines shipped under the contract do not appear to have proven satisfactory, and on July 7, 1906 (after 319 had been delivered), adjustment of the controversies arising was had by an agreement between plaintiff and the Aërocar Company, by which the latter agreed to settle for the motors up to that time delivered and not paid for at \$300 per engine (less a rebate of \$25 on each engine before paid for), by giving its promissory notes aggregating \$27,542.14; and by which agreement plaintiff was required to "make all reasonable efforts to sell to third parties the balance of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

motors called for by said contract and not already shipped." It was then provided that "any such motors not exceeding 40 in number remaining unsold January 1, 1907, shall be tested and inspected as provided by said contract dated November 1, 1905, and if answering such test and inspection shall at the option of Reeves Pulley Company be shipped to and accepted by the Aërocar Company at \$300.00 per motor [a reduction of \$20 from the original contract price] net f. o. b." plaintiff's works at Columbus, Ind. It was provided that the original contract should be otherwise canceled, and the Aërocar Company relieved from liability for further motors than provided by the agreement of July 7, 1906. In connection with this adjustment, the defendant executed the instrument attached to the settlement contract in these words:

"I hereby agree to guarantee payment by the Aërocar Company of all notes mentioned therein and of the motors by it to be accepted after January 1, 1907, in accordance with the terms of said proposition, provided that the said Reeves Pulley Company shall with its acceptance of this proposition relieve me from all further liability under said contract."

No further relations seem to have been had between the parties until December 12, 1906, when the Aërocar Company wrote plaintiff inquiring what success was already had in disposing of the 40 engines, and if any were still unsold, what had been done toward selling them, expressing the hope that all would be disposed of, for the reason that it (the Aërocar Company) did not care for any more of plaintiff's air-cooled engines. Plaintiff two days later replied to the letter that it would be able in due time to report regarding the engines, and that it was using every effort to dispose of them, that it had spent a large sum in advertising, and had "several matters in brew with reference to their disposition, but can not tell at this time whether we shall be successful." The parties appear to have had no more relations upon the subject until January 3, 1907, when plaintiff sent the Aërocar Company a bill of lading of that date, together with an invoice for 40 engines at \$300 each. The Aërocar Company at once wired plaintiff to hold the car of motors, and that it must insist upon its own inspection before shipment. Plaintiff replied that "engines were tested and inspected in compliance with the contract before shipping." The Aërocar Company refused to receive or accept the engines, for the reason that it had had no opportunity to inspect them. Plaintiff's proposition to allow the Aërocar Company to take its choice between those so shipped and certain others at the plaintiff's factory was declined. Plaintiff accordingly brought suit against defendant, the Aërocar Company not having been sued. The declaration contains a special count upon the refusal of the Aërocar Company to accept and pay for the engines. It contained also the common counts in assumpsit, a bill of particulars under which demanded payment for "40 motors or engines furnished by the plaintiff to the Aërocar Company at \$300.00 each, payment thereof being guaranteed by defendant."

Upon the trial plaintiff gave evidence tending to show that it had made all reasonable efforts to sell to third parties the balance of the engines called for by the original contract, but had failed to the extent of the 40 engines shipped. The record is not clear that plaintiff sold to other parties more than two of the engines originally contracted to de-

fendant, or that more than 400 out of a total of 500 were ever built, the manufacture of "air-cooled" motors having been discontinued, by plaintiff in favor of the "water-cooled." The plaintiff also gave evidence of an inspection by its own employes of each of the 40 engines in question at or within a few days after the dates of the completion of the respective engines, the inspection dates ranging from May 28, 1906, to September 27, 1906, and being fairly evenly distributed over that period. About one-third of the engines were thus inspected previous to the agreement of July 7, 1906, and the last of them more than three months previous to January 1, 1907. Plaintiff also gave evidence tending to show that the method of test and inspection used was proper and effective. The defendant offered testimony tending to show that plaintiff's method of inspection did not furnish an adequate test of the power of the engines. There was no testimony that either the Aërocar Company or the defendant had ever seen or inspected the engines or been given notice or opportunity to inspect, or to be present at plaintiff's inspection; or that either the Aërocar Company or defendant knew when plaintiff's inspections were had. At the conclusion of the evidence the court, against the defendant's objection and exception, struck out all defendant's testimony, upon the apparent ground that the inspections made by plaintiff's employes at the time of the completion of the engines were binding and conclusive upon defendant in the absence of fraud, and that there was no evidence of such fraud, defendant's counsel indeed disclaiming "intentional fraud" in that regard.

Defendant's motion to strike out the testimony on behalf of the plaintiff as to the tests, because made before January 1, 1907, and because not made in the presence or with the participation of the defendant or of the Aërocar Company, and without notice of the making of such tests or opportunity to have such representation, was overruled, and defendant's request for direction of a verdict in its favor for substantially the reasons stated in the motion referred to was denied; as was its request to be permitted to go to the jury upon the questions of fact whether reasonable efforts were made by plaintiff to sell the engines, and whether the engines were manufactured and tested as the contract required; and the jury peremptorily instructed to render a verdict for the plaintiff for \$12,411.62. The assignment of errors raises for review the action of the court in each of the respects mentioned, as well as in other respects not necessary to mention.

It is obvious that the court could have properly directed a verdict for the full purchase price only upon the theory that the Aërocar Company had actually accepted the engines. We say this because the measure of damages for the refusal of a vendee to accept a completely manufactured article is not the purchase price, but is the difference between the purchase price and the market value at the time and place when acceptance is required. This proposition is too well settled to require elaboration, or to justify more than the merest reference to authority. See *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694; *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. 444, 20 C. C. A. 503; *Southern Cotton Oil Co. v. Heflin* 99 Fed. 339, 39 C. C. A. 546, and cases cited.

The fact, if it existed, that the engines should have been accepted was not sufficient to raise a liability for the full purchase price, but only for

damages for failure to accept. There was no evidence of the value of the engines at the time it is alleged they should have been accepted, much less evidence that they were valueless. Unless, therefore, it appeared beyond dispute that the engines were in fact accepted by the Aërocar Company, the court should not have directed a verdict for the purchase price, even assuming that the evidence showed beyond dispute that plaintiff had used all reasonable efforts to sell the engines to other parties. It is not seriously contended on the part of the plaintiff that there was any acceptance of the engines by the Aërocar Company except by virtue of the inspection of the engines by plaintiff's employés, as the same were from time to time manufactured. A suggestion was, however, made upon the argument that a delivery sufficient to answer the requirements of a sale to that extent might be predicated upon the delivery of the motors to the carrier at plaintiff's factory, and the acceptance by the carrier. No authority is presented, and we know of none, supporting a proposition that the delivery to a carrier chosen by plaintiff, without the vendee's authority or knowledge, constitutes the carrier the agent of the vendee to accept the engines, as a sufficient compliance with the contract, and to waive thereby a right of inspection given by the contract. That such delivery does not work out an acceptance by the vendee seems clear. *Grimes v. Van Vechten*, 20 Mich. 410; *Pope v. Allis*, 115 U. S. 363, 372, 6 Sup. Ct. 69, 29 L. Ed. 393.

Inasmuch as the contract provides that the engines are to be tested and accepted at plaintiff's plant, and makes plaintiff's inspection, in the absence of the Aërocar Company's inspector, a final acceptance by the vendee, an inspection and acceptance at the plant is, unless validly waived, a condition precedent to a right of action for the purchase price. Under such a contract the place of inspection is of the very essence. It has been repeatedly held that a statement in a mercantile contract descriptive of some material incident, such as the time and place of shipment, is ordinarily to be regarded as a condition precedent to the enforcement of the contract. Among the cases in which this proposition has been applied to the place of shipment are *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372. In *Cleveland Rolling Mills v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920, the proposition was applied to the time of shipment. No reason is apparent, and none is suggested, why the rule as to the necessity of compliance with respect to place and time of shipment should not equally apply to place and time of inspection. These considerations made it unnecessary for the Aërocar Company to make a test and inspection of the engines upon their arrival at Detroit.

Plaintiff is thus compelled, in support of its contention that the engines were accepted by the Aërocar Company, to rely solely upon the proposition that the inspection by plaintiff's employés, made from day to day, extending over a period of nearly three months, had the force of an actual inspection and acceptance by the Aërocar Company, notwithstanding the latter had in fact never seen or inspected the engines, or been given notice or opportunity to inspect them, or to be present at plaintiff's inspection, nor did it know when plaintiff's inspections were



to be had. This proposition rests, as it must, upon the contention that it was the duty of the Aërocar Company to have its representative at the factory whenever plaintiff should be ready to make an inspection. It is undoubtedly the rule that if the Aërocar Company had been represented by an inspector as the engines were manufactured and tested, and had such engines been allowed to pass without objection, an acceptance would thereby have been accomplished under the terms of the contract so thoroughly as to preclude a subsequent defense of failure to meet the warranty. *Carleton v. Jenks*, 80 Fed. 937, 26 C. C. A. 265; *Dodge v. Dickson, Manfg. Co.*, 113 Fed. 218, 51 C. C. A. 175. Such, also, would be the effect under the contract in question had the Aërocar Company unreasonably neglected or refused to have an inspector present on notice that plaintiff was ready to have the inspection made. But a construction of the contract requiring the Aërocar Company to have its representative at the factory whenever plaintiff should be ready to inspect motors in connection with their completion, and which has the effect of making the inspection on the part of plaintiff's employés, in the absence of and without notice to the Aërocar Company, amount to an acceptance by the latter of the engines, is, to our minds, entirely unreasonable. In the first place, the inspection of the 40 engines in question (which required at the most, in the case of each engine, but a very few minutes) extended over a period of nearly 90 days, not more than 3 engines being inspected on a given day, and the intervals between such dates of inspection ranging from one to 15 days. Under the original contract of November 1, 1905, and the later agreement of July 7, 1906, the Aërocar Company was given the right to be present and participate in any test to be made of the engines, and the right to be notified of the time of such inspection is necessarily implied.

As to the 13 engines inspected before July 7, 1906, the Aërocar Company cannot be held to have accepted plaintiff's inspection as final unless it either expressly or by necessary implication waived such notice and right to be present and participate, as by refusing or unreasonably delaying to appear when notified, or by a course of dealing so practically construing the contract as to require the Aërocar Company to inspect the engines as manufactured. As before said, there was no evidence of the existence of any of these features.

But as to the 27 engines manufactured after July 7th, it is clear that the Aërocar Company was neither bound nor expected to make the inspection until after January 1, 1907. Until that time it could not be known with certainty that the Aërocar Company would be called on to inspect or accept any of the engines, as it was possible and it was hoped that all might be sold to other parties. An inspection before that date would thus have been unreasonable. Moreover, the language of the contract of July 7th leaves no room for argument on this proposition, even as against the Aërocar Company, for the express provision is that "all such motors not exceeding 40 in number remaining unsold January 1, 1907, shall be tested and inspected."

But as to the defendant the case is, if anything, even more clear, for he guarantees the "payment by the Aërocar Company of \* \* \* the motors by it to be accepted after January 1, 1907." It is upon

this guaranty that suit is brought, and the plaintiff can recover only by bringing his case within its terms, viz., by showing motors accepted after January 1, 1907, and not paid for. Whether recovery could be had for the 13 motors made before July 7, 1906, on showing an actual acceptance of them before that date, we need not now discuss, as the question may never arise. Had recovery been sought upon the theory that the Aërocar Company refused to accept (upon inspection or refusal to inspect) engines which they should have accepted, the rules we have suggested above, as to the right, necessity, and time of inspection, would apply.

The offer to substitute other engines for those shipped to Detroit in January, 1907, did not affect the defendant's right to stand upon the provisions of the agreement as to an inspection and acceptance at plaintiff's shops, for the reason that the Aërocar Company was merely given an option between the uninspected engines and engines which might or might not conform to inspection tests. The sufficiency of plaintiff's tests—provided that they were had in good faith—would seem immaterial. If the Aërocar Company was not given the opportunity to participate in plaintiff's inspection, the latter would cut no figure; and if, on the other hand, the Aërocar Company was given such opportunity but failed to take the benefit of it, the plaintiff's tests (made in good faith) would have been conclusive. But as the record stood, the court should, without reference to other considerations, have directed a verdict for the defendant. The conclusions reached require a reversal of the judgment.

The other questions raised by the assignments we pass by as unnecessary for consideration, in view of the conclusion reached. So far as they may be thought to involve error, they would seem unlikely to arise upon another trial.

A question arises whether under the guaranty of July 7, 1906, the defendant could be held liable in an action on account of the refusal of the Aërocar Company to inspect the engines, even though such refusal was unjustified; or whether, on the other hand, defendant's liability is limited to a guaranty of the payment of the purchase price of such engines as should actually be accepted; in other words, whether the guaranty can be construed as one of acceptance. We suggest this in view of the language of the instrument, which is in terms a guaranty of payment of two classes of items: first, the notes given for engines previously delivered; and, second, the engines "by it [the Aërocar Company] to be accepted after January 1, 1907"; and in view of the express release of the defendant from all liability under the contract except as provided by the terms of the guaranty. Inasmuch as a determination of this question is not necessary to a decision of the case here presented, and as it was not definitely raised in the court below and was not discussed in the briefs of counsel filed before the hearing in this court, we content ourselves with this reference.

The judgment of the Circuit Court will be reversed, and a new trial ordered.

## TREMONT COAL &amp; COKE CO. v. SHIELDS.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1909.)

No. 1,639.

## MASTER AND SERVANT (§ 286\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

In an action by a miner to recover from a coal company for an injury caused by the falling of rock upon him in a tunnel, which he and others were running, when he went in to begin his shift immediately after a blast, where the alleged negligence of defendant consisted in not timbering the tunnel and in not inspecting it before plaintiff went to work, and defendant introduced evidence that the tunnel was in rock which did not need timbers, and which it was not customary to timber, that it was inspected but a few hours before the accident, and that it was the duty of the miners themselves after a blast to sound the walls and remove any rock loosened by the blast, the question of defendant's negligence was one for the jury, and it was error to charge that it was negligent as matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1010; Dec. Dig. § 286.\*]

## In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

This was an action for personal injuries, resulting in a verdict for the plaintiff therein, from which judgment the present writ of error was brought by the defendant in the court below.

The plaintiff alleged that he was employed by the defendant in the capacity of what is known as a "hard-rock or quartz miner," and as such was engaged, with other like miners, in running a tunnel in order to reach certain veins of coal; that he and the other miners similarly engaged were working in shifts of eight hours each, two men to a shift, and that plaintiff's regular shift was from 11 o'clock at night to 7 o'clock in the morning; that at 11 o'clock in the night of July 27, 1906, the plaintiff went to work on his shift, in company with the other miner on his shift, and that since the plaintiff's last shift of work, which ended at 7 o'clock in the morning of that day, "considerable digging had been done in the face of said drift, and fresh rock and dirt had been exposed in the walls and overhead, not visible when plaintiff had quit work in the morning, and of which he had no previous knowledge or notice, and which rendered said place of work extremely dangerous and unsafe; that the rock and dirt dug down by preceding shifts had been allowed to accumulate in the drift so as to cover the floor with piles of loose stones and earth, rendering it very difficult to move about in the drift and impossible to escape in the event of caving; that the sides and top of said drift at that point and near there, and especially said freshly exposed portion of the top wall, were wholly unsupported by any sort of timbers or protection against caving and falling, although the same were freshly dug out and unsafe without such timbering and supports, and the drift was further obstructed and rendered unsafe and dangerous to move about in, or to escape from, by reason of the tracks in and along the floor of the drift being blocked up for a long distance with cars that had been allowed to accumulate and stand there, and plaintiff avers that, in all of the aforesaid particulars, the defendant was then and there wholly lacking and negligent in its due, reasonable, and ordinary care and prudence for the safety of plaintiff, and especially in thus failing and neglecting to furnish and to maintain a reasonably safe place for him to work; that within a few minutes after plaintiff went upon duty at the time and place last aforesaid, and before he had time to discover the risk and danger of the aforesaid situation, or to escape therefrom in the obstructed condition of the drift before described, a large and heavy rock in the freshly exposed portion of the wall overhead, near the face of the drift, suddenly caved and fell in upon him, carrying with

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it a large mass of dirt and stones, and completely crushing and burying him beneath their heavy weight, inflicting the wounds and injuries," for which he sued. The answer of the defendant company put in issue all of the averments of negligence on its part, and as affirmative defenses set up assumption of risks and contributory negligence on the part of plaintiff.

Upon the conclusion of the plaintiff's case, the defendant moved for a nonsuit, which motion was denied, and upon the conclusion of all of the evidence the defendant moved for an instructed verdict in its favor, which motion the court likewise denied. And, when it came to charge the jury, it took from them all consideration of the evidence in respect to the alleged negligence of the defendant in these words:

"Now, one of the essentials of the plaintiff's right of action in this case is the fact that he was injured. That is not controverted. That does not have to be proved. That is a fact in the case. Another of the elements essential to his right of action is that this injury was in consequence of the defendant's negligence—negligence amounting to a breach of duty which the employer owed to him while in the service of the defendant company.

"The plaintiff specifies negligence in a number of particulars. There is a controversy as to whether the defendant was negligent at all, but the plaintiff is not required, in order to make out his case, to prove that the defendant was negligent in all particulars specified. If the case is proved as to one particular specification of negligence, which is sufficient in law to create a liability, it becomes unnecessary for the court and jury to analyze all of the testimony, and determine as to all of the other particulars of negligence.

"Now, when there is a material fact about which there is a controversy, which has been so clearly proved as to really amount to an admission and to be an uncontroverted fact in the case, the court is not required to refer that to the jury, but may determine it as a question of law; and hence in this case the court has assumed to decide, as announced yesterday, that as a matter of law the defendant has been proven to have been negligent in this case. That does not authorize you to assume that the court has determined that this defendant is negligent in all of the particulars, or with all the enormity alleged, but sufficient to constitute a legal liability. I have no objection to making it known to you and to the parties and their attorneys that the negligence which appears so clear in this case as to justify the court in making this ruling is practically confessed by the manner of the defense. The defense in part has proceeded upon the theory that the officers and superintendents of this mine did not know that there was danger at that particular time in the face of the tunnel, knowledge which should have been known, or the defendant should have possessed, if there had been that degree of care in inspection and competency of supervision which was required in operating a mine which is necessarily dangerous. That, in connection with the undisputed testimony in the case, I think justifies the court, and therefore the court assumed the responsibility of deciding that this defendant has been proved to have been negligent by reason of neglect to supervise the work of the employes and to constantly inspect the mines, so as to know as often as the shifts were changed the conditions there, and the degree of danger to which the men going into a place of that kind were exposing themselves in going there.

"Now, that is as far as the court has gone, and it is not necessary for you to go beyond that and determine all of these questions, whether in a mine of this character, a mine of that size, it was a fault on the part of the defendant company not to organize a force classified so as to have muckers and timbermen and miners working according to the established methods of carrying on operations in larger mines. That question you do not need to spend the time to decide. Various other grounds of negligence are alleged. It is not necessary for us to decide whether it was negligence not to support the roof and the walls of this tunnel, cut, as the testimony tends to prove it was, through rock or solid formation.

"Now, in your province of deciding whether the plaintiff shall have a verdict or not, the ruling of the court has simplified the case so that it can be taken up by the jury and decided according to your determination of two principal questions"—which the court proceeded to explain were the questions of contributory negligence and assumption of risks.

Except at the entrance, it was undisputed that the tunnel, so far as it had been constructed at the time of the accident in question, was in sandstone, but the plaintiff and several of the witnesses on his behalf gave testimony tending to show that there were some places in it, more or less soft and dangerous, without timbers.

The witness Hamilton, who worked on the shift from 7 a. m. to 3 p. m., testified, among other things, as follows: "The day Shields was hurt I had worked from 7 o'clock in the morning until 3 in the afternoon, and put in several blasts. We would drill until time to go off, and would load our holes and fire them as we went out, and did not go back to see what the effect of the blast was. Q. Mr. Hamilton, what was the condition of the roof at the point where you were at work when you left there near the breast of the cut? A. I considered it bad. Q. In what respect? A. Danger of caving. Q. Well, I will ask you what the character of that danger was, as to being immediate? A. Well, I considered it dangerous right at the present time. Q. Did you make any investigation in reference to it? A. I looked at it; tried to pry a chunk down that I was afraid of. Q. Well, what was it particularly that you thought was dangerous? A. Well, I was more afraid of a large stone that there was slips around that looked to me like it cut it off, and I was afraid it would fall down; that was before I fired the blast and I tried to pry it down, but could not move it. \* \* \* This rock was from 3 to 3½ feet from the breast of the tunnel. Q. What was the condition of the roof generally around this rock? A. Well, if that rock would stay there, the balance of the rock would stay up I think. Of course, you could see other smaller slips, but in that case this rock acted as a key, and, if this stayed there, the balance would stay. The rock was visible all of my shift, and I worked under it from 7 in the morning. There were no timbering in the tunnel at that point, nor anywhere near there. Q. I will ask you whether or not in your judgment, based upon your experience and observation as a miner, it was a proper and prudent thing to do, for the reasonable safety of the men at work in that tunnel, to have had timbers at any point along the distance that you have described (between the entrance of the tunnel and the place where Shields was hurt)? A. Yes, sir; it was. Q. Why? A. Because it caved many times. We ran through about 20 or 30 feet back from the breast where Mr. Shields was hurt a short vein of coal, and there was soft rock laying next to the coal, and that caved oftentimes in good quantities. Q. That is the point you say that timbers should have been placed? A. Yes, sir; that is one point. Q. Were there other places in that distance of 150 feet that should have been timbered? A. Except on the breast. Q. I will ask you whether or not you ever saw a timber crew at work timbering there? A. No, sir. Q. Do you know whether or not the defendant company had a timber crew? A. I don't. Q. Did you ever see any material for putting in timbering in the mine? A. No, sir. Except some that I put in afterwards. Q. Did you ever hear any of your fellow workers ask for timber? A. I heard my partner say to the foreman, Mr. Wildiz: 'John, there had ought to be some timbers in here.' That occurred while we were working between where we got this coal slip, and where Mr. Shields got hurt. No timbers were furnished in reply to this request. Q. Whose duty is it in the mine to investigate the condition of the roof and the walls, with reference to the necessity for timber? A. It is the duty of the foreman, and also the duty of the men working there. If the miner sees a place in the mine he thinks ought to be timbered, he should go to Mr. Wildiz, and it would be Mr. Wildiz' duty either to furnish timbers and instruct the miners to timber it up, or furnish timbermen to do it. It is the duty of the foreman to see to the clearing away of the rock from the face of a tunnel after it has been blasted. I visited the place where plaintiff was injured before any work had been done there the next morning, and found the rock that I had seen in the roof laying on the floor of the tunnel with loose rock under it."

The witness Carlson, who worked on the shift immediately preceding that of the plaintiff, testified, among other things, as follows: "I was employed there when Shields was hurt. I was on the afternoon shift from 3 to 11. Mr. Hamilton and his partner were just ahead of me, and Mr. Shields and Mr. Gillis followed me. The day Shields was hurt I worked from 3 to 11, breaking rock in the tunnel. When I went off duty at 11 o'clock that day, the roof was pret-

ty bad. It needed timber all right. It was not so bad that a man could not work there, but then it was bad enough. It was liable to come down any time. Just before going off that shift, we fired six or seven blasts in the face of the tunnel. The roof was in a bad condition. Not very safe for a man to work there unless it was timbered. Q. I will ask you whether that tunnel was timbered any point from the entrance to the place where the injury occurred. A. The entrance to the tunnel; yes, sir. Q. Were there any timbers at any point between the entrance and the point where this accident occurred? A. There were a few sets. Q. Whereabouts were they? A. They were at the entrance. Q. From that point, a distance of about 150 feet, to where Shields was hurt, were there any? A. No, sir. Q. From your experience in mines I will ask you whether for the reasonable safety of the men it should have been timbered? A. Yes, sir. Q. From the character of the roof in the tunnel at the point where the accident occurred, and the intervening distance between the entrance and where the accident occurred, what ought to have been done that was not done for the reasonable safety of the men working there? A. Timbered; that is the only thing. The timber should have been put in in regular sets, two posts and a cap. During the time that I was at work there, I was not furnished with any timbers, and did not see any about there. I asked Mr. Wildiz for timbers several times, and he said that the timbers would be down there, but I never saw any. I asked for timbers the last shift before Mr. Shields came on the day he was hurt. I wanted to fix up that place where Mr. Shields got hurt. Mr. Wildiz said that timber was not necessary. \* \* \* When I went on duty at 3 o'clock in the afternoon, I noticed a large rock in the roof of the tunnel near the breast, and called the foreman's attention to it. Mr. Wildiz was the foreman. That was before 4 and 5 o'clock. Q. What did he do and say, if anything? A. Well, he sounded the rock, and pronounced it safe. The rock did not look very safe to me. This rock was about  $2\frac{1}{2}$  or 3 feet from the breast of the tunnel when I last saw it. There were two seams, and the end of the rock was hanging down. That was what I was afraid of, that it would be liable to drop at any time, and there was water seeping through the seams, and it was cut off in front. The blasting that I did on the last shift would naturally jar the rock, and make it more dangerous. When I came off the shift at 11 o'clock, I saw Mr. Shields and Mr. Gillis in the bottom of the slope, coming down, as I was on my way up. Each shift would drive the tunnel on an average of about eight inches to a foot. I would go in at 3 in the afternoon and drill holes in the rock during the eight hours of my shift, and, when I got through drilling, would put powder in the holes and light the fuse and leave the mine. The rock might have fallen on my shift, but, to the best of my judgment, I did not think it would. If I had believed it would, I would have timbered it. I never saw any timbermen there, and supposed we had to do our own timbering. It was not necessary to take the rock down, but, if it had been taken down, it would be the foremen's place to say so when we notified him."

The witness Gillis was on the same shift with the plaintiff, and he testified, among other things: "I was present when the accident happened to Mr. Shields, and was his partner on that shift. Mr. Carlson and his partner were on the shift immediately preceding us, and Mr. Hamilton and his partner preceded Carlson. The day of the accident Mr. Shields and I went on at 11 p. m. Q. Just explain when you went in the condition you found existing there and what happened? A. I went into the tunnel where we were working and found the roof in very bad shape, at a point about  $3\frac{1}{2}$  or 4 feet from the face of the tunnel. I went in a few minutes ahead of Mr. Shields, and was examining that place with my light, when Shields came in, and I told him that this roof looked dangerous, and that he had better proceed to examine it and secure it if possible. And, while I was examining it, Mr. Shields hung his light a little further on the left-hand side of the tunnel, looking in, and turned as I spoke, and said he would go out and get the hammer, meaning an eight-pound hammer, to pound the roof all over. I told him that I had carried in the hammer, and that it was here. Mr. Shields turned around to get the hammer when the roof dropped. A piece of rock dropped and threw Shields down and hit me a little on the head, and threw me over on the side and cut my head, and dazed me, and knocked my lamp out of my cap, and it didn't go out,

and I picked my lamp up, and heard Mr. Shields say: 'For God's sake, take this off from me.' When I staggered up dazed, there was another fall of rock, and I looked around in a dazed condition, and Mr. Shields was under the rock."

On the other side, and in behalf of the defendant company, Wildiz testified as follows: "I am the John Wildiz who has been referred to by the witnesses in this case as having been superintendent for the Tremont Coal & Coke Company at the time Pat Shields was injured. The entrance to that tunnel was about 12 feet, and the rock is a kind of black rock, which is not solid, and that is the reason I had to put three sets of timbers in tiers to hold it up. That is right at the mouth of the tunnel. And, as soon as we got through there, we struck sand rock, solid as a bell all the way through, with the exception of a little seam or water crack that never softened the rock any. In ground like that we had in that tunnel, it never did need any timbers, and never will need any timbers. I have worked in coal mines all my life, going on to 27 or 28 years now. My mining has been confined to coal mines, rock tunnels, and laying track. I started in as a mucker and laid track for many years as boss track layer, and was foreman and superintendent. In driving a tunnel such as this one by blasting, we must expect that some rock or rocks will be jarred loose, and, when the shot goes off, that leaves loose rock. A man has to go there with a pick or certain tools and pull that down and examine as he goes. If a miner knows anything about mining, he will take a pick or certain tools so that he can reach ahead of him as he goes and examine the roof and sides a certain distance from the place where the charge is located. Of course, every miner will expect that something may be loose and not safe for him to go in unless he examines the place or falls, and as he goes with the pick, he can rap and tell what is loose and what is solid. The miner should not go right into the face without making preliminary tests as he proceeds, because they are not safe, for there may be something hanging down that wants to be taken down or secured before going too far, and by going straight in he takes chances certainly, not knowing what may be ahead of him. It is just like if we walk in the dark, we may fall down in a hole. I heard the testimony of Mr. Carlson yesterday that he asked me for timbers on the shift before Shields was hurt. Mr. Carlson did not make such a request of me. Mr. Gillis did not ask me for timbers for a place in this tunnel near the entrance. I never was asked for any timbers there, because we had timbers laying there. I never intended to put in square sets because they would not need them. I was inside foreman at that time, and had charge of the work in the tunnel and control over these men, and whatever was to be done in that tunnel I had the general direction of it. I was last in that tunnel between 3 and 4 o'clock of the same afternoon of the day on which Mr. Shields was hurt, and went clear through the tunnel to the breast where the work was going on, as it is my business to do."

Three other witnesses, Roberts, Marquette, and Morris, testified on behalf of the defendant. Roberts testified, among other things, as follows: "I started in working as a miner when I was a boy 11 or 12 years old and am now 49, and have had about the same experience that Pat Shields has had. I have been through this tunnel. I was last in it about two weeks ago. I examined the formation of the rock at the place where the accident occurred, and from there to the entrance. I regard that as good safe tunnel from the entrance all the way through. The rock had not changed any up to the time I went in there a couple of weeks ago. It was sandstone rock. My experience on the ground has been quite a great deal in both rock and coal. I have seen a good deal of it, and have seen the same kind of work, and I can take anybody to see the same work at the present time in the Wilkerson Coal & Mining Company's mines. They had larger tunnels and larger tunnels that are standing there for years in the same kind of ground, and are just as firm as the day they were put through. This mine is about a half a mile from the defendant's mine. The other tunnels I refer to are not timbered. My past experience shows that they don't timber such work ordinarily. I heard the next day after the accident that there had been a man hurt there, and my partner and I out of curiosity went in to see what kind of a looking place it was. If I was blasting rock in a tunnel, I never go in there until the smoke is cleaned out, and generally take my pick with me and examine the ground as I advance as care-

fully as I can. I take my pick, and tap the roof all around to see if it is solid, or if there has been any shake around there from the shot which I left, and advance that way until I reach the face. If it is solid ground like that was, the rock is liable not to be cut back from the face. Under ordinary circumstances, it is liable to shake a little piece most anywhere. There might be a little piece that a man would overlook. There would be a liability of rock falling from the center as a rule, but would not look for much coming off the sides." The witnesses Marquette and Morris gave similar testimony to that of Roberts.

Blattner & Chester, L. B. Da Ponti, and Shepard & Flett, for plaintiff in error.

Dudley G. Wooten, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). It is not our province any more than it was that of the court below to weigh the conflicting statements of the witnesses upon the question of the alleged negligence on the part of the defendant. That was for the jury to do, under appropriate instructions from the court. The company's superintendent in his testimony, as has been seen, denied that any timbers had been requested of him, asserted that there were timbers on hand for use when needed, that the tunnel, except at the entrance thereto where timbers were placed, was in sandstone, and needed no timbers, and that he had carefully inspected it as late as 3 o'clock of the afternoon preceding the plaintiff's injury. The testimony of the witnesses Roberts, Marquette, and Morris also tended to support the denial of the defendant's alleged negligence. To what extent the jurors were the proper judges.

That question, lying as it does at the foundation of the case, having been taken from the jury by the court below, the judgment must be, and accordingly is, reversed, and the case remanded for a new trial.

## MARRIN v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. February 27, 1909.)

No. 20, October Term, 1908.

### 1. CRIMINAL LAW (§ 751\*)—TRIAL—MISCONDUCT AFFECTING JURORS—READING NEWSPAPERS.

While the fact that jurors, engaged in the trial of a criminal case, have read newspaper articles relating to the case which were highly improper and calculated to prejudice the defendant will justify the court in its discretion in permitting the withdrawal of a juror and a continuance of the case, it is not an abuse of discretion to refuse to do so where such jurors, on being interrogated, declare that the articles read would not influence them in arriving at a verdict.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §.751.\*]

### 2. CRIMINAL LAW (§ 1137\*)—APPEAL AND ERROR—REVIEW—WAIVER OF ERROR.

Where counsel for a defendant on trial for a criminal offense moved for the withdrawal of a juror and continuance of the case on the ground that the jurors had read newspaper articles during the trial calculated to prejudice the defendant, but after the examination of the jurors and consulta-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



tion with his client, announced that he would not press the motion but that defendant put himself in the hands of the court, he was bound to accept the court's decision and cannot assign the overruling of his motion for error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1137.\*]

3. CONSPIRACY (§ 43\*) — CONSPIRACY TO DEFRAUD BY THE USE OF THE MAILS—AVERMENT OF FRAUDULENT PURPOSE—VARIANCE.

While in an indictment, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676) for a conspiracy to make use of the mails pursuant to a scheme to defraud, a fraudulent purpose must be averred and proved, and where a purpose to defraud two jointly is charged, it must be proved as laid, yet where the sending of individual letters to parties named is charged in the indictment in different counts, an averment in general terms of an intent to defraud these parties does not necessarily import that the conspiracy contemplated a joint defrauding of the whole number named; the parties not being in business together or jointly interested in the property which it was the aim of the conspiracy to secure.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.\*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

For opinion of court below on rule for a new trial, see 159 Fed. 767.

V. Gilpin Robinson, for plaintiff in error.

J. Whitaker Thompson, U. S. Atty.

Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The defendant was convicted of a conspiracy to defraud by the use of the mails. He was engaged with others, in conducting what was known as the "Storey Cotton Exchange," with which a large number of persons in different parts of the country were induced by correspondence to intrust their money for the purpose of speculating in cotton, upon highly inflated expectations, skillfully aroused, of altogether impossible profits; the United States mails being used to advertise and carry on the business. The fraudulent character of the enterprise and the defendant's connection with it were abundantly shown, and the only question is whether he was duly convicted. The case was one of considerable public interest, in view of the extended character of the swindle, and the number of persons affected, and prominent reports of it appeared in the Daily Press of Philadelphia, where it was tried. In the main these were unobjectionable, although some of the papers were not so circumspect as they might be. But in one, which arrogated to itself the credit of having unearthed the fraud and brought the defendant and his associates to justice, highly sensational accounts were indulged in, commenting on and distorting the evidence, as well as referring to matters of which no evidence was given, in a way that was calculated to prejudice the defendant, and to impede the administration of justice by standing in the way of a fair and impartial trial, and they might well have been made the ground of proceedings for contempt. The defendant took no notice of these articles for a time, but, growing

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

worse as the trial progressed, it was finally concluded by his counsel that they ought not to be passed over, and they were accordingly brought to the attention of the court by a motion to withdraw a juror and continue the case. The trial was thereupon stopped and the jurors interrogated, by which it appeared that six of them had seen and read some, if not all, of the articles complained of. But the rest had not; and all who had with one accord declared that they were not and would not be influenced by them, taking the evidence as given by the witnesses, and not from the newspapers. Upon this showing the defendant's counsel, after consulting with his client, announced that, although indignant at the occurrence, he would not press his motion, but would put himself in the hands of the court, as he expressed it. The motion was thereupon overruled, and the trial proceeded with; and, having resulted in a conviction, the case is now brought here on error.

As already stated, the newspaper articles complained of were outrageous in character, and the indignation of counsel with regard to them was fully justified. But the action of the court must nevertheless be sustained in overruling the motion. While it was within the discretion of the trial judge to withdraw a juror and continue the case, he was certainly not required to do so in the face of the declaration by the jurors who had read the articles that they would have no influence with them in arriving at a verdict. Even where a juror on his voir dire, in a homicide case, where the rules are held the strictest, admits to having formed an opinion as to the guilt or innocence of the accused from reading newspaper accounts of the transaction, and that opinion is so fixed that it would take evidence to remove it, yet, if the juror, at the same time, is able to say, and the court is so convinced, that if sworn as a juror he can discard this opinion and decide the case solely on the evidence as it is given by the witnesses, he is qualified to act, and a challenge for cause will not be sustained. 17 Am. & Eng. Cyc. Law, 2d Ed. 1147; Commonwealth v. Spahr, 211 Pa. 542, 60 Atl. 1084. This being the rule in selecting a jury before trial, much more is it to prevail afterwards, when the evidence is all in, and the case is about to go to the jury, and the complaint is that they have been exposed to improper newspaper influence, the effect of which upon them they explicitly deny. It is true that it may be a question how far a person is able to measure or dispel the bias to which he has been subjected, particularly in the case of articles so virulent and persistent as here. But, there being no other test, the matter has largely to be submitted to his own judgment; and, where attention has been called to it by an investigation such as was conducted here, even the ordinary juror, and much more the conscientious one, would be careful to try and exclude any suspicion of influence, with a reasonable chance of success. It was therefore a matter for the court in its discretion on the showing made to grant or refuse the motion to withdraw a juror. It was not bound to do so, so as to make a refusal of it an abuse of discretion of which we can lay hold.

It is said, however, that the court did not exercise the discretion vested in it, as is shown by the opinion denying a new trial, where it

is admitted that the articles were calculated to prejudice the defendant, and that he would have been entitled to have a juror withdrawn if he had insisted on it; the mistake being made by the court in supposing that he did not. But it is clear from the record that the defendant did not press his motion, if, indeed, he did not in effect withdraw it. The court so understood it, as appears from the opinion referred to, which, if capable of being resorted to for one purpose, is admissible generally. Nor is this at variance with the record proper. As is there shown, after the examination of the jurors had disclosed that, according to their statement, the newspaper articles had had no effect upon them, it was said by Mr. Robinson, addressing the court:

"I am put in an exceedingly delicate position, and so is the defendant. He says that in the face of the assurance that is given by the jury he does not feel as if he ought to press for the withdrawal of a juror. Of course, he could not say anything else. But it puts me, and it puts him, and it puts the jury, in an exceedingly delicate position. And we are in the hands of the court."

There was more that followed, but this is the substance, and we do not need to quote further. The gist of it all is that the motion to withdraw a juror and stop the case was not pressed. And this, as it now appears by the statement of counsel made at the argument, was not done on his own responsibility, but advisedly, after going over the matter and weighing the consequences with his client. It was conceived, as he frankly says, that there was a chance for an acquittal, and they concluded to take it, rather than have the trial go for naught, only to have in the end to face another jury. Having thus taken the chance of success, why should not the defendant in justice be held to it? Or why, because he is disappointed in the result, should he be allowed to retract in the hope of a different outcome on another trial? As already stated, as the result of polling the jury, it was announced by counsel, after consulting with his client, that the motion under consideration was not pressed, and that the defendant put himself in the court's hands. What could this mean, except that he was willing to abide by whatever the court decided; if to continue, he was content, or, if to go on, he was equally so? He could not declare, as he plainly did, that he did not press for a continuance, and now insist on it. He was called upon either to require the court to protect him against what had happened or to accept without demur its action in the premises, and the adoption of the one was an abandonment of the other. *Spreckles v. Brown*, 212 U. S. 208, 29 Sup. Ct. 256, 53 L. Ed. —. Had a juror been withdrawn after the announcement of counsel, the defendant with not a little show of reason might have contended, upon a subsequent arraignment, that it was not at his instance that a juror had been withdrawn, but that the court had acted upon its own responsibility, and that he could not in consequence be put again in jeopardy. And he cannot expect us to sanction that which would lead to any such possibility. But, aside from that, having put himself on record, as not pressing for a continuance, he cannot assign for error that a continuance was not had.

It is said, however, that even after the remarks of counsel, which have been alluded to, further testimony was taken, and an exception

noted by the court at the close upon overruling the motion. This is true, and it introduces the only uncertainty. It is not clear just how or why it so happened. But an exception was not asked by the defendant, but was apparently noted by the court of its own motion out of abundant caution, so that, if the defendant's rights were found to have been prejudiced in any respect, they might be protected. It is not to be taken as indicating that the motion was overruled against the defendant's protest, which in the face of his previous submission, it clearly was not. And not, under the circumstances, having been prejudiced in any way by the action of the court, as we look at it, it saved nothing which he can now set up.

The only other matter which it is necessary to notice is the question of variance. As already stated, the offense charged in the two indictments, as to which this is claimed, is conspiracy; the conspiracy specified being the carrying out of a scheme to defraud by the use of the mails. A conspiracy to commit an offense against the United States, if followed by an overt act, is itself a crime. Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676); *Grunberg v. U. S.*, 145 Fed. 81, 84, 76 C. C. A. 51. And, as is well known, the use of the mails to defraud is criminal. Section 5480 (U. S. Comp. St. 1901, p. 3696). Why it was necessary to combine the two in the present instance, a scheme to defraud being a conspiracy in effect, and the overt act, the carrying of it out by means of the mails, being the substantial thing, does not appear. But we must take the charge as it stands, and the only question is whether there was a departure from it in the proof. As charged in the first indictment, the scheme was directed to the defrauding of three persons, naming them, evidence being offered as to only one, and in the second, to the defrauding of four, evidence being offered as to but two. It is contended that the designation of the persons to be defrauded is of the essence of the offense, and must therefore be proved as laid, and that the proof here only going to a part of them the conviction cannot be sustained.

By section 5480, by which the use of the mails in a scheme to defraud is made a crime, it is the depositing in or the taking out of a letter, pursuant to such scheme, that is the offense; or, in other words, it is not the scheme, but the acts done under it, that are the concern of the law. In *re Henry*, 123 U. S. 373, 8 Sup. Ct. 142, 31 L. Ed. 174; In *re De Bara*, 179 U. S. 320, 21 Sup. Ct. 110, 45 L. Ed. 207, *Francis v. U. S.*, 152 Fed. 155, 81 C. C. A. 407. And a conspiracy to commit such an offense is a confederating together of two or more persons to carry out a scheme of that kind in that way. The use made of the mails in the sending and receiving of letters is thus the material thing, and not, except as a matter of inducement, or aggravation, the magnitude, of the fraud, whether extending to many or to few. No doubt a fraudulent purpose must be averred and proved. But, the letters sent being the substance of the offense, and the sending of individual letters to parties named having been charged in the indictment in different counts, an averment in general terms of an intent to defraud these parties does not necessarily import that the conspiracy contemplated a joint defrauding of the whole number named. This

might be the case where two or more parties were in business together or jointly interested in property which it was the aim of the conspiracy to secure. And the charge of a purpose to so defraud them, even with the relaxation in criminal pleading, which now obtains, would doubtless have to be proved as laid. *Commonwealth v. Harley*, 7 Metc. (Mass.) 506; *Commonwealth v. Kellogg*, 7 Cush. (Mass.) 473. But the letters relied on in the present instance were individual and several, and the parties to whom they were addressed had no connection with each other, business or otherwise, so far as is shown. And the sending of the letters to them being charged in different counts, and constituting the overt acts for which the defendant was held, the individual purpose in each sufficiently appears, which the mere joining of the parties together in the general allegation that the scheme as contemplated by the defendant and his associates embraced them all is not, in our judgment, sufficient to overcome. The defendant in every prosecution is entitled to be informed by the indictment of the offense which he is to meet, and to have it so described and identified, that he will be protected from having to defend against it a second time. But we are not persuaded that the present indictment does not fulfill these requirements, or that the defendant or any one else would be misled, to his hurt, into the idea that a joint, and not an individual, defrauding of the parties named was charged. The government was at liberty, therefore, to stop short with proof as to either of the parties as to whom letters were mailed without any showing as to the rest, and the charge of variance, which is based on this, cannot be sustained. The judgment is affirmed.

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CRUCIBLE STEEL CO. OF AMERICA v. MOEN.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 164.

1. APPEAL AND ERROR (§ 1045\*)—REVIEW—IMPANELING JURY—OVERRULING CHALLENGE.

The overruling of a challenge to a juror for favor because of his intimate acquaintance with one of the beneficiaries for whom plaintiff sued as trustee held not reversible error, where the fact of such person's interest in the case was only disclosed after the jury had been sworn and the remaining members of the panel excused, by a re-examination permitted to defendant's counsel, who, without excuse shown, was not present when the jury was impaneled.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1045.\*]

2. TRIAL (§ 48\*)—EVIDENCE ADMISSIBLE IN PART.

The exclusion of all of a bundle of letters, offered in evidence, without any attempt to show how any of them bore on the issues, was proper, where many of the letters were incompetent, especially where but little light could have been thrown on the case by the admission of any of them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MacIntyre & Davis (William J. Wallace and William B. Ellison, of counsel), for plaintiff in error.

Frederick Dwight (Hector M. Hitchings, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The action was brought to recover the balance due upon a contract made October 16, 1901, between the Mossberg & Granville Manufacturing Company and the Crucible Steel Company—the defendant below—whereby the former company agreed to manufacture for the latter, certain wire drawing machinery and rolling mills, with appurtenances, for the agreed price of \$48,470.

The complaint alleges that the Mossberg Company performed all the conditions of the agreement, including certain extra work to the amount of \$3,600, for which the defendant agreed to pay and that payment of the balance, \$18,874.99, was demanded and refused. There was also a claim for three articles alleged to be worth \$38.50.

The entire cause of action was duly assigned to the plaintiff.

The answer contains a general denial, and, for a separate defense, alleges a counterclaim of \$24,000, stated in the following averments:

First: That the Mossberg Company agreed to complete the work within six months from October 16, 1901, and warranted that the machinery should be free from defects and able to perform the work required.

Second: That work was thereafter done and the machinery delivered for which defendant paid the sum of \$33,403.89.

Third: That when an attempt was made to operate said machinery it was discovered that it was inferior in quality and latently defective and it was thereupon rejected by the defendant.

Fourth: That the machinery was not delivered until long after the expiration of the six months as aforesaid, greatly to the damage of the defendant.

By reason of the alleged delay, and defects in the machinery furnished, the defendant alleges damages in the sum of \$24,000, for which sum judgment is demanded.

The first question argued relates to the refusal of the court to allow a challenge to the fifth juror for favor.

The cause was called for trial on the morning of Thursday, October 24, 1907, and both parties answered ready. There was a cause on trial, which, it was expected, would last until 2 o'clock but, in fact it took the entire afternoon. In order to accommodate the jurors, who were anxious to be excused, the judge consented to impanel a jury at once in the case at bar as he was thus enabled to excuse the jurors not actually engaged until the following Monday. The representative of Mr. Davis, counsel for the defendant, was instructed by the judge to notify Mr. Davis to appear in court and attend to the selection of the jury, he did not appear and the record does not present any valid excuse for his failure to do so. It does show, however, that he did appear immediately after the jury had been impaneled.

The counsel for plaintiff and his witnesses had then left the courtroom.

When it became evident that the defendant's counsel would not be present the judge examined the jurors in his behalf and asked them, it would seem, every question necessary in a civil action. They were then sworn and excused until the next day.

After the opening of the court on Friday morning the defendant's counsel asked permission to examine the jurors and thus discovered that the fifth juror was intimately acquainted with one of the beneficiaries, under the trust assignment. But for this examination the jurors would not have known who these beneficiaries were. No exigency of the trial required the disclosure of their names. The challenge was for favor, and we think it was properly overruled. Of course it is easy to see that after the disclosure was made and the challenge overruled the defendant's counsel was placed in an exceedingly embarrassing position—no additional jurors were in court and his right to a peremptory challenge was gone.

It must not be forgotten that the difficulty arose from the initial neglect to have some one in court to represent the defendant.

We can readily understand that the defendant's counsel might have felt himself aggrieved by being compelled to proceed with a juror he had challenged, and, perhaps, a suggestion from the court that a talesman be summoned or that the cause proceed with 11 jurors would have been assented to by the plaintiff's counsel and thus have relieved the situation. However, the ruling complained of does not constitute reversible error.

No one who has presided for any length of time at jury trials in the city of New York can ignore the fact that the convenience of jurors, witnesses and counsel are constantly conflicting and that in order that the business may proceed in an orderly and harmonious manner the judge is frequently compelled to make dispositions of causes which are satisfactory to all interests at the time but which, as subsequently appears, occasion inconvenience and possibly hardship to some of the parties concerned.

It is manifest that in ordering the jury impaneled on Thursday the trial judge was exercising his discretion for the accommodation of the greatest number and he could not have foreseen the subsequent complications.

We were much impressed at the argument by the contention that there was error in the exclusion of the correspondence between the parties beginning November 11, 1902, and ending April 27, 1903, but an examination of the letters has convinced us that they were properly excluded.

While the witness Clark was being examined, and after the counsel for defendant had introduced a letter from the Mossberg Company, which was received and marked in evidence, he handed to the court a package containing 26 letters and telegrams, 16 of which were written by the defendant and 10 by Mossberg Company with the statement that he desired to offer them in evidence.

The testimony of Mr. Clark continued for some time, when, as the record shows, the following occurred:

"Mr. Davis: Were any of those letters marked as admitted?"

"The Court: They are simply a crimination and recrimination \* \* \* and they are each rejected with an exception to defendant as to each letter."

It appears, then, that this mass of correspondence covering 21 printed pages was handed to the court with no word of explanation. After the court had ruled the letters out as containing nothing but charges and countercharges, his ruling was accepted without any effort to point out where, in this mass of chaff, the wheat was to be discovered.

Without a doubt much the larger part of this correspondence was incompetent, if any part of it bore on the issues it was the duty of counsel for defendant to point it out. The rejection on this ground alone can be upheld.

We should, however, hesitate to rest the ruling solely on this ground if we were satisfied that any substantial injury had been done the defendant by the rejection of the letters, but we are convinced that they throw little, if any, light on the questions involved.

The contract was in two parts.

First: The Mossberg Company agreed to make for the defendant 10 machines for drawing high-carbon crucible steel wire pursuant to specification. The warranty as to these machines was as follows:

"We guarantee the above machines to be free from defects in workmanship and material, and to draw the following sizes (naming them) of crucible and high carbon steel wire at usual speeds, reductions and material."

Second: The Mossberg Company agreed to make for the defendant 34 rolling mills. The warranty as to these was as follows:

"We will guarantee the above machinery to be free from defects in material and workmanship."

That the machines were made in accordance with the specifications hardly admits of a doubt, and the principal question regarding the drawing machines was whether they were capable of drawing the wire as indicated; the Mossberg Company contending that the tests to which they were subjected were unfair and not "at the usual speeds, reductions and material."

As to the rolling mills the question debated was whether they were free from defects in material. Defects undoubtedly existed in the steel, but, as this was furnished by the defendant, the Mossberg Company was not responsible unless they should have discovered the defects by a reasonably skillful external examination.

Bearing in mind, then, the issues between the parties we are unable to see how the rejection of the letters prejudiced the defendant. As before stated, the great bulk of the correspondence was from the defendant and it must be admitted, generally, that after a dispute has arisen a party cannot, in this manner, make evidence for himself.

The facts were all proved and we have been unable to discover a single fact of importance stated in this correspondence which was not established by the testimony of the witnesses or by other letters



and documents in evidence. This being so, the deductions of parties based upon these facts and their opinion of each other's conduct was wholly immaterial.

We have examined the other exceptions argued and think none warrants a reversal of the judgment.

The questions above referred to were presented to the jury in a clear and impartial charge which stated with perfect fairness the contentions of the parties.

The judgment is affirmed with costs.

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MUNSON S. S. LINE v. MIRAMAR S. S. CO., Limited.

(Circuit Court of Appeals, Second Circuit, February 23, 1909.)

No. 102.

ADMIRALTY (§ 106\*)—APPEAL—TRIAL OF CAUSE ANEW—PARTIES.

An appeal in admiralty from a District Court to the Circuit Court of Appeals opens the whole case for trial de novo in the appellate court subject to its rules, and the fact that one party did not appeal does not preclude the court from directing the entry by the District Court of a decree more favorable to him.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 721; Dec. Dig. § 106.\*]

Nature of hearing on appeal, admission of new proof, see note to *The Venezuela*, 3 C. C. A. 322.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 166 Fed. 722.

Charles Haight, for the motion.

C. R. Hickox, opposed.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. In this case we lately affirmed (166 Fed. 722) the decree of the court below, saying at the same time that, although the District Judge did not allow the libellant, appellee, as much as he was entitled to receive, he could not complain because he had not appealed. He now moves that we modify this decision on the ground that, an appeal in admiralty being a new trial, it makes no difference that he did not appeal. *Irvine v. Hesper*, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175. In that case the District Court awarded \$8,000 salvage to the libellants, who appealed to the Circuit Court. Though the claimant did not appeal, that court reduced the award to \$4,200. The libellants then appealed to the Supreme Court, which affirmed this decree; Mr. Justice Blatchford saying at page 266 of 122 U. S., at page 1181 of 7 Sup. Ct. (30 L. Ed. 1175):

"The claimants not having appealed to the Circuit Court, it is suggested that they are liable for at least the amount awarded by the District Court, and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. *Yeaton v. United States*, 5 Cranch, 281, 3 L. Ed. 101; *Anonymous*, 1 Gall. 22, Fed. Cas. No. 444; *The Roarer*, 1 Blatchf. 1, Fed. Cas. No. 11,876; *The Saratoga v. 438 Bales of Cotton*, 1 Woods, 75, Fed. Cas. No. 12,356; *The Lucille*, 19 Wall. 73, 22 L. Ed. 64; *The Charles Morgan*, 115 U. S. 69, 75, 5 Sup. Ct. 1172, 29 L. Ed. 316. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

A very interesting and difficult question is to be determined, upon which the decisions even of the same courts are not harmonious.

From 1789 to 1891 decrees of the District Court in admiralty were reviewed by appeal to the Circuit Court. Section 631, Rev. St. U. S. Such appeals were trials *de novo*. The libelant opened and closed the case in the Circuit Court, just as he had in the District Court. Either party could take new proofs in the Circuit Court at will (Supreme Court Admiralty Rules 49 and 50) and could put in new pleadings (*The Charles Morgan*, 115 U. S. 69, 75, 76, 5 Sup. Ct. 1172, 29 L. Ed. 316). The Circuit Court entered its own decree and executed it. *The Lucille*, 19 Wall. 73, 22 L. Ed. 64; *The Saratoga*, 1 Woods, 75, Fed. Cas. No. 12,356. In the former case Mr. Justice Miller said:

"An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated—a trial in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be made in the Circuit Court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the District Court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it."

In this circuit, however, proofs taken in the Circuit Court which could have been taken in the District Court might be suppressed. *The Saunders* (C. C.) 23 Fed. 303; *The Stonington* (C. C.) 25 Fed. 621. This is quite consistent with the trial being *de novo*.

But the matter of reviewing decrees in admiralty causes of the Circuit Court in the Supreme Court has been the subject of great changes in legislation. From 1789 to 1803 the review was by writ of error, and the Supreme Court had, as in actions at common law, the power to consider questions of law only. This was the result of the construction given by the majority of the court in the case of *Wiscart v. D'Auchy*, 3 Dall. 321, 1 L. Ed. 619, to sections 21 and 22 of the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 83, 84). Subsequently Act March 3, 1803, c. 40, 2 Stat. 244 (sec. 692, Rev. St. U. S.), gave the Supreme Court the right to review admiralty causes by appeal, and from that time down to 1875 the court was authorized to pass upon the facts as well as the law. Unlike the Circuit Court, however, it did not enter or execute its own decree, but remanded the cause for further proceedings to the Circuit Court. Rev. St. U. S. § 701. New evidence might be taken in admiralty and prize causes, though not in equity causes. Rev. St. U. S. § 698 (U. S. Comp. St.

1901, p. 568). This is strong evidence that admiralty appeals were to be new trials. Otherwise new proofs would be useless. In 1817 a rule was adopted (2 Wheat. vii) whereby new evidence could only be taken by leave of the court. Supreme Court Rule 12;<sup>1</sup> The Mabey, 10 Wall. 419, 19 L. Ed. 963. Notwithstanding these regulations the appeal in the Supreme Court remained a new trial.

As Judge Wallace, speaking for this court, said in *The Havilah*, 48 Fed. 684, 1 C. C. A. 77:

"Prior to the act of February 16, 1875 (18 Stat. 315, c. 77 [U. S. Comp. St. 1901, p. 525]), 'to facilitate the disposition of cases in the Supreme Court and for other purposes,' neither special findings of facts nor exceptions were a necessary part of the record upon an appeal in an admiralty cause, and the hearing in the Supreme Court and in the Circuit Court was a trial de novo."

In the case of *Yeaton v. United States* (1809) 5 Cranch, 281, 3 L. Ed. 101, the General Pinkney was condemned in the District Court for the violation of an act of Congress passed February 28, 1806. On appeal to the Circuit Court this decree was affirmed November 7, 1807. On appeal to the Supreme Court the case came on for hearing March 7, 1809; the act of Congress in question having expired April 26, 1808. Chief Justice Marshall said:

"The majority of the court is clearly of opinion that in admiralty cases an appeal suspends the sentence altogether, and that it is not res adjudicata until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard de novo, as if no sentence had been passed. \* \* \* The court is therefore of opinion that this cause is to be considered as if no sentence had been pronounced; and, if no sentence had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

In *Hobart v. Drogan* (1836) 10 Pet. 108, 119, 9 L. Ed. 363, Mr. Justice Story said:

"No objection has been made to the amount of salvage decreed by the court below, if the libelants are entitled to any. And the objection has been properly abandoned; for the amount, under the circumstances, is certainly not unreasonable. Besides, this court is not in the habit of revising such decrees as to the amount of salvage, unless upon some clear and palpable mistake of gross overallowance of the court below."

In *Post v. Jones* (1856) 19 How. 150, 15 L. Ed. 618, the Supreme Court remitted the cause to the Circuit Court, with direction to adjust the salvage in accordance with the views expressed in its opinion. In the *Camanche* (1869) 8 Wall. 448, 479, 19 L. Ed. 397, one of the questions discussed in the Supreme Court was the amount of the salvage awarded in the Circuit Court. Mr. Justice Clifford, although affirming the decree of the Circuit Court, recognized the right of the Supreme Court to alter the amount, saying:

"Appellate courts are reluctant to disturb an award for salvage, on the ground that the subordinate court gave too large a sum to the salvors, unless they are clearly satisfied that the court below made an exorbitant estimate of their services."

In the case of *The Connemara* (1882) 108 U. S. 352, 360, 2 Sup. Ct. 754, 759, 27 L. Ed. 751, Mr. Justice Gray recognized that before

<sup>1</sup> 3 Sup. Ct. ix.

the act of 1875, to be presently considered, the Supreme Court had full jurisdiction of facts and law on admiralty, saying:

"Before the act of 1875, this court, upon an appeal in a case of salvage, gave the same weight, and no more, to the decree of the court below, that a court of common law would allow to the verdict of a jury, and might revise that decree for manifest error in matter of fact, even if no violation of the just principles which should govern the subject was shown. *Post v. Jones*, 19 How. 150, 160, 15 L. Ed. 618. Since the act of 1875, in cases of salvage, as in other admiralty cases, this court may revise the decree appealed from for matter of law, but for matter of law only, and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case."

Then came Act Feb. 16, 1875, c. 77, 18 Stat. 315, which again restricted the power of the Supreme Court to the narrow limits prevailing between 1789 and 1803. *The Francis Wright*, 105 U. S. 381, 26 L. Ed. 1100. The material parts of the act are as follows:

"Section 1. That the Circuit Courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. \* \* \* The review of the judgments and decrees entered upon such findings by the Supreme Court upon appeal shall be limited to a determination of the questions of law arising upon the record and to such rulings of the Circuit Court excepted to at the time as may be presented by a bill of exceptions prepared as in actions at law."

The next legislation was Act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 549), which distributed all appeals between the Supreme Court (section 5) and the Circuit Court of Appeals (section 6). We think the first section of the act of 1875 must be regarded as repealed by necessary implication by the act of 1891. *The Paquete Habana*, 175 U. S. 677, 684, 685, 20 Sup. Ct. 290, 44 L. Ed. 320. All appellate jurisdiction having been taken from the Circuit Court, the judges of that court could certainly not thereafter make special findings of fact and conclusions of law; and, all appeals in admiralty causes having been restricted to the Circuit Court of Appeals, such conclusions of law and fact could not be reviewed by the Supreme Court.

Under the authority conferred by section 2 of the act of 1891 this court adopted rule 11,<sup>2</sup> requiring assignments of error to accompany the petition of appeal, and rule 14,<sup>3</sup> requiring all the testimony in the District Court to be included in the transcript of record, as required by Supreme Court admiralty rule 52. This was no more than was required upon appeal to the Supreme Court by sections 997 and 1012, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 712, 716). *Dufour v. Lang*, 54 Fed. 913, 917, 4 C. C. A. 663. It further adopted special rules in admiralty, 1, 7, and 8. Rule 1 requires appeals to be heard on the pleadings and evidence in the District Court, unless the court otherwise orders; rule 7, that the court or any judge thereof may allow either party, upon sufficient cause shown, to make new allegations, pray different relief, interpose new defenses, or take new proofs. Finally, by section 10 of the act of 1891, this court does not, as the Circuit Court did, enter and execute its own decree, but remands the

<sup>2</sup> 79 C. C. A. xxvii, 150 Fed. xxvii.

<sup>3</sup> 79 C. C. A. xxviii, 150 Fed. xxviii.

cause to the lower court for further proceedings. These rules and this practice, being inconsistent with a new trial as previously understood in the Circuit Courts, provoked a protest from many of the leading practitioners in admiralty, which may be seen in *Re Hawkins*, 147 U. S. 486, 13 Sup. Ct. 512, 37 L. Ed. 251.

We are of opinion that this court stands with relation to the District Court exactly as the Supreme Court before the act of 1875 stood in relation to the Circuit Court. The appeal is still a new trial in this court, subject to the regulations before mentioned, and we have power to modify the decree of the District Court as the Supreme Court had between 1803 and 1876. *The Western States*, 159 Fed. 354, 360, 86 C. C. A. 354. This case illustrates how completely an appeal to this court is a trial de novo. It arose under section 566, Rev. St. U. S. (U. S. Comp. St. 1901, p. 461), giving either party in admiralty causes arising on the Great Lakes the right to a trial of issues of fact by a jury. The verdict of the jury was for the libellant in the sum of \$15,000. The District Judge entered a decree for \$5,000. We held the verdict binding and not advisory, so that the District Judge should either have entered a decree for \$15,000 or have ordered a new trial. Still we affirmed the decree, because we thought the amount awarded the libellant sufficient.

That the act of 1875 does not apply to the Circuit Court of Appeals has been held in *The Havilah*, 48 Fed. 684, 1 C. C. A. 77; *The Beeche Deene*, 55 Fed. 526, 5 C. C. A. 207; *The Philadelphian*, 60 Fed. 426, 9 C. C. A. 54; *The Glide*, 72 Fed. 200, 18 C. C. A. 504; *Nelson v. White*, 83 Fed. 215, 32 C. C. A. 166; *Pioneer Fuel Co. v. McBrier*, 84 Fed. 495, 28 C. C. A. 466; *The Edward H. Blake*, 92 Fed. 202, 34 C. C. A. 297.

On the other hand, it has been held in many cases that one who has not appealed can be heard only in support of the decree, and therefore can get in the appellate court no more or other relief than it gives. *Canter v. American Insurance Co.*, 3 Pet. 307, 7 L. Ed. 688; *Stratton v. Jarvis*, 8 Pet. 4, 8 L. Ed. 846; *Airey v. Merrill*, 2 Curt. 8, Fed. Cas. No. 115; *The Peytona*, 2 Curt. 21, Fed. Cas. No. 11,058; *Allen v. Hitch*, 2 Curt. 147, Fed. Cas. No. 224; *The Alonzo*, 2 Cliff. 548, Fed. Cas. No. 2,223; *The Roarer*, 1 Blatchf. 1, Fed. Cas. No. 11,876; *The William Bagaley*, 5 Wall. 377, 412, 18 L. Ed. 583; *The Quickstep*, 9 Wall. 665, 672, 19 L. Ed. 767; *The Maria Martin*, 12 Wall. 31, 20 L. Ed. 251; *The Mabey*, 13 Wall. 738, 20 L. Ed. 473; *The Stephen Morgan*, 94 U. S. 599, 24 L. Ed. 266; *Shaw v. Folsom* (C. C.) 40 Fed. 511; *The F. W. Vosburg*, 50 Fed. 239, 1 C. C. A. 508; *The Atlantis*, 119 Fed. 568, 56 C. C. A. 134; *Leary v. Talbot* (D. C.) 151 Fed. 355; *Vacarezco v. 567,000 Gallons of Oil* (C. C. A.) 161 Fed. 543.

We have followed this practice in many cases in this circuit, with an exception, in favor of libellants who have proceeded against two vessels and recovered a decree in the District Court against one only, that if the vessel at fault appeals, and both are held at fault, the libellant is entitled to a decree against both, although he has not appealed. This was necessary to protect the appellant. *The Galileo* (C. C.) 29 Fed. 538, 540; *The Umbria*, 59 Fed. 489, 8 C. C. A. 194.

It is true that Judge Blatchford in the case of *The Hesper* was speaking of the power of the Circuit Court. Still in referring to the case of *The Connemara*, supra, he fully recognized the fact that before the act of 1875 the Supreme Court had power to alter decrees in admiralty brought to it on appeal, and what he said as to the power of the Circuit Court, while perfectly consistent with the cases of *The Charles Morgan*, *The Lucille*, *The Saratoga*, *Yeaton v. United States*, *Hobart v. Drogan*, *Post v. Jones*, and *The Connemara*, supra, is absolutely inconsistent with the views of the judges in the cases holding that one who has not appealed can be heard only in support of the decree. As we find it impossible to reconcile these two views, and must choose between them, we prefer to follow the case of *Irvine v. The Hesper* as the simpler and more effective practice, as well as the latest pronouncement of the Supreme Court on the subject.

We therefore modify our former decision by directing the court below to increase the item of allowance for delay connected with dry docking from \$105.75 to \$310.27, and enter a decree in favor of the libellant for the sum heretofore awarded, so increased, with costs.

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MEYERSON v. HART et al.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 140.

**EVIDENCE (§ 417\*) — PAROL EVIDENCE AFFECTING WRITING — COMPLETENESS OF WRITING.**

A written contract of employment, complete in itself, by which one party agreed to employ the other for one year at a stated weekly salary, and the other party agreed to "accept said employment and devote his entire time and best energies to fulfilling the duties imposed upon him," cannot be added to by parol by reading into it a provision that the employé should be employed only as a foreman in the employer's business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1884; Dec. Dig. § 417.\*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

George Ryall, for plaintiff in error.

Henry L. Scheuerman, for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The complainant alleges that the defendants, having employed the plaintiff for the term of one year from December 26, 1905, at \$50 a week, on March 9, 1906, refused to permit him longer to perform the terms of the contract, to his damage in the sum of \$2,050.

The defendants insist that the plaintiff refused to perform the work assigned to him, pursuant to the contract of employment.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

So far as the question in controversy is concerned this contract is brief, clear, complete and free from ambiguity. It is as follows:

"Chicago, Illinois, Dec. 19th, 1905.

"Hart, Schaffner and Marx hereby agree to employ I. Meyerson for a period of one year from December twenty-sixth, nineteen hundred and five at a salary of fifty dollars per week, payable weekly.

"I. Meyerson hereby agrees to accept said employment and devote his entire time and best energies to fulfilling the duties imposed upon him, and that he will not for a period of one year from said date become interested in or engaged in any other business; and that he will not devote any time to any other business or be connected with any other business.

"Hart, Schaffner & Marx.

"I. Meyerson."

Assuming that the parties desired to make exactly this agreement would it be possible to use more perspicuous language? The defendants agree to employ the plaintiff for one year at a salary of \$50 per week. The plaintiff accepts the employment and agrees to devote his time and energies to fulfilling the duties imposed upon him. If there be anything uncertain or incomplete about this writing we fail to comprehend what it is.

Granting that extraneous evidence might be necessary to show that the agreement related to the clothing business, it is enough to say that no such question arises on this record. The sole contention of the plaintiff is that he should be permitted to establish by parol that he was employed to act in the capacity of foreman. He has no other criticism of the contract to make. Stated more succinctly, the plaintiff asks that he be allowed to show by oral evidence that a written contract by which he agrees to perform the duties which his employers may impose upon him was, in fact, a contract which made it obligatory upon them to make him foreman of one of their shops and keep him there for a year, no matter how extravagant or incompetent he might be. He contends that he was to be foreman and nothing else. Even though business exigencies required the closing of his shop, even though fire destroyed it he was to be foreman still, and was entitled to draw his salary though he performed no service.

All this he claims under a written contract deliberately made and signed by him in which the word "foreman" does not appear. Undoubtedly the defendants intended to employ him as foreman if he were competent, but they knew little of his capacity and purposely and wisely required the insertion of a provision which enabled them to assign him to other work if a fair trial demonstrated that he was incapable of discharging the duties of foreman. Such an agreement was eminently fair to the plaintiff for, though performing inferior work, he was at all times to draw the high wages. Upon what theory we can reconstruct this agreement, made after ample time for reflection, by reading into it a provision which is not even implied by its terms, we are at a loss to discover.

Test it in another way; suppose the agreement had read, "We hereby agree to employ I. Meyerson as foreman for a period of one year" etc. Would the contention be entertained for a moment that the defendants might show by parol that this language meant that they were

to employ him as foreman only so long as it suited them to do so and could at any time transfer him to another and an inferior field of labor?

If the plaintiff's contention be correct they could do this.

In both cases the result would be the destruction of the written agreement and the substitution of an oral agreement in its place. This, as we understand it, the law forbids.

Nearly 60 years ago Prof. Greenleaf stated the rule as follows:

"When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." Greenleaf on Evidence, vol. 1, § 275.

See, also, *Brantingham v. Huff*, 174 N. Y. 53, 66 N. E. 620, 95 Am. St. Rep. 545; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Violette v. Rice*, 173 Mass. 82, 53 N. E. 144.

It is a wise rule, a salutary rule, a rule designed to prevent misunderstanding and fraud. It was the result of the experience of the ablest jurists of this country and England and is the law to-day.

It is true that having run the gauntlet of numerous "hard cases" with the inevitable result which such cases are said to produce, it has emerged shorn of some of its ancient authority.

Parol evidence has been admitted to explain, interpret and complete, but we are not aware of any well-considered authority which goes to the extent of permitting parol evidence to change the purport of a perfectly plain written agreement.

If the rule be so relaxed as to permit this to be done a written contract will be little more than *prima facie* evidence of the intent and purpose of the parties.

The decision of this court in *Development Co. v. King*, 161 Fed. 91, 88 C. C. A. 255, is not at all controlling. There was in that case no question as to the meaning of the contract, which provided that the plaintiff should perform such labors as the defendant "may direct." The sole question was whether a direction that he proceed to a remote part of Mexico, was a reasonable one.

No question of this kind arises in the present case. No one pretends that there was anything unreasonable in requiring the plaintiff to work as a presser if the contract means what it says. It is only upon the theory that the agreement was one to employ the plaintiff exclusively as foreman that the assignment to do other work is asserted to be unreasonable.

If plaintiff had been directed to work as janitor, or to work in a shop of the defendants at San Francisco, and he had refused on the ground that the duty imposed upon him was unreasonable there would be a general similarity upon the facts between this case and the *Development Co. Case*.



As before stated the only question in the case at bar is whether the plaintiff should be permitted to show that he was employed solely as foreman.

We think the judgment is correct and should be affirmed.

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ROBINSON v. ALGER.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 145.

SALES (§ 182\*)—CONSTRUCTION OF CONTRACT—PASSING OF TITLE.

The delivery of a bill of sale of a yacht then lying at Detroit, containing a provision that it was understood and agreed that the seller was to deliver the yacht to the purchaser in good condition at the port of New York as soon as practicable after the opening of navigation in the spring, construing such bill in connection with contemporaneous letters from the seller, *held* not to evidence a completed delivery of the yacht, which passed title as matter of law, but to be consistent with an intention that the contract should be executory, and the title should not pass until delivery in New York, which left the question one for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Olney & Comstock, for plaintiff in error.

Alexander, Watriss & Polk, for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. Robinson, the plaintiff below, brought this action to recover \$4,000 (less \$1,190.83 collected by attachment of defendant's property) paid to the defendant below under the following circumstances: In February, 1907, the plaintiff was looking for a yacht for use at his country place on Long Island during the following summer. The defendant owned the yacht *Gypsy Joe*, then lying at Detroit. The parties got into communication through one Jones, a broker. At the trial, the plaintiff being on the stand, a bill of sale executed by the defendant at Detroit February 2, 1907, was offered in evidence. It was the usual printed form, the material parts being as follows, written words in italic:

"To All to Whom These Presents shall Come—Greeting: Know ye, that I, *Russell A. Alger, Jr., of Detroit, Mich., sole owner of the gasoline yacht or vessel called the Gypsy Joe of the burden of 14 x/100 tons, or thereabout, for and in consideration of the sum of one dollar and other valuable consideration dollars, lawful money of the United States of America, to me in hand paid, before the sealing and delivery of these presents by George H. Robinson, of New York, N. Y., the receipt whereof I do hereby acknowledge and am therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said George H. Robinson, his executors, administrators, and assigns, the whole of the said gasoline yacht or vessel, together with all and singular the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture, and all other necessities thereunto appertain-*

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing and belonging, the license of which said *gasoline yacht* or vessel is as follows, viz.: \* \* \* To have and to hold the said *gasoline yacht* and appurtenances thereunto belonging unto *him*, the said *vendee*, his heirs, executors, administrators, and assigns, to the sole and proper use, benefit, and behoof of *him* the said *vendee*, his heirs, executors, administrators, and assigns, forever. And *I*, the said *vendor*, have promised, covenanted, and agreed, and by these presents do promise, covenant and agree, for *myself and my heirs*, executors, and administrators, to and with the said *vendee*, his heirs, executors, administrators, and assigns, to warrant and defend the said *gasoline yacht* and all the other before-mentioned appurtenances against all and every person and persons whomsoever. *It is understood and agreed that the said Russell A. Alger, Jr., is to deliver the said yacht Gypsy Joe to the said George H. Robinson, in good condition, at the port of New York as soon as practicable after the opening of navigation on Lake Erie and in the Erie Canal and Hudson river in the spring of 1907, without expense to the said George H. Robinson.*"

The plaintiff was then asked whether the yacht had been delivered to him, which question was objected to on the ground that title had passed when the bill of sale was delivered. The court sustained the objection. The plaintiff then offered in evidence three communications from the defendant to Jones, which were handed to him by Jones February 6th, along with the bill of sale. These documents were also excluded under objection.

A telegram, dated January 29th:

"Jan. 29, 1907.

"Dated Detroit, Mich. 29. To Frank B. Jones, 20 Broadway, N. Y. City. Will accept four thousand for Gypsy Joe guarantee in first class condition and deliver on opening navigation payment to be made immediately.

"Russell A. Alger, Jr."

A letter, dated January 30th of which the only relevant portion was:

"Detroit, January 30, 1907.

"Mr. Frank Bowne Jones, 29 Broadway, New York, N. Y.—Dear Sir: I telegraphed you yesterday you could sell 'Gypsy Joe' for \$4,000.00 delivered in New York. I will guarantee her in first-class condition, but I should expect the money to be paid at once. I will send down for the 'Glenda' probably about the 1st of May. In the meantime I will take my crew from her, put them aboard the Gypsy Joe, and deliver her in New York City. This would make it quite convenient for me."

A letter, dated February 4th, of which the only relevant portion was:

"Detroit, February 4, 1907.

"Mr. Frank Bowne Jones, New York, N. Y.—Dear Sir: I enclose you here-with bill of sale duly signed and witnessed. I also enclose you O. K. initialed inventory of the Gypsy Joe. However, as you will see, it does not include either the searchlight or the dynamo. I think I can find the dynamo. The searchlight I at once disposed of. However, you can tell Mr. Robinson that in place of these he is receiving the awnings and the cushions as I purchased them complete, as you remember, for the boat, as well as the \$80.00 imported coil used by the Packard car. This certainly is a very nice boat. Before it goes down I will have it thoroughly overhauled, so that it will be in practical commission by the time he receives it. As far as the insurance goes, I will carry this myself. I will not ask Mr. Robinson to have anything to do with the boat until it is delivered. By the way, does not my insurance cover me until that time, though the boat is laid up, or do I have to take any further action?"

Thereupon the plaintiff gave Robinson his check, dated February 6, 1907, for \$4,000, to the order of defendant. The rulings of the trial

judge rest upon the proposition that as matter of law the bill of sale evidenced an executed contract whereby title in the yacht passed immediately to the plaintiff, and that he was left to sue for nondelivery upon the defendant's covenant "to deliver the said yacht Gypsy Joe to the said George H. Robinson in good condition at the port of New York as soon as practicable after the opening of navigation on Lake Erie and in the Erie Canal and Hudson river in the spring of 1907 without expense to the said George H. Robinson."

The question is one of the intention of the parties, to be gathered from the whole instrument. The printed form undoubtedly contemplated a present executed sale. But other circumstances create a doubt whether it is controlling. If the words "delivered at New York" had been inserted with the words of grant, the question (at least) would have arisen whether the document passed title until delivery at New York. Even more explicit language was written in later, after the covenant of warranty of title, no doubt, because there was more space there to write in. That the yacht was to be delivered in good condition at a future day tends to support the construction that the contract was executory; it being unusual to insure the condition of other people's property. The seller prepared the bill of sale, and in case of doubt it should be construed most strongly against him. If the buyer, on reading it, had asked the broker on this point, and the broker had given him the seller's telegram and letters, which were excluded, we think he might naturally have inferred that the seller understood and intended the contract to be executory. These documents were receivable as admissions tending to show that the seller understood that the yacht was sold "delivered in New York," and that she was to remain his property until that time. It can make no difference that the documents were given without anything being said on the subject. Their effect on the buyer's mind would have been the same.

The cases on the subject of the passing of title in sales of personal property are numerous, and each depends upon its own circumstances; but all agree that the question is one of intention. We think that the intention of the parties in this case depended, among other things, upon the circumstances that the plaintiff wanted a yacht in the approaching summer at New York, that the yacht in question was then lying at Detroit, and that the written addition to the bill of sale, together with the defendant's contemporaneous communications with Jones, were consistent with the intention of the parties that title should not pass until delivery, notwithstanding the printed language of the bill of sale and the fact that the buyer paid the price down on receiving it. Under the circumstances the question of the intention of the parties should have been submitted to the jury, with proper instructions as to the law.

The judgment is reversed.

## In re CYCLOPEAN CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 152.

**BANKRUPTCY (§ 387\*)—LIQUIDATION AGREEMENT—SECURED CLAIMS—RELEASE OF SECURITY.**

Claimant lent money to a bankrupt corporation when it was in financial distress under a written agreement by which he received as security accounts against third persons guaranteed by the company. He advanced under such agreement some \$10,000, and was also an unsecured creditor of the company for a small amount. *Held*, that by signing a so-called liquidation agreement for settling the debts of the company with other creditors, no amount being placed opposite his name, he did not relinquish his security and was entitled to hold the same as against the trustee in bankruptcy of the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 613; Dec. Dig. § 387.\*]

**Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of New York.**

On petition to review a decree of the District Court for the Eastern District of New York, confirming the report of a special master and adjudging: First, that the claimant Frederick L. McAfee is entitled to collect certain accounts receivable of the Cyclopean Company, bankrupt, amounting to \$8,528.81. Second, that the said McAfee is entitled to collect from the Para Recovery Company, all sums owing from said company to the bankrupt under a contract between them dated Nov. 7, 1906. Third, that the said McAfee account to the trustee in bankruptcy of the Cyclopean Company for any overplus of the said accounts receivable above the sum of \$7,785.93 and interest and also for any overplus collected from the Para Company after applying said amounts to the payment of the notes of the bankrupt held by him aggregating \$2,182.34 and interest. Fourth, that the trustee in bankruptcy upon demand of said McAfee pay out of the funds in his hands as receiver of the bankrupt, two certain notes or receiver's certificates for the amounts of \$1,020.44 and \$783.93 which said McAfee shall credit on account of his total secured claims. Fifth, that said McAfee is a general creditor for \$241.36 and for any balance not paid from the proceeds of the securities held by him.

The record contains no statement of the proceedings before the special master. If witnesses testified as to what took place when the liquidation agreement was signed the testimony has not been incorporated in the record. The master states that his conclusions were reached "after considering the evidence submitted." In one of the findings of fact printed at the end of respondent's brief it is stated that Rivenburg "wrote his name in the first column at the end of said instrument, with the intention clearly expressed in a conversation then and there had by and between Charles Rivenburg, Albert H. Zugalla and Thomas A. Hill, that said Charles Rivenburg would sign said instrument only as to his claim evidenced by note or notes not secured by assignment of accounts receivable or by assignment of contract." This would seem to indicate that witnesses were examined and that this court has not before it all the facts upon which the master based his findings. The record contains nothing but the written documents and on this record the controversy must be determined.

Francis X. Carmody, for petitioner.

Noble, Jackson & Hubbard (Gordon Gordon and James R. Sloane, of counsel), for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COXE, Circuit Judge (after stating the facts as above). The facts, stated chronologically, are as follows: Prior to June 4, 1906, the Cyclopean Company being in need of money entered into an agreement with Charles Rivenburg, by which he agreed to furnish financial assistance, receiving as security therefor, accounts rendered by the Cyclopean Company to its customers, the company guaranteeing payment in full, at maturity thereof, of each and every account assigned to Rivenburg, and that each account should, in all respects, be "true and correct and fully enforceable." The agreement is carefully drawn and enters into minute details of the proposed transactions between the parties. The evident purpose was to safeguard Rivenburg in every possible manner for advances made to the company when its continued existence depended upon financial aid. Prior to April 8, 1907, Rivenburg had loaned to the company amounts aggregating, in round numbers, about \$10,000 and held as security therefor assigned accounts for about that amount. On April 8th, the company and certain of its creditors entered into the so-called liquidation agreement by the terms of which Thomas A. Hill, subsequently made the receiver and trustee in bankruptcy, was made attorney "to liquidate, settle, or otherwise properly dispose of the various rights of the parties hereto." The signatures of eleven creditors are attached, among them being Charles Rivenburg's. Only two of the creditors stated the amount of their claims. Rivenburg was both a secured and unsecured creditor but the space opposite his name is left blank.

The liquidation agreement is unique in its provisions, disputes soon arose as to its meaning and litigation followed. Rivenburg insisted that the money collected from accounts assigned as collateral should be paid to him, Hill took the opposite view. On June 5, 1907, a petition was filed in bankruptcy against the Cyclopean Company and on the following day Hill was appointed receiver. On June 20th, the company was adjudicated a bankrupt and on September 24th, Hill was elected trustee. On June 11th, Rivenburg assigned to McAfee, the present claimant, all his claims against the company with the collateral security therefor. On June 26th, McAfee and Hill entered into an agreement reciting the previous steps taken and the litigation between the parties and agreed to refer the question of ownership of the collaterals and the moneys collected therefrom to the referee in bankruptcy. On the 19th day of October, 1907, an order was entered referring the matter to the referee, as special master, to ascertain and report the facts and his conclusions thereon. On March 31, 1908, the master filed his report in favor of the claimant and on June 16, 1908, the District Court confirmed the report, though differing with the master as to some of his conclusions.

Thereafter the decree was entered which is the subject of this review. Owing to the fact that on two occasions the parties attempted to arrange their difficulties outside the ordinary legal channels, the case is sui generis and abounds in objections disputing the jurisdiction of the court, in questions of practice and procedure and in attacks upon the validity of the so-called liquidation agreement. We do not deem it necessary to pass upon these questions. If we are right in

the view we take of the merits of the controversy they will all become academic. The principal question is whether Rivenburg released his security. That he should have done so seems incredible when we consider the motives which govern human conduct. He was a clear-headed, careful, prudent business man. His agreement with the company of June 4th proves this beyond peradventure. He had come to the assistance of the company when it was in sore need of help, he had lent his money with the distinct understanding that every dollar should be secured by an account or bill receivable of the company. Ten months afterwards he had advanced for its benefit, in round numbers, \$10,000 and held security therefor, which, for aught that appears to the contrary, was perfectly valid and sufficient to satisfy the loan.

It is an almost unthinkable proposition that a sane man would, without consideration, obligation or advantage of any kind, relinquish his right to \$10,000. The company and its creditors already had the benefit of Rivenburg's \$10,000. He had, in effect, discounted the company's paper to that amount. If then the avails of these securities are to be taken from Rivenburg, or his assigns, and handed to the creditors, the practical result will be that the creditors will have received \$20,000 and Rivenburg's \$10,000 will be a total loss except for the percentage he may obtain in dividends.

The contention of the trustee leads to such inequitable results that it fails to satisfy the conscience of the court. The only act of Rivenburg on which the release of the security is based is the signing by of the liquidation agreement. As before stated no amount appeared opposite the signature and the master finds as a fact that he intended to sign the document only as affecting \$241, the amount of his unsecured claim. That Zugalla, the secretary and treasurer of the Cyclopean Company, understood that Rivenburg did not intend to release his security is made plain by a certificate signed by him contemporaneously with the liquidation agreement, in which he says:

"It is understood that this act on the part of said Rivenburg shall in no way interfere with or disturb the security undertaken by virtue of a series of promissory notes given by the Cyclopean Company and indorsed by said Zugalla. \* \* \* It is further understood that the contract heretofore entered into on or about June, 1906, between the Cyclopean Company and said Charles Rivenburg shall in no wise be affected by the signing of the aforesaid agreement entitled Liquidation Agreement."

Assuming that there were no disputed facts before the master and that his finding presents a question of law which may be considered by this court upon a petition to review, we have no hesitation in holding, that the signature alone is insufficient to operate as a release of the security. The signature in blank is perfectly consistent with the theory that it was only intended to apply to the unsecured debt. When it is sought to deprive of his security one who has come to the relief of an embarrassed corporation, relying upon the collaterals offered by it, clear and positive proof must be produced. Such proof is not found in this record.

The decree is affirmed with costs.

## SIMMONS v. CITY OF CHADRON et al.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1909.)

No. 2,919.

**FALSE IMPRISONMENT (§ 15\*)—TORTS—LIABILITY FOR WRONGFUL ARREST BY OFFICERS.**

A municipal corporation cannot be held liable in damages for the wrongful arrest by its officers of a person charged with a public misdemeanor.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 64; Dec. Dig. § 15.\*]

Liability for torts of public officers, see note to Mayor, etc., of City of New York v. Workman, 14 C. C. A. 534.]

In Error to the Circuit Court of the United States for the District of Nebraska.

The following is the opinion of W. H. MUNGER, District Judge:

This is a suit brought by the plaintiff against the defendants, charging them with having entered into a conspiracy to deprive the plaintiff of the right to vote at the general election in November, 1906, for a representative to Congress, in violation of the law of the United States. The petition alleges that the defendant Albert W. Crites was the city attorney of said city of Chadron, Fred J. Houghton, acting police judge, and Grant C. Alexander was the chief of police; that for the purpose of depriving the plaintiff of his right to vote for a representative in Congress a complaint was filed before said Houghton, acting police judge, charging the plaintiff with drunkenness, etc. To the petition the defendant city of Chadron has filed a demurrer.

It clearly appears from the petition that, in the arrest of plaintiff by the city authorities of said city of Chadron, the city was exercising one of its governmental powers, and not what are commonly called "corporate" powers, and that where the acts of the officers of the city are void in performing governmental powers, or powers which are exercised as an agency or arm of the state, for and on behalf of the public, the city is not liable. The law in this respect is clearly stated in 3 Abbott on Municipal Corporations, § 970, as follows: "Public corporations are not liable, either in the use of agencies or for the acts of their officers and employés in enforcing ordinances, valid or invalid, passed for the carrying out of some governmental or public duty or power; and the contrary rule, of course, will apply where the ordinance relates to local proprietary or private powers or duties of a corporation."

This distinction, we think, is clearly illustrated in the case of McGraw v. Town of Marian, 98 Ky. 673, 34 S. W. 18; 47 L. R. A. 598, cited by complainant. The liability of municipal corporations for the unlawful arrest and imprisonment under invalid ordinances, etc., is fully and clearly discussed in the note to cases in 44 L. R. A. 795, and 47 L. R. A. 598. This view has also been sustained by the Court of Appeals of this circuit, in the case of City of Kansas City v. Lemen, 57 Fed. 905, 6 C. C. A. 627, and I think, also, in the case of Gillespie v. City of Lincoln, 35 Neb. 34; 52 N. W. 811, 16 L. R. A. 349. Without at this time undertaking to say whether the petition states a case over which this court has jurisdiction, we content ourselves with sustaining the demurrer.

The demurrer of the city of Chadron is sustained, and cause dismissed as to said city.

Allen G. Fisher, for plaintiff in error.

D. B. Jenckes and A. W. Crites, for defendants in error.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. After a careful consideration of this record, we are unanimously of opinion that the petition states no cause of action, and that the Circuit Court committed no error in sustaining the demurrer. As no new or difficult question of law is presented, we deem it unnecessary to say more than that the judgment ought to be affirmed.

It is so ordered.

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SCHOONMAKER v. CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 176.

MUNICIPAL CORPORATIONS (§ 849\*) — INJURIES TO VESSELS — CONCEALED OBSTRUCTIONS.

Where the dockmaster in charge of a bulkhead owned by a city assigned a scow to a berth for unloading, the fact that owing to a dispute with another vessel she took a position 15 or 20 feet further along did not relieve the city from liability for her loss owing to obstructions in the bottom, unless the master was notified or knew of the danger.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1806; Dec. Dig. § 849.\*]

Appeal from the District Court of the United States for the Southern District of New York.

James J. Macklin (De Lagnel Berier, of counsel), for appellant.

Francis K. Pendleton, Corp. Counsel (Theodore Connoly and George P. Nicholson, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The libel was filed against the city of New York to recover for loss of the scow barge Carey Brick Co. No. 3 and her cargo of bricks. The city owns and collects wharfage for the bulkhead between Seventy-Eighth and Seventy-Ninth streets on the East river and a little pier jutting out into the river at the end of Seventy-Ninth street. The city's dockmaster assigned the scow to take the berth of Denning No. 1 as soon as the latter had unloaded. Through a dispute with another boat which felt entitled to the same berth, the scow when she got into the bulkhead lay some 15 or 20 feet higher up the bulkhead and nearer the Seventy-Ninth street pier than the Denning No. 1 had lain. This corner was a dangerous place, and early in the next morning at low water the scow took the ground on some dangerous obstructions that caused her loss. We do not think it material that the scow did not lie in exactly the same spot Denning No. 1 occupied. The city is clearly liable unless it notified the master of the scow of the danger or unless he knew of it. The burden is upon the city to prove this defense. The trial court dismissed the libel on the ground that the master was notified of the danger. The whole testimony on the subject is as follows: The dockmaster says that he told Corkery, the stevedore, that the corner was a bad place.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



But the stevedore represented the cargo, and notice to him was not notice to the scow. Corkery testified that, when the scow was swung out into the river to enable Denning No. 1 to be towed out, he called out to the master of the scow to look out for the corner because it was a bad place. He makes no claim that the master heard him. The dockmaster and the stevedore then went away for the day, and the scow pulled into her berth at about 7:20 p. m. on a rising tide. The master of the scow says he neither knew of the danger nor heard the stevedore's hail. If he had known of it or had heard the hail, it is quite unlikely that he would have pulled his boat in, at least without some inquiry of others or investigation of the bottom.

If the witnesses contradicted each other, we should be disposed, in accordance with the usual practice, to adopt the finding of the trial judge as to their credibility, because he saw and heard them. But their testimony is entirely consistent, the only question being whether the master of the scow heard Corkery's hail. Because we see no reason to doubt his testimony that he did not, the decree is reversed, with costs.

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THE W. A. SHERMAN.

(Circuit Court of Appeals, Second Circuit. February 16, 1909.)

No. 204.

ADMIRALTY (§ 122\*)—COSTS—PROCEEDING FOR LIMITATION OF LIABILITY.

A petitioner for limitation of liability cannot recover from a claimant costs and expenses incurred in invoking the benefit of the statute where his right to limitation is not contested, but on any contested issue in the proceeding the costs and expenses, including proctor's fees, are taxable to the losing party.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 800; Dec. Dig. § 122.\*]

Appeal from the District Court of the United States for the Southern District of New York.

Peter S. Carter, for appellant.

Frederick N. Esher, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. One Miller brought suit in the Supreme Court of Hudson county, N. J., against the Hudson Towboat Company to recover \$5,000 for damages for personal injuries sustained by him while on the barge Dorset in tow of the steam tug W. A. Sherman. Thereupon the Hudson Towboat Company, owner of the steam tug Sherman, filed a petition in the District Court of the United States for the Southern District of New York to limit its liability, in which it also denied liability. The tug was duly appraised at \$3,000, and a stipulation for costs and for the appraised value given by the petitioner. Miller appeared in the limited liability proceedings, gave a stipulation for costs, and answered the petition. The proceed-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing involved two issues: First, the petitioner's right to limit; second, the petitioner's liability.

We infer from the decree and from the bill of costs that Miller was the only claimant, and the only contested issue that of liability. Upon the trial the court held that the petitioner was not liable to the claimant, and a decree to that effect, with costs in the amount of \$31.90, was entered in its favor. The costs taxed were for fees of witnesses and mileage and clerk's costs at the trial. The petitioner appeals on the ground that it was entitled to a proctor's fee of \$20, and for disbursements made in the proceeding to limit its liability, amounting to \$268.27.

After a petitioner has surrendered his vessel or given a stipulation for or paid the amount of her appraised value into court, he has no further concern in the proceeding, unless claimants contest his right to limit or he contests his liability. Expenses he has incurred for the purpose of availing himself of the act of Congress he should stand. They are such as cost of filing petition, and stipulations for costs and value, premium, if any, for stipulations, expense of appraisal or of bill of sale transferring the vessel, commissioner's report on appraisal, expert fees, etc. If any issue is contested in the proceeding between the petitioner and the claimants or any claimant, the costs should fall as usual upon the losing party. They are such as witness fees, mileage, deposition fees, proctor's fee. The cost of bringing in the creditors, such as filing, issuing, and publishing the monition, should be paid out of the fund, on the principle that it should administer itself, and this duty to administer itself applies even when, the petitioner being held not liable, there is no other distribution than to return it to him. The result is especially equitable in a case like the present, where there was but one claimant and the petitioner might as well have pleaded his right to limit in the action in the state court. Reference may be had to the cases of *The Leonard Richards* (D. C.) 41 Fed. 818, 821; *The H. F. Dimock*, 77 Fed. 226, 237, 23 C. C. A. 123; *The Excelsior* (D. C.) 136 Fed. 271.

We discover no reason why the petitioner was not allowed a docket fee of \$20, but the allowance of costs being a matter of discretion in the court below, the appeal is dismissed, without costs to either party in this court.

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## EDISON ELECTRIC LIGHT CO. v. NOVELTY INCANDESCENT LAMP CO.

(Circuit Court of Appeals, Third Circuit. February 16, 1909.)

No. 3, October Term, 1908.

### 1. PATENTS (§ 328\*)—INVENTION—INCANDESCENT LAMPS.

The Edison reissue patent No. 12,393 (original No. 444,530), for a leading-in wire for incandescent lamps, in which the joint between the exterior copper wire and the interior platinum wire is sealed within the glass, which both effects a large saving of platinum and greatly strengthens the joint, was not anticipated, and discloses invention. Also, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 167 F.—62

2. PATENTS (§ 26\*) — INVENTION—CORRECTION OF MISTAKEN IDEA—USE AND ARRANGEMENT OF MATERIALS.

While the correction of a mistaken idea entertained by the art, amounting to the mere recognition of a mechanical truth, may not be an inventive act, invention may be found in a new structure, involving a readjustment of materials in use, by which new and highly beneficial results are brought about. *Daylight Manufacturing Company v. American Prismatic Light Company*, 142 Fed. 454, 73 C. C. A. 570, distinguished. *Rainear v. Western Tube Company*, 159 Fed. 431, 86 C. C. A. 411, followed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.\*]

3. PATENTS (§ 26\*) — INVENTION—REARRANGEMENT OF MATERIALS—REVERSAL OF STRUCTURE.

Where, therefore, in incandescent electric lamps, already in use, an inner copper or bronze section of the leading-in wire, supporting the filament, was extended down into and sealed up in the glass neck, where the union with the intermediate platinum section was made, the union of the latter with the exterior copper section being outside the glass, in view of the difficulties of the problem as shown by the efforts of other inventors and the resulting advantages thereby secured, it involved invention to reverse this structure and extend the outer copper section into the glass, making a union with the platinum there.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.\*]

4. PATENTS (§ 52\*)—ANTICIPATION—ACCIDENTAL REALIZATION OF STRUCTURE.

A merely accidental occurrence, realizing the structure of a patent, not only not appreciated, but actually made the ground of rejection as an imperfection, does not amount to an anticipation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 70; Dec. Dig. § 52.\*]

5. PATENTS (§ 65\*)—ANTICIPATION—MISTAKEN FIGURE IN PRECEDING PATENT.

Neither is it an anticipation that by a mistaken showing in the figure of a preceding patent, by the error of the draftsman, the structure of the patent appears contrary to the conception of the inventors and the reading of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 65.\*]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 161 Fed. 549.

Richard N. Dyer and John Robert Taylor, for appellants.

A. Parker-Smith, for appellees.

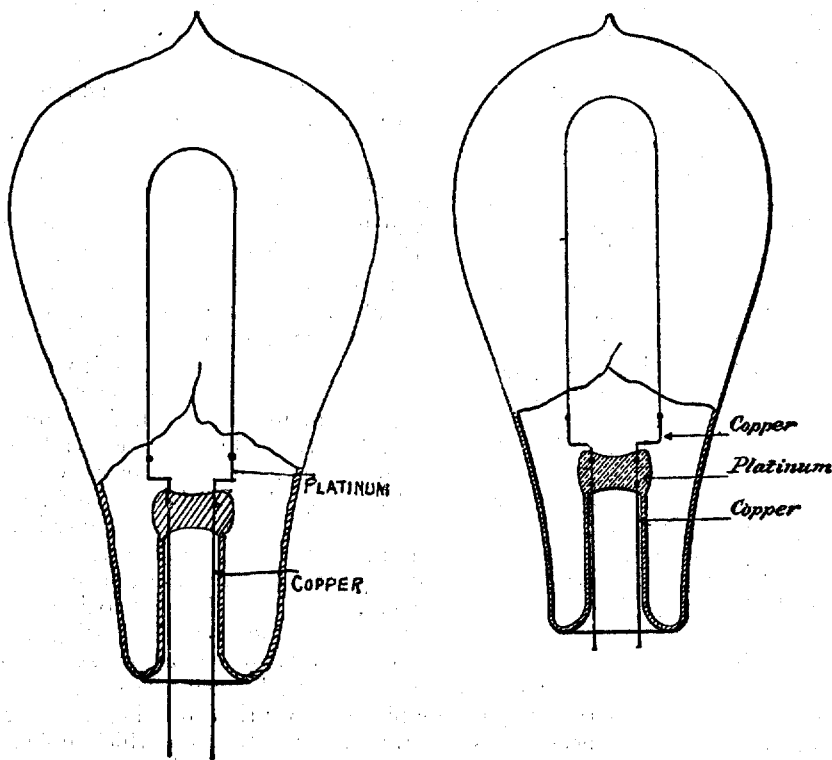
Before DALLAS and GRAY, Circuit Judges, and ARCHBALD, District Judge.

ARCHBALD, District Judge. The patent in suit is for a leading-in wire for incandescent electric lamps. It was taken out by Thomas A. Edison, January 13, 1891, but, being found to be too broad, a reissue was obtained October 10, 1905, and it is on this that the suit is based. Infringement is admitted, the validity of the patent being the only question.

The leading-in wire of an electric lamp conducts the current to the filament within the bulb, and having to be sealed in, air-tight, where it enters the bulb, in order to preserve the vacuum within, a metal must be employed whose coefficient of expansion is as near as may be to

\*For other cases see same topic & § NUMBER in Dec. & Am. D'gs. 1907 to date, & Rep'r Indexes

that of the glass, or at least the particular kind of glass used, so that the two shall contract and expand together, the filament burning up if there is the slightest leakage. Platinum is found to be the best for the purpose, but being very rare and expensive, economy is enforced, and the smallest possible amount, both in length and size of wire, which will insure a perfect seal, is therefore to be employed. It is quite ductile also, and liable to stretch in consequence, which tends to impair the seal, requiring it to be relieved of strain. The exterior ends of the wire have also to be rigid so that they will not sag and short-circuit, and the union of the platinum with the exterior copper section must be so secured as to avoid, so far as practicable, the breakage incident to handling in manufacture. These were the problems which confronted the inventor, and which he undertook to solve by the device of the patent.



There are two forms of construction shown, but with only one are we concerned. In this there is an inner section of the leading-in wire of platinum, connecting at one end with the filament and sealed into the glass at the other, and an outer section of copper to which the platinum is joined, the point of union being within the glass into which the copper section is led and sealed. The other construction had inner

terminals of copper between the platinum and the filament, but was in other respects the same, and while admittedly the preferred form with the inventor, and employing the smallest amount of platinum, was found to be objectionable and was given up. The validity of the patent depends on whether, in contrast with the prior art, invention is so shown.

There is a suggested anticipation, because in practice, in other forms, such as the Heisler and Bernstein lamps, in which the exterior copper section is not led into the glass, it sometimes happened that the glass, by mistake, ran down on to and over the point of union with the platinum, thus realizing, as it is said, the construction of the patent. But no such accidental and fugitive occurrence is of account. 30 Cyc. 840. Not only was it not understood or appreciated, but it was actually made the ground of rejection, the lamp, when it happened, being regarded as imperfect and thrown out. It thus gave nothing to the world, standing in the way of discovery, indeed, instead of promoting it, and is thus entitled to no consideration here. Equally ineffective is it to urge that the Edison construction is disclosed by the Lemp and Wightman patent (401,444), where, by an error of the draftsman in one of the figures, the outer section of the leading-in wire is apparently made to extend into the glass. The inventors had no such conception, and no one reading the patent would get any idea of it, if, indeed, he would not perceive and correct the mistake. To accept it, under the circumstances, as a disclosure which advanced the art, anticipating the present invention, would reflect on the judgment of the court.

The patentability of the device is the real question. It was denied by the court below, on the ground that all the inventor did was to correct the mistaken idea entertained by the art, that, if the exterior or copper end of the leading-in wire was extended into the glass, it would crack the glass, and thus ruin the seal, and that recognition of this mistake was a mechanical truth and not an inventive act, for which no patent would lie. But that does not fairly state the case in all its parts. It is not like the condition in *Daylight Manufacturing Company v. American Prismatic Light Company*, 142 Fed. 454, 73 C. C. A. 570, as supposed. The method there pursued already appeared in the prior art, and its application to the production of rolled prism plate based on the discovery that, contrary to the conceived idea, such plate could be successfully annealed and cut, was properly held to involve no invention, the mechanism by which it was accomplished being essentially old. The prevailing opinion being that it was a useless product, the discovery that it was not, which was all that there was, could not be regarded as rising to the dignity of invention, nothing new for effecting it having been devised. But the structure on which invention is predicated here is unquestionably new, there being a readjustment of materials, by which new and highly useful results are brought about. The case in many features is like that of *Rainear v. Western Tube Company*, 159 Fed. 431, 86 C. C. A. 411, in which invention was found, although there was nothing more than a rearrangement of materials in common use to produce a nonrusting pipe-union joint. Indeed, the case here is stronger than that, for the principle of which

advantage was taken in that case, that brass and iron in contact would not rust, was well known; whereas, here, electric lamp makers labored under the impression that the imbedding and sealing in of the exterior copper section of the leading-in wire, which is of the essence of the invention, would crack the glass. Mr. Edison no doubt discovered that this was not the fact, and that the copper section could be so successfully sealed up. But, however important to it, that is not the whole invention, which is not to be so limited or classed, not to say that it is to be condemned, even if that should prove to be the case.

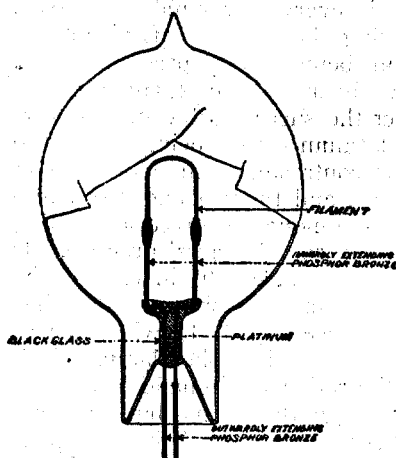
In what, then, does the claim to patentability consist? The prime object of the invention was the saving of platinum, and to this, in consequence, the mind of the inventor was particularly addressed. It is so declared in the specifications, and in every way stands confessed. This object was a worthy one, justifying the exercise of, if not engaging, the inventive faculties, platinum being a very precious metal, and the extent of its use entering largely into the cost and ultimate price of the lamp. And in this respect the success achieved was certainly most marked, the length of the platinum section being reduced to not exceeding an eighth of an inch, as contrasted with two-thirds to three-quarters of an inch in other lamps, and there being also a material reduction in the size of the wire, the money so saved amounting to from \$20,000 to \$30,000 a year in the complainants' practice. It may be that, in the previous Edison patent (248,419) in one of the figures (4), a still greater economy of platinum is shown. But this, for some reason, was not a commercial success, and, the whole device being involved in any such comparison, it is with other lamps which have proved a success that contrast is the rather to be made.

Invention might well be made to rest on this alone, but economy in platinum is by no means the only benefit attained. When the platinum extends outside the glass, it is subject to a pulling strain, to which, being ductile, it is liable to yield, and being drawn out and reduced in size in this way, it shrinks away from the glass, impairing the seal. But by anchoring the outgoing copper in the glass, the strain on the platinum is removed, and with it the danger of leakage, insuring a practically perfect seal. It is because of this that with less platinum there are better results. It is said that, as an offset, the copper brings in gas bubbles. But none are observable about the platinum, and it is there that they particularly count, and, whatever theorizing as to this may be indulged in, it is established by the evidence that, with the copper extended into and sealed up with the glass, a greater percentage of perfect seals is secured, and theory must yield to proof.

Another important feature is the rigidity obtained in the outgoing wires. If these sag, there is a danger of short-circuiting, destroying the lamp, which not infrequently occurs where the platinum extends beyond the glass. Stability is also required, the breakage of the wires in handling in course of manufacture being a not inconsiderable source of loss. Both of these defects, however, are remedied, and the corresponding advantages obtained, by carrying the copper into and imbedding it within the seal, the copper ends outside of it not sagging

like the platinum, and an effective protection, both of the platinum and of the copper and platinum union, being afforded thereby.

With all these useful features, which, if not altogether new, are not found united in any previous device, why, it may be asked, is not invention shown? No doubt, the extending of the exterior copper section into the glass is of its essence, being that from which pretty much everything else flows. It is true, also, that the art did not believe that this could be successfully done, being dominated with the idea that it would break the seal. But, as already stated, the invention does not stop with the correction of that mistake. There may be that, but there is more, and, to so



*Bernstein Series Lamp*

confine it, it must appear that the resulting benefits, with that out of the way, were known. It is said that the construction adopted in the patent was obvious from the reverse construction shown in the Heisler and Bernstein lamps, where an inner copper or bronze section, supporting the filament, is extended down into and sealed up in the glass, where the union with the platinum takes place. But it is always hazardous to assert the obviousness of a device which no one, with the whole art before him, up to that time has conceived. Nor were the benefits of the patented structure to be reasoned out, unaided, as maintained. The ordinary explanation, for instance, would be that the more platinum,

the better the seal, and not, as demonstrated, that, other things combining, a more perfect seal could be secured with less. The defendants' expert, as it would seem, is not even yet convinced. Neither was it to be supposed that, aside from the question of breakage, the copper, with its greater coefficient of expansion, on being extended into the glass, would somehow hold. Above all, was there nothing in the Heisler and Bernstein construction to suggest a solution by the mere turning of it upside down. The platinum there extended outside the glass, where the union with the copper was formed, with all the resulting disadvantages which it was the object of the present invention to overcome. But it is somewhat difficult to see how, by mere observation, as something lying on the surface, it would be recognized that they would disappear, if only this construction was turned around. It may be, as a mere naked conception, that the reverse construction did not go unobserved. But upon what consideration can it be declared that it was at the same time apprehended that thereupon all the benefits as we now know them (only so that the glass did not crack) would immediately ensue? The fact is, as the record shows, dispelling any such idea, that not a few inventors, including Mr. Edison himself, had for

some time been busied in the effort to secure a satisfactory arrangement of leading-in wires, and the different means taken for doing so, better than anything else, shows the complexity of the problem involved, and that in order to meet it something more than ordinary skill was required. To deny to its successful solution the merit of invention upon the contrary idea is to declare that these efforts were needless, and that there was already disclosed in the art an easy and obvious way out, which ought to have been, but somehow was not, seen. We are not, however, to be persuaded to that view. On the contrary, we think that the successful method of dealing with the subject, and particularly the method here adopted, was inobvious, if not obscure, calling for inventive insight to develop and discern, and that the patent, therefore, should have been sustained.

The decree is reversed, and the bill reinstated, with directions to refer the case to a master to state an account. The patent having expired since suit brought, no injunction will go out.

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CENTRAL TRUST CO. v. NEW AMSTERDAM GAS CO. et al.

(Circuit Court, S. D. New York. February 18, 1909.)

DEPOSITS IN COURT (§ 11\*)—DISPOSITION OF INTEREST ON DISTRIBUTION OF FUND.

An injunction pendente lite was granted at suit of gas companies restraining the enforcement of a reduced rate of charge for gas, but requiring the companies to deposit the excess collected above such rate with the master to await the final determination of the case. In the meantime the master realized some interest on the fund. Some 2½ years later the injunction was dissolved, and it became necessary to refund the amount so impounded to customers to the number of 873,000. *Held*, that the interest accumulation would be used in the first instance in paying the expense of administering the fund, especially as the cost of making distribution of the same among several million items would absorb a large part of it, and that no disposition of the excess remaining, if any, would be made until the amount of such excess was ascertained.

[Ed. Note.—For other cases, see Deposits in Court, Dec. Dig. § 11.\*]

In Equity. On settlement of order vacating injunction pendente lite.

Joline, Larkin & Rathbone, for complainant.

Cortland Betts, for defendant New Amsterdam Gas Co.

Edward R. O'Mallay, for defendant Atty. Gen. of State of New York.

George S. Coleman, for defendant Public Service Commission, First District.

Francis K. Pendleton, for defendant City of New York.

LACOMBE, Circuit Judge. Defendants have submitted a clause "dismissing the bill," which is disallowed. The decision of the Supreme Court in the consolidated case does not warrant the granting of such relief at this time in the suits brought by the other companies.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



If defendants should be hereafter advised to move for a dismissal of the bills for failure to prosecute, they may then present the question.

As to repayment of the fund, the special master had been instructed to take action in the matter before this motion was argued. See memorandum filed February 5, 1909.

As to interest, no question as to whether or not the gas company should pay interest at 6 per cent. per annum to any consumer is before this court; any such controversy, if such there be, will have to be adjusted in some other tribunal. At the very outset of this suit, when the preliminary injunction was issued, June 8, 1906, it was clearly and specifically pointed out that no consumer (except the city of New York) was made a party, and that none of them were or would be individually bound by any action which the court might take in such suit. No injunction was ever issued against any individual consumer; each one was left free to refuse payment of the overcharge if he chose to do so. *Consolidated Gas Co. v. Mayer* (C. C.) 146 Fed. 150; *Richman v. Consolidated Gas Co.*, 186 N. Y. 213, 78 N. E. 871. Many consumers did so refuse, and have only paid at the 80-cent rate during the interval. So, now, if any consumer prefers not to take from the fund which the master is about to distribute the amount of his overcharge, but, on the contrary, elects to prosecute the company for the amount of such overcharge with legal interest, he is entirely free to do so. Whether or not the company would have any defense to such action would be decided by the court in which it might be brought.

All that we have to do with here is the return of the items of overcharge deposited with the special master to the true owners. While in his custody the fund earned some interest, not at the rate of 6 per cent.;  $2\frac{1}{2}$  per cent. was the utmost the master could obtain at any time, and not always that. These accumulations it is now suggested should be distributed ratably with the refunds as interest thereon. The order under which the deposit was made did not provide that this should be done. It was known at the time that there would be expenses of administration which would have to be borne by the fund itself, but which it was expected the accumulations would be sufficient to meet. Indeed, the present application recognizes that, and asks that only the amount in excess of expenses of administration be now distributed. The order required the gas company to prepare the papers for refund. This they have done, and filed them with the special master month by month. They disclose the exact amount of overcharge paid by each consumer, but to list up, check over, and audit the separate accounts so that no one will receive more or less than is due him is a work of great magnitude, and will be expensive. It was contemplated when the original order was made that the gas company would distribute the refunds through its collectors, week by week, as they made their rounds. At that time it was supposed there would be only the accumulations of a year to dispose of, but the fund has grown to such a size that any such method would be too dilatory, and the master will himself oversee distributions through the mails, reducing the time to a fraction of what it would be under

the original plan. The important thing is to get this overcharge back to each consumer in the shortest possible time and with no trouble to him.

Returning, again, to the question of distributing surplus of the accumulations above the expenses of administration. The master has had a careful calculation made in the case of the Consolidated Company; the relative proportions are the same in the other companies, and those figures may be referred to in considering all similar applications. Papers for refund submitted by the company show that there are 873,691 separate accounts. The distribution even of the total accumulations between this large number of different individuals would give but a trifling amount to each. These accounts run back for a period of 33 months, and it is estimated that there will be an aggregate of over 20,000,000 separate items. The auditor, after an experiment as to the time required for making interest calculation as to a few items, estimates that in order to calculate the interest on these 20,000,000 items, varying in amount and date, and to check and audit these calculations, would cost, at 75 cents per hour, a sum which would nearly equal the whole amount of the accumulations. Apparently the persons who would get the most benefit from these operations would be the clerks employed to do the work. Moreover, if the vouchers now being prepared for distribution with the checks were held back until all these interest calculations could be made by 400 clerks, the time necessarily consumed would delay repayment for 2 or 3 months more.

These circumstances are mentioned merely to indicate some of the aspects of the question. Estimates are always unsatisfactory and often misleading. The present application can be disposed of without giving any consideration to them. As has been stated, all that is now asked is a distribution of so much of the accumulations as may be in excess of the expenses of administration of the fund. It is impossible to tell what that excess may be, or whether there will be any surplus at all. If all consumers had kept their receipts, a reasonably accurate estimate might be made as to what it will cost to prepare, check over, and audit the refund vouchers and to prepare and send out the checks. Undoubtedly, with such a vast number of items that expense will be very heavy, but its probable extent might be estimated with reasonable assurances of retaining sufficient to meet it. But from complaints which have come to the master and from investigations which have been made by gentlemen connected with the press, it is apparent that many unscrupulous persons have for some time past been persuading consumers to turn over their receipts and to make some arrangement or sign some paper, which they expect hereafter to present as evidence of an assignment to themselves and on which they will try to collect the money. It is known that in many instances these alleged assignments have been procured by deceit and false representations, in some instances even statements have been made that the individual soliciting the receipts was approved by the court, or was selected by the special master, the whole scheme being a fraud upon the consumer. The victims are presumably in most

instances not well to do, ignorant of their rights, often illiterate, and unfamiliar with the English language.

It is the duty of the master, so far as may be possible, to protect these unfortunate persons, who did not understand the importance of following the instructions which would have protected themselves, against being defrauded of the money which he holds for them. In many instances, although the individual amount is small, it may be a serious matter to the owner of the claim. This can be done only by inquiry and investigation, frequently by taking sworn testimony before the special master or some other. How many of these cases there may be no one can now tell; probably out of the 873,691 accounts they will run into the thousands or tens of thousands. No possible estimate of the cost of thus protecting the original fund for those rightfully entitled to it can now be made; it will undoubtedly be very large; it would not be surprising if the cost practically exhausted the accumulations. No one can now tell what surplus there will be after paying expenses of administration, if, indeed, there be any; and it would be unwise for the master to undertake to distribute any part of the accumulations from which alone he can meet the cost of a fight to protect the fund against fraudulent claims until the fight is over.

When the principal of the fund is distributed and the cost of that operation determined, the court will entertain whatever application may be made to it as to the disposition of any surplus of the accumulations.

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In re HUDSON RIVER ELECTRIC CO.

(District Court, N. D. New York. February 19, 1909.)

1. BANKRUPTCY (§ 100\*)—ADJUDICATION—VACATING.

An adjudication of bankruptcy against a corporation, made as a matter of course on default, will be vacated on petition of creditors or others interested, filed promptly on first obtaining knowledge of the adjudication, to permit them to raise the question whether such corporation is engaged in a business which renders it subject to such adjudication, where that appears doubtful.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 144; Dec. Dig. § 100.\*]

2. BANKRUPTCY (§ 100\*)—ADJUDICATION—VACATING.

Receivers of a corporation in possession of its property under appointment in a suit by creditors are competent parties to move for the vacation of an adjudication of bankruptcy made against it without their knowledge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 100.\*]

In Bankruptcy. Motions, in proceedings, in the matter of the Hudson River Electric Company, in the matter of the Hudson River Electric Power Company, in the matter of the Hudson River Power Transmission Company, in the matter of the Saratoga Gas, Electric Light & Power Company, in the matter of the Empire State Power Company, and in the matter of the Madison County Gas & Electric Company, on orders to show cause, or directly, respectively, to set aside

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and vacate the several orders heretofore made herein adjudicating said corporations a bankrupt, respectively, and for orders permitting answers or demurrers to the several petitions to be filed and their sufficiency, and also the liability of such corporations to be adjudged bankrupt, determined.

James A. Van Voast, Abram J. Rose, and Geo. B. Curtiss, for the motions.

C. S. & C. C. Lester, Henry V. Borst, Henry W. Williams, and Coville & Moore, opposed.

RAY, District Judge. Each of the corporations above named is a public service corporation, and each has been adjudicated a bankrupt, no defense, answer, or demurrer to the petitions or either of them having been filed. The order of adjudication in each case was made as matter of course, and without an examination of the petition. A very short time before these petitions were filed, and there was slight difference in the days of filing, a suit in equity was commenced in the Circuit Court of the United States by Eben H. Gay and another against the companies named and two others, Hudson River Water Power Company, and, Ballston Spa Light & Power Company, also public service corporations, as defendants, charging, among other things, that they were insolvent, being mismanaged, their property wasted and misapplied, etc., and that there is, in fact, practically but one company, the others being owned and controlled by it through ownership of stock agreements, etc., and that all have been and were being run, conducted, and managed as one company, and should be in the future kept together as one in the interests of stockholders, bondholders, general creditors, and the public. The object of the action was and is, the action being now pending, to wind them up and have a sale, etc., and, if possible, effect a reorganization in the interest of all. A receiver was asked for, and the Circuit Court duly appointed Geo. W. Dunn, Milton Delano, and Charles W. Andrews receivers of such corporations, with instruction to keep them together and run and manage them as one; keeping the accounts separate, however. These receivers duly qualified and entered on the discharge of their duties, and are now operating under the orders of the Circuit Court of the United States. The properties of these companies have cost millions of dollars, and each is heavily bonded, the aggregate amount of bonds being about ten millions of dollars or upwards. There are outstanding contracts for the furnishing of light and power to other corporations, cities, villages, etc., as well as to individuals. The affairs are in a mixed and tangled condition, and such receivers, with the aid of appraisers appointed by the Circuit Court, are engaged in making an inventory and appraisal of all the properties. The operations of the companies extend over several hundred square miles of territory. While some of the corporations generate and make both electricity and gas, one generates electricity only, while another transmits it.

As bankruptcy proceedings were already pending against the Hudson River Water Power Company, which has a plant for the generation of electricity and a dam across the Hudson river, and is per-

haps the most important company of the eight involved, this court appointed the same receivers for that company, but they are managing and operating its affairs and plant under the authority of the Circuit Court, no adjudication having been made. In that case an answer was interposed and the question raised, which is, as yet, undetermined, that, being a public service corporation and engaged principally in generating and selling electricity, the corporation is not subject to the provisions of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and cannot be adjudicated a bankrupt. It is claimed that the Hudson River Electric Power Company is the principal one of the eight, and that the others are subsidiary. Whether this or the Hudson River Power Company is the principal company, it has not been controverted that the others are subsidiary companies. The pendency of the suit in equity, the appointment of the receivers, and their possession of all the properties of the companies well may have, and seem to have, diverted attention from the filing of the petitions in bankruptcy. The receivers had just entered on the discharge of their duties, and were in ignorance of the facts.

The Schenectady Trust Company is one of the largest creditors of Hudson River Electric Power Company, having provable claims to the amount of some \$6,000, and alleges that it had no knowledge of the filing of the petition in bankruptcy, or of the adjudication made November 20, 1908, until November 24, 1908. It moved promptly to vacate the adjudication, alleging, in brief, that said alleged bankrupt is a public service corporation organized under the transportation law of the state of New York, and is engaged principally in transporting and transmitting electric current for the purposes of light, heat, and power; that the petition filed against it is defective and insufficient, and does not disclose such fact, etc. It alleges that such corporation is not subject to be adjudicated a bankrupt, and asks to have the adjudication vacated and to be allowed to come in and defend.

In substance and effect, on the same or similar allegations raising the same questions, such trust company, having the same standing, asks the same relief in the case of the Hudson River Electric Company, organized under said transportation law, and engaged principally in purchasing, transporting, and selling electric current. Ignorance of the bankruptcy proceedings, etc., as above stated, is also alleged.

The Schenectady Trust Company is a large creditor of the Hudson River Power Transmission Company, and asks to have the adjudication in that case, made on the same day, vacated and set aside, and be allowed to come in and defend on the ground that the petition filed did not show that the alleged bankrupt corporation was engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, etc., and that the said alleged bankrupt corporation is in fact a public service corporation engaged principally in the occupation of transporting and transmitting electric current for the purposes of light, heat, and power, and is not engaged in either of the pursuits before mentioned, and is not subject to the provisions of the bankruptcy act. The said trust company alleges that it was ignorant of the bankruptcy proceedings until four days after the ad-

judication. It thereupon moved promptly to vacate the adjudication. In this case the receivers join in the application to vacate, and ask to defend, and allege ignorance of the main and pertinent facts which would justify a defense and allege that, having made an investigation, they have ascertained that the petitioning creditors in the bankruptcy proceeding against the Hudson River Power Transmission Company are not creditors of said corporation, and that the petition does not set forth that the alleged bankrupt is a corporation, or what, if any, business it is engaged in, or in fact show that it is one of the corporations that comes under the provisions of the bankrupt law, etc.

In the matter of the Saratoga Gas, Electric Light & Power Company, the Schenectady Trust Company alleges that it is a creditor of such corporation having a provable claim to the amount of \$2,750, and that in the petition filed against said corporation there was no allegation to the effect that it was engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, or any one or more of said occupations, and alleges that in fact the said corporation is a public service corporation engaged principally in the occupation of lighting the streets and public and private buildings of the village of Saratoga Springs, N. Y., by means of gas and electricity, and is not engaged principally in either of the occupations or businesses which would bring it within the provisions of the bankrupt act. The said trust company says that the adjudication in this case was made November 20, 1908, and that it had no knowledge of the bankruptcy proceedings until November 24th. It thereupon moved promptly to vacate the adjudication. The certificate of incorporation of the Saratoga Gas, Electric Light & Power Company states that the objects of the corporation are to be the manufacture and supply of gas for lighting the streets, avenues, public parks, and other places, and the public and private buildings of the village and town of Saratoga Springs, and the manufacture and use of electricity for producing light, heat, and power for the same purposes.

In this case the receivers move also to vacate the adjudication, and allege that the petitioning creditors are not creditors of the alleged bankrupt, and also raise the same questions presented by the Schenectady Trust Company. They allege that they have moved promptly on discovering the facts. It also appears that the principal business of this company is the generation and supply of electricity.

In the matter of the Empire State Power Company, the same questions, with others, are raised, and the receivers ask to have the adjudication in that case vacated and set aside, so that an answer or demurrer may be interposed, and the liability of the company to be adjudicated a bankrupt determined upon a showing of the actual facts. The Empire State Power Company is a public service corporation organized under the transportation corporation law of the state of New York, and is engaged principally in generating and transmitting electricity.

The Madison County Gas & Electric Company is also a public service corporation, and was organized under the said transportation corporation law, and is engaged principally, it is alleged and as the proof shows, in generating and furnishing electricity for the purposes

of light and heat. It is alleged that this corporation is not subject to be adjudicated a bankrupt under the bankruptcy law of the United States.

It is not necessary at this time to decide that these corporations or any of them are not subject to be adjudicated bankrupts respectively under the provisions of the national bankruptcy law. Whether a corporation engaged principally in the manufacture and sale of gas for furnishing light and heat is engaged in manufacturing or in a mercantile pursuit, may be questioned. Whether a corporation engaged principally in generating electricity, and selling it to furnish light, heat, and power, may well be questioned. The corporations engaged principally in transmitting or transporting electricity would not seem to be within section 4 of the act, and can it be said that a corporation engaged principally in purchasing, transmitting, and selling electricity is engaged in trading or in mercantile pursuits within the meaning of the section. These questions are here involved, and if the objections are well taken this court has no jurisdiction to adjudicate these corporations bankrupts, or either of them a bankrupt. If the petitioning creditors are not creditors of the corporation against which they have filed a petition, that fact should be made to appear.

In each of the cases there has been due diligence shown; no laches appears. The moving parties have proceeded promptly. No injury can result to any interest in setting aside these adjudications taken by default, and permitting interested parties to promptly file answers or demurrers as they may be advised. I have no doubt that the receivers of these corporations, appointed by the Circuit Court of the United States, and now in the possession of all these properties and representing the interests of all the creditors, are competent parties to move herein, and ask that these adjudications be vacated. They have been appointed by the Circuit Court to represent the creditors and care for their interests. I think it their right and duty to interpose in these proceedings and prevent adjudications in bankruptcy proceedings in case the corporation they represent is not subject to the provisions of the bankruptcy act. Haste in these proceedings is not demanded by the circumstances. The property is now in the hands of the Circuit Court, and is being protected and cared for by it. There is no danger of waste or neglect. So far as possible, these companies should be kept together and managed as one whole, for, in truth, while some are producing gas and generating electricity, they are furnishing it to others to transmit, and these in turn sell it to cities, villages, and individuals for the purposes of furnishing light and heat. If it shall be determined that any one of these corporations is subject to the bankruptcy law, and that proceedings in the bankruptcy court take precedence to and supersede those now pending in the Circuit Court, the bankruptcy court will take jurisdiction and proceed to administer the affairs and property of that corporation under the provisions of the act. These preliminary questions should be settled. It would be unfortunate indeed to allow these adjudications to stand and have it demonstrated at a later period that the bankruptcy court was without jurisdiction in the premises. The court in bankruptcy has jurisdiction to adjudicate as a bankrupt a corporation engaged principally

in manufacturing, trading, printing, publishing, mining, or in mercantile pursuits, but no other. As was said by the Circuit Court of Appeals in the Matter of the New York Tunnel Company (decided December 15, 1908), 166 Fed. 284:

"If the petition were against a railroad company there would be on the face of the record such a jurisdictional defect as would make an adjudication void."

So here, if the petition is against a corporation which is not engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, when that fact appears in the course of the proceedings, there will be such a jurisdictional defect on the face of the record as to make the adjudication and all proceedings under it void. In *re New Eng. Breeders' Club* (D. C.) 165 Fed. 517.

There will be an order in each of the above-entitled matters vacating and setting aside the adjudication heretofore made, and permitting any creditor who desires, and the receivers if they are so advised, to interpose an answer or a demurrer.

The order will also provide that the petitioning creditors, if so advised, may amend within 10 days after being served with a copy of the order vacating the adjudication. Answers or demurrers to be filed within thirty days after entry of the order vacating and setting aside the adjudication.

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UNITED STATES v. PALAN et al.

(Circuit Court, S. D. New York. February 18, 1909.)

CRIMINAL LAW (§ 200\*)—DEFENSES—CONVICTION UNDER STATE LAW AS DEFENSE TO FEDERAL PROSECUTION.

The conviction and punishment of a defendant for violation of a state law is not technically a bar to his conviction and punishment under a federal law for the same act; but, in the absence of extraordinary circumstances, where the offenses are substantially the same, such double punishment should not be inflicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 406; Dec. Dig. § 200.\*]

Henry L. Stimson, U. S. Atty.  
Isadore L. Pascal, for defendants.

HOLT, District Judge. This is a motion in arrest of judgment. Defendants have been indicted and convicted of a violation of section 3 of the immigration act of 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 899 [U. S. Comp. St. Supp. 1907, p. 392]). The material portion of that section is as follows:

"That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, \* \* \* or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars."

The indictment contained four counts. The first count charged the defendants with importing into the United States a certain alien woman for the purpose of prostitution. The second count charged the defendants with keeping and harboring such woman in a certain house in the city of New York for the purpose of prostitution within three years after she entered the United States. The third count charged that the defendants imported such woman for an immoral purpose, to wit, concubinage. The fourth count charged that they kept and harbored her in said house for such immoral purpose. The jury found the defendants guilty under the second count only. The verdict, therefore, establishes that the defendants kept and harbored such woman in a certain house for the purpose of prostitution within three years after she entered the United States.

The defendants proved on the trial that they were arrested while living at such house, and while keeping there such alien woman, and were charged before the Court of Special Sessions of New York with the offense of keeping a disorderly house. The defendant Esther Palan pleaded guilty, and was sentenced to one month's imprisonment. The defendant Samuel Palan pleaded not guilty, was tried, convicted, and sentenced to six months' imprisonment. The defendants served their respective terms. The defendants' counsel, on the trial herein, moved to direct the jury to acquit on the counts for keeping and harboring, on the ground that they had already been convicted and punished for that offense in the state court. I denied the motion at the trial, stating, however, that if the jury convicted the defendants of keeping and harboring I would take the question under consideration on a motion in arrest of judgment. Such motion has now been made.

It is well settled that every citizen of the United States is a citizen of two sovereign governments, the state in which he lives and the United States, and that certain acts may constitute an offense under the laws of each government. *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213; *U. S. v. Marigold*, 9 How. 569, 13 L. Ed. 257; *Moore v. People*, 14 How. 13, 14 L. Ed. 306; *Grafton v. U. S.*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084. Most of the cases cited are cases in which the question has arisen upon the pleadings. I am not aware of any instance in which a person who has been convicted and has undergone the punishment imposed in a state court has been subjected to another punishment upon conviction in a federal court for the same act. But it would seem, on principle, that if the prosecution in one court is not a bar to a prosecution in the other the punishment inflicted in one court is not technically a bar to the infliction of another punishment by the other court. I think, therefore, that the fact that these defendants have served a term of imprisonment under a judgment of the state court for substantially the same offense of which they have been convicted in this court is not technically a bar to their being sentenced to further imprisonment upon a conviction in this court. But, in the absence of extraordinary circumstances, I think no such double punishment should be inflicted. To punish a man twice for the same offense

shocks the sense of justice. I shall therefore suspend sentence in this case.

I do this the more readily because it seems to me that the constitutionality of the portion of the act of Congress under which this conviction has been obtained is doubtful. I have no doubt of the power of Congress to make it a crime for any person in this country to import into it an alien woman for an immoral purpose; but the provision under which the conviction has been had in this case makes it a crime for any person to keep or harbor in any place for any immoral purpose any alien woman within three years after she shall have entered the United States. The statute makes no distinction between alien women of previous good character and those of bad character. They may have been of good character before coming to this country, so that there was no legal impediment to their entrance upon their arrival, and may have continued to be such for nearly three years thereafter. It is even immaterial whether the man knows that such a woman is an alien. By the provision of this law, if any man, a citizen of this country, forms illicit relations with an alien woman of previous good character, say two years after her entrance into this country, he is liable to be punished by imprisonment in the state prison for five years, and to be fined \$5,000. Obviously, such an offense could not be punished by Congress if the woman were not an alien. It would be a matter exclusively for state legislation. The simple question therefore is: Does the fact of the alienage of a woman enable Congress to pass a law punishing a man criminally for entering into illicit relations with her. I doubt it. As the point has not been raised or argued in this case, I have formed and express no definite opinion on the subject; but, if I had not concluded, upon the grounds already stated, to suspend sentence in this case, I should have felt it my duty to give the question of the constitutionality of the provision of the act under which this conviction has been had careful consideration before sentencing the defendants.

Sentence is suspended in this case, and the defendants released from further detention.

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#### A. KASTOR & BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. February 10, 1909.)

No. 5,182.

CUSTOMS DUTIES (§ 26\*)—CLASSIFICATION—ODD-SHAPED KNIVES—"PEN-KNIVES"—"TOYS."

The real test of whether an article is a toy is its use by children as a plaything; and diminutive penknives, with odd-shaped handles, which, though they cannot be effectively used for most of the purposes for which an ordinary pocketknife is used, are not in fact used as playthings, are less properly classed as "toys," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1674), than

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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as "penknives," under Schedule C, par. 153, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7036, 7818.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below, which affirmed the assessment of duty by the collector of customs at the port of New York, reads as follows:

FISCHER, General Appraiser: The merchandise consists of one-blade penknives about two inches in length, with odd-shaped handles. Some of these resemble in shape a lady's slipper, others a gun, a hat, a fish, etc. Duty was assessed on these articles as penknives, valued at not more than 40 cents per dozen, at the rate of 40 per cent. ad valorem under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 153, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641), and they are claimed to be dutiable properly as toys at the rate of 35 per cent. under paragraph 418 of said act. The articles are diminutive penknives, with peculiar or odd-shaped handles. The cutting blade and other metal parts thereof are made of cheap Bessemer steel. The knives are evidently not toys, but a cheap grade of cutlery. That they are toys is the only claim set up by the importers.

Their contention is apparently based upon the low cost of the article, the peculiar or odd shape of the handle, and the miniature form or size of the knife. The dutiable character of this class of articles is not to be determined by the cheapness of the knife, by its odd or unusual shape, or the fact that it is smaller in size than the ordinary penknife. That must be determined and conditioned by the character and the use of the said articles. The testimony is far from convincing on the question as to whether they are used as toys, and from an examination of the samples we must take notice that knives of this kind are certainly not of the character in general use as playthings. As to size, the board held that neither miniature opera glasses nor miniature penknives were to be regarded as toys. G. A. 5,833 (T. D. 25,734); G. A. 6,264 (T. D. 26,996). As to odd shape, the board held that automatic pencils in the form of a gun were not toys. G. A. 6,020 (T. D. 26,306). As far as the cost of the articles might affect their classification, the board held in the matter of metal nippes that no matter how trifling the cost might be the articles were not on that ground alone to be considered as toys. G. A. 6,638 (T. D. 28,296).

We are of the opinion that these knives are not commonly in use as playthings for children, and we hold that they are not toys. If they are not penknives, as classified, they would then have to be considered as manufactures of metal under paragraph 193, and so dutiable at the rate of 45 per cent. ad valorem, a rate higher than that complained of. We regard the articles as knives, and as covered by paragraph 153, and hold that they are so dutiable.

The protests are overruled, and the decision of the collector in each case is affirmed.

B. A. Levett, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

HOLT, District Judge. It is obvious that the instrument in question is not one which can be effectively used for most of the purposes for which an ordinary pocket-knife is used. Still no one would deny that it is a knife. I think few people would term it a toy. The evidence does not satisfy me that it is commercially known as a toy, or is in fact used by children as a plaything, which is the real test of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

what is a toy. My opinion is that it would be more proper to classify it as a manufacture of metal than as a knife or a toy, in which case, as suggested in the General Appraisers' decision, the duty would be still higher. But the only question on this appeal is whether it should be assessed as a toy, instead of as a knife, and in my opinion its assessment as a knife is more nearly correct than its assessment as a toy.

The decision of the Board of General Appraisers is therefore affirmed.

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In re KEARNEY.

(District Court, E. D. Pennsylvania. February 19, 1909.)

No. 3,139.

**BANKRUPTCY (§ 164\*)—VOIDABLE PREFERENCE—PAYMENT BY DEBTOR.**

A payment made by a bankrupt to his brother, two days before the bankruptcy and while insolvent, in repayment of a loan, constituted a voidable preference, although the loan was made for a specific purpose and with the understanding that the money should be returned if such purpose was not carried out, as it was not, where, so far as appears, the money was not kept in a separate fund, or where it could be traced, but was used generally in the bankrupt's business, and where the creditor had reasonable cause to believe that he was insolvent when the repayment was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.\*]

In Bankruptcy. On certificate of referee.

The following is the report of the referee (Richard S. Hunter, Esq.):

"John A. Kearney, a brother of the bankrupt, lent him \$200 three weeks before his bankruptcy. Two days before his bankruptcy the bankrupt gave his brother a check for \$233.40, being the amount of the loan, together with a balance of general indebtedness of \$33.40. This latter sum is admitted to be due to the trustee in bankruptcy, but John A. Kearney claims to retain the \$200 as a loan made for a specific purpose, with an agreement to return the same should that purpose be not fulfilled, and also because the insolvency of James Kearney was not known to his brother at the time of repayment to him.

"The facts in the case are as follows: James Kearney was in the retail liquor business at Thirtieth and Ludlow streets, Philadelphia, having bought the license, bar fixtures, and furniture in September, 1907, and given in part payment of the same a judgment note for \$8,000. In the early part of the year 1908 an order was made upon the bankrupt for the support of his wife, and judgment was entered against him on the note above mentioned for \$8,400. Soon afterwards, during March and April, 1908, the bankrupt obtained small loans from his brother to an aggregate amount of \$45 or \$50. The bankrupt had endeavored for some months before his bankruptcy to dispose of his license and business. He could get no advance from the brewery company which owned the real estate, but one of his creditors suggested that, if he could raise \$500, the creditor might put up the balance of the \$1,100 license fee, which would have to be paid on June 1, 1908. The bankrupt stated this to his brother, and his brother lent him \$200 as a part of the \$500, with the agreement that if, for any reason, he did not obtain the license, the \$200 was to be refunded. The remainder of the money was not raised. On May 25, 1908, the bankrupt told his brother that he saw no way of getting through and that he would have to let the place go. John A. Kearney said, 'How about my money?' The bankrupt at first refused to give it to him, but afterwards gave

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

him a check for \$233.40, which was all that he had in bank. On May 27th, two days afterwards, the voluntary petition was filed and an adjudication was entered. The schedules filed showed indebtedness by the bankrupt of \$54 for wages, \$200 for rent, and \$9,728.72 to general creditors, including the \$8,000 principal of the judgment of Mrs. Wintersteen. The assets of the bankrupt are valued at \$75.

"It is clear from the above statement that James Kearney was insolvent at the time when he gave the check to his brother, and that the effect of that payment was to enable John A. Kearney to obtain a larger percentage of his debt than other general creditors. The claimant alleges that he did not know that his brother was insolvent; that his brother never confessed insolvency to him, and never told him of Mrs. Wintersteen's judgment. The question, however, before the referee, is whether the circumstances known to the claimant were such as to put him upon inquiry. James Kearney told his brother he did not know what was going to become of the place; that he was going to let it go. John A. Kearney knew that his brother was unable to raise the \$1,100 necessary to renew his license, and that he must lose the place on the 1st of June. He knew that he was in trouble about his wife, and had lent him several sums on that account already. He was undoubtedly put upon inquiry as to his brother's financial condition, and the slightest examination into it would have revealed the existence of the Wintersteen judgment, and of the current indebtedness afterwards set forth in the schedules.

"It is argued on behalf of the claimant that the \$200 was in the nature of a trust fund, and was not an ordinary indebtedness; but the fund was not earmarked and apparently not deposited in bank. The last deposit made in the bankrupt's account prior to the adjudication was on April 28, 1908, and the \$200 was not lent until May 4th, or 5th. It appears to have been used to pay current expenses.

"The referee orders John A. Kearney to repay to the trustee in bankruptcy the sum of \$233.40, paid by the bankrupt to him on May 25, 1908."

James B. Given, for claimant.

Charles B. Harding, for trustee.

J. B. McPHERSON, District Judge. Upon the foregoing facts, it is clear, I think, that the payment on May 25th to the bankrupt's brother was preferential. Even if it was intended, at the time when the loan was made, that the money should be used for the specific purpose of paying for the license, and, if not so used, that it should be returned, the testimony seems to show plainly that this intention was not carried out, but that the bankrupt used the money for some other purpose. No effort was made on his behalf to prove what he had done with it. He was not even asked the obvious question whether the deposit of \$200 that appears in his bank book under date of April 28th was the money that he had received from his brother; and, as he must have known what became of it, his failure to say anything upon the subject is probably significant. Since, therefore, the money was not traced into a particular fund or deposit, or earmarked in any other way, the inevitable inference is that the check of May 25th was drawn against the general funds of the bankrupt, and was intended to prefer the payee. Except that the burden of proof was in the first instance on the trustee to prove the statutory elements of a preferential payment, the situation is essentially such as was presented in *Plow Co. v. McDavid*, 14 Am. Bankr. Rep. 653, 137 Fed. 802, 70 C. C. A. 422. See, also, *Hosmer v. Jewett*, Fed. Cas. No. 6,713; *Re Richard*, 4 Am. Bankr. Rep. 700; *Loveland* (3d Ed.) § 173; *Collier* (6th Ed.) p. 594; *Brandenburg* (3d Ed.) § 1187. After the trustee had established a pri-

ma facie case of preference, it then became the duty of the claimant to prove that the loan was impressed with a trust, and that the money could be followed, either with precision, or at least into a mass from which it might be extracted with reasonable certainty.

The order of the referee is affirmed.

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PUNDT v. PENDLETON, Jailer.

(District Court, N. D. Georgia, N. W. D. February 11, 1909.)

1. UNITED STATES (§ 3\*)—AUTHORITY OVER PROPERTY ACQUIRED WITHIN STATES—MILITARY POST.

The land on which Ft. Oglethorpe is located in Georgia, being a part of that acquired by the United States for a National Military Park with the consent of the State Legislature, which ceded jurisdiction of the lands and roads therein, said fort being used as a military post, is within the provision of the Constitution of the United States, art. 1, § 8, giving exclusive jurisdiction over forts, etc., to Congress, and neither the state nor other local authorities have power to interfere with any instrumentalities necessary to the proper use of such location as a military post.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 3; Dec. Dig. § 3.\*]

2. ARMY AND NAVY (§ 27\*)—TEAMSTERS IN QUARTERMASTER'S DEPARTMENT—LIABILITY TO WORK ROADS UNDER STATE LAW.

A teamster in the permanent employment of the Quartermaster's Department of the United States army, stationed at the military post of Ft. Oglethorpe in Georgia, and under articles 1 and 730 of the army regulations required to obey strictly and execute promptly the orders of his superiors, cannot be required by the local officers of the state to appear and work on the roads outside of the fort and reservation, and his detention in jail for a failure to perform such road work is a violation of his rights under the Constitution and laws of the United States.

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 27.\*]

3. JUDGMENT (§ 828\*)—CONCLUSIVENESS OF ADJUDICATION—DISMISSAL.

A judgment of a state court dismissing a writ of certiorari to review a sentence of imprisonment for want of notice, and not on the merits, is not a bar to a subsequent proceeding by the petitioners for release on a writ of habeas corpus.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.\*]

4. HABEAS CORPUS (§ 45\*)—FEDERAL COURTS—STATE PRISONERS—DISCRETION TO DISCHARGE.

A federal court will discharge from imprisonment by a state, on a writ of habeas corpus, a teamster in the employment of the Quartermaster's Department of the army, where such imprisonment is in violation of the Constitution and laws of the United States and prevents the performance of the duties of his employment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38-45; Dec. Dig. § 45;\* Courts, Cent. Dig. §§ 1376-1385.\*]

Habeas Corpus.

John W. Henley, for complainant.

William E. Mann, for defendant.

NEWMAN, District Judge. The matter for determination here arises on a petition for writ of habeas corpus issued on behalf of the petitioner, W. A. Pundt, the answer of the jailer of Catoosa county, to whom the writ was directed, and agreed statement of facts, together with certain documentary evidence. The statement of facts, which will show clearly the question raised, is as follows:

"Agreement.

"It is agreed by and between John W. Henley, Assistant United States Attorney, representing the petitioners, and William E. Mann, attorney at law, representing the respondent in the above-stated case, that the following evidence and facts be submitted to the court for determination of said cases, and that the same constitute the material evidence in said cases, as follows:

"(1) That each of said petitioners has continuously resided at Ft. Oglethorpe, on the premises known as 'Fort Oglethorpe Military Post,' as follows: James Price more than twelve months; James L. Kennedy about three years; G. K. Peavey about three years; D. A. Mowery since 1906; W. A. Pundt three years. During all this time each of them has been employed as teamster in the Quartermaster's Department of the United States military service at Ft. Oglethorpe, and has been domiciled in a building of the government at said fort, which building is a part of the fort. That on or about the 2d day of December, 1907, each of said petitioners was warned by the road overseer to meet him at Cloud Springs Church on the 4th day of December, 1907, to work the public road; that said road is situated outside of said military post, and outside of the Chickamauga and Chattanooga National Park, within the road district wherein said road commissioners resided. That said teamsters, under the rules and regulations of the Quartermaster's Department and the Army Regulations, are required to obey strictly and execute promptly the orders of their superiors as required by Army Regulations 1 and 730; that they are subject to the order of the Quartermaster's Department at said post, and their duties are necessary and important in said department. That on account of their duties to the government they did not obey said summons and did not work the public roads. That on account of said default the road commissioners of Catoosa county caused to be served on D. A. Mowery, W. A. Pundt, George L. Kennedy, and G. K. Peavey notice to appear before said road commissioners on the 28th day of December, 1907, to answer said default. That no notice was served on James Price, except by posting notice as required by section 546, Code Ga. 1895, which notice was posted in compliance with said section. That the said James Price did not appear for trial under said notice, either in person or by attorney, and was not present when the road commissioners adjudged him to be in default and made an order committing him to Catoosa county jail for thirty days in default of the payment of the sum of \$12 adjudged by them against him. The other petitioners in this case did appear before said commissioners on the 28th day of December, 1907, and testified in their own behalf. That said road commissioners on the 28th day of December, 1907, passed an order and judgment in each of said cases requiring each of them to pay a fine of \$12 and all costs of the proceeding, to be collected by execution, or in default that each of them be committed to the common jail of said county for the term of thirty days. That on the same day the said road commissioners passed an order in each of said cases to the effect that, each of said petitioners refusing to pay the above-adjudged penalty or judgment, it is the order of the road commissioners' court of the 1096th district that he (each of the petitioners in this case) be committed to the common jail of said Catoosa county for the term of thirty days, there to be received and safely kept by the jailer for said term; that on the same day the said road commissioners passed a further order with reference to each of these petitioners, to the effect that, he having appeared before us as a road defaulter, after hearing the evidence, it is ordered that he be committed to the common jail of said county for a term of thirty days, and be safely kept by the jailer for said term; that on the same day the following order was passed with reference to each of said petitioners, to the effect that he

(each of the said petitioners) has been committed to the common jail of said county as a road defaulter by us for a term of thirty days, may be discharged from prison by paying the penalty adjudged by us for four days at \$12, also the further sum of \$1.75, costs of this suit.

"(2) It is further agreed that petitioners in this case applied for and obtained the sanction of the writ of certiorari, which came on for hearing before Judge Fite at Dalton on 12th day of October, 1908, and that, after argument on the motion to dismiss, the court ordered and adjudged that the certiorari in each of said cases be dismissed upon the ground that no notice had been served upon the opposite party in interest as required by law, and that the judgment of the court below be affirmed, and that each of said petitioners in certiorari and his surety on his bond pay the costs of said proceeding. And further ordered that the execution of the remainder of the sentence of imprisonment imposed by the road commissioners be suspended until the 22d day of October, 1908, and that each of said plaintiffs in certiorari then appear and abide and perform said sentence of imprisonment. That the certiorari in said cases was not heard upon its merits. That each of the petitioners in this case appeared at Ringgold on the 22d day of October, 1908, and entered upon the execution of the sentence of imprisonment rendered by the road commissioners imposing the sentence of imprisonment for a term of thirty days in Catoosa county jail. That they and each of them were so imprisoned and were in the custody of James B. Pendleton, jailer of Catoosa county, at the time their petition for writ of habeas corpus was made in this case, and at the time the writ of habeas corpus was served.

"(3) It is further agreed that the lands on which Ft. Oglethorpe is situated, where petitioners resided at the time they were required to work the road, was acquired by the United States by purchase with the consent of the Legislature of the state of Georgia as expressed in an act of the General Assembly of Georgia as set forth in Georgia Laws 1890-91, vol. 1, p. 200.

"(4) It is further agreed that all the roads on Ft. Oglethorpe Military Reservation, and all the roads on Chickamauga and Chattanooga National Park, and the road from Ringgold to said park, as well as the road from Lafayette to the Tennessee state line, aggregating about one hundred miles, are maintained, worked, and kept up by the United States government. That the roads on Ft. Oglethorpe Military Reservation are worked and kept up by the Quartermaster's Department at said reservation.

"(5) It is further agreed that George L. Kennedy claims to be a resident of the state of Alabama; D. A. Mowery claims his residence in the state of Kentucky; G. K. Peavey claims his residence in Dooley county, Ga.; W. A. Pundt claims to reside in the state of Texas.

"(5a) It is further agreed that the certiorari proceedings in the cases of each of these petitioners against L. R. Williams, C. S. Benton, and A. D. Beaver, district road commissioners of Catoosa county, so far as may be necessary on the investigation of this case, be submitted as a part of the evidence.

"(6) It is further agreed that Ft. Oglethorpe was designated and established in compliance with the laws of the United States.

"(7) That petitioners can resign and quit their employment by the government at their option, except as bound by contract.

"This 5th day of November 1908.

"[Signed] John W. Henley, Asst. U. S. Atty., for Petitioners.

"W. E. Mann, Atty. as of Record."

The statute of the state of Georgia on the subject of road duty provides:

"All male inhabitants of this state between the ages of sixteen and fifty shall be subject to work on the public road."

To this general duty there are certain exceptions not material here.

The petitioner was employed as a teamster in the Quartermaster's Department in the United States army in connection with



the troops of the regular army of the United States stationed at Ft. Oglethorpe. The land on which Ft. Oglethorpe and the buildings appurtenant to it are situated is a part of a tract of land of which jurisdiction was ceded to the United States by an act of the Legislature of Georgia (Laws Ga. 1890-91, vol. 1, p. 200), as follows:

"Be it enacted by the General Assembly of the state of Georgia, that the jurisdiction of this state is hereby ceded to the United States of America over all such lands and roads as are described and referred to in the foregoing preamble to this act, which lie within the territorial limits of this state, for the purpose of a National Park, or so much thereof as the national Congress may deem best; provided, that this cession is upon the express condition that the state of Georgia shall so far retain a concurrent jurisdiction with the United States over said lands and roads as that all civil and criminal process issued under the authority of this state may be executed thereon in like manner, as if this act had not been passed; and upon the further express conditions, that the state shall retain its civil and criminal jurisdiction over persons and citizens in said ceded territory as over other persons and citizens in the state, and the property of said citizens and residents thereon, except land and such other property as the general government may desire for its use, and that the property belonging to persons residing within said ceded territory shall be liable to state and county taxes, the same as if they resided elsewhere, and that citizens of this state in said ceded territory shall retain all rights of state suffrage and citizenship; provided further, that nothing herein contained shall interfere with the jurisdiction of the United States over any matter or subjects set out in the act of Congress establishing said National Park, approved August 19, 1890, or with any laws, rules or regulations that Congress may hereafter adopt for the preservation or protection of its property and rights in said ceded territory, and the proper maintenance and good order therein; provided further, that this cession shall not take effect until the United States shall have acquired title to said lands."

This act followed Act Cong. Aug. 19, 1890, c. 806, 26 Stat. 333, an act by the language of the preamble to establish a National Military Park at the battlefield of Chickamauga.

It appears that the particular part of the tract of land on which Ft. Oglethorpe is located, although within the boundaries set out in the preamble of the act of the Legislature just referred to, was for some reason not acquired at the time that a large portion of the land for the park was obtained by purchase and by condemnation proceedings, but was acquired subsequently, by order of the Secretary of War, and through the War Department; and upon this part of the land, apparently, the military reservation known as "Ft. Oglethorpe" was designated by the War Department by two orders issued May 6, 1906, and November 3, 1906, respectively. This land comprising the Ft. Oglethorpe reservation is partly in Catoosa county, and some of this was presumably before the cession a part of the 1906 militia district, the district in which controversy arose, and in which the road commissioners acted.

Jurisdiction is ceded within the park not only of the lands but of the roads, and these roads are kept up by the United States. The roads which the petitioner was summoned to work are outside of the park and the military reservation. The Constitution of the United States, art. 1, § 8, provides:

"The Congress shall have power \* \* \* to exercise exclusive jurisdiction in all cases whatsoever \* \* \* over all places purchased by the consent

of the Legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

This clause of the Constitution is fully discussed in the case of *Ft. Leavenworth Railroad Company v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264, in the opinion by Mr. Justice Field. It would seem from what is there stated, and the authorities cited, including the opinions of Attorneys General, that, where land is acquired by the consent of the Legislature of the state "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," the jurisdiction of the United States over the ceded territory would be exclusive, but where acquired in any other way the rule applicable would be this:

"Where, therefore, lands are acquired in any other way by the United States, within the limits of a state than by purchase with her consent, they will hold the lands subject to this qualification: That if upon them forts, arsenals, or other public buildings are erected for the use of the general government, such buildings, with their appurtenances as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers.

"But when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits."

As heretofore stated, the land on which Ft. Oglethorpe is located is within the limits of the tracts of land acquired by the United States by the consent of the Legislature of the state. The purpose for which these lands were acquired, as named in the cession, was for a "National Park." The purpose named in the act of Congress was a "National Military Park." The act of Congress was in the mind of the Legislature of the state, as shown by the reference to it in the caption of the act. So it seems that little question could exist that to use this land for a military post is in line with the purpose of the cession, even testing it by the language used in the act of the Legislature, and more so when considered in connection with the act of Congress. It is certainly not in any way antagonistic to the purpose contemplated. It is perfectly clear that, the government having decided it was necessary and proper to establish a military post there, and having established such post by order of the War Department, neither the state, nor any county of the state, would have the right to interfere with any instrumentalities necessary to the proper use of this location as a military post, and to render that use effective and complete.

This would be true even if the lands had been acquired within the state, without any consent whatever on the part of the Legislature of the state. Taking into consideration, however, the act of the Legislature, passed in view of and to effectuate the act of Congress, I do not think there is any material difference, for present purposes at least, between the situation here and what it would be if the act of

the Legislature had been in the language of the constitutional provision as to the establishment of forts, arsenals, etc.

The original intention in establishing the Chickamauga and Chattanooga National Park was that it should embrace the battlefield of Chickamauga, or so much of it as could reasonably be obtained, and the purpose of establishing the park was that it should commemorate one of the great conflicts of the Civil War, the Battle of Chickamauga. It is made the duty of the Secretary of War, through commissioners to be appointed, to repair the roads within the park, and to make such new roads as may be necessary; also to provide approaches to the park; to erect monuments as Congress might make the necessary appropriation; to ascertain and mark lines of battle; to erect tablets, etc. The use, therefore, of a part of the ceded land for a military post, while not coming strictly within the act of cession, is at least not antagonistic thereto. After the establishment of the park, a certain number of troops there would be proper, and might be necessary, to protect the property and to carry out the purpose of the cession. It is certainly true that the county of Catoosa would have no right to interfere in any way with the troops located at Ft. Oglethorpe, or with anything necessary and proper to be used in connection with the fort as a military post, and the troops located there.

It is not claimed, and will not be claimed, of course, that the officers and enlisted men of the army stationed at the fort are subject to road duty in Catoosa county. Are teamsters employed and regularly used by the Quartermaster's Department at the fort subject to such road duty?

Section 1133, Rev. St. U. S. (U. S. Comp. St. 1901, p. 823), provides:

"It shall be the duty of the officers of the Quartermaster's Department, under the direction of the Secretary of War to purchase and distribute to the army all military stores and supplies, requisite for its use, which other corps are not directed by law to provide; to furnish means of transportation for the army, its military stores and supplies, and to provide for and pay all incidental expenses of the military service which other corps are not directed to provide for and pay."

Army Regulation 1009 is as follows:

"The Quartermaster's Department is charged with the duty of providing means of transportation of every character either under contract or in kind, which may be needed in the movement of troops and material of war. It furnishes all public animals employed in the service of the army, the forage consumed by them, wagons and all articles necessary for their use, and the horse equipments for the Quartermaster's Department. It furnishes clothing, camp and garrison equipment, barracks, store houses, and other buildings; constructs and repairs roads, railways, bridges, builds and charts ships, boats, docks and wharves needed for military purposes, and attends to all matters connected with military operations which are not expressly assigned to some other bureau of the War Department."

By Act Cong. March 1, 1875, c. 115, 18 Stat. 337 (U. S. Comp. St. 1901, p. 973), the President is authorized to make and publish regulations for the government of the army, in accordance with existing laws.

By section 2 of Act June 23, 1879, c. 35, 21 Stat. 34 (U. S. Comp. St. 1901, p. 973), the Secretary of War is authorized and directed

to cause all the regulations of the army and general orders now in force to be codified and published. Pursuant to these acts of Congress, army regulations have been made and published. Among such regulations are the following:

Army Regulation 1:

"All persons in the military service are required to obey strictly and to execute promptly the lawful orders of their superiors."

Army Regulation 730 is as follows:

"In the Staff Corps and departments the employment of civilians will be regulated by the respective chiefs of bureaus under the direction of the Secretary of War. Those whose services are engaged with the intention or probability of retaining them for more than three months are classified as permanent employes. Their appointment, dismissal, promotion or reduction will be made under the supervision of the respective chiefs of bureaus, by the officers employing them, except as controlled by statute or the civil-service rules; but in selections for such employment preferences will be given, as far as practicable, to applicants who have served meritoriously as enlisted men in the army; and the appointments, and promotions of all permanent employes, except mechanics, laborers, teamsters, and others of similar or kindred occupations, will be submitted for the approval or confirmation of the Secretary of War."

Section 1342, Rev. St. (Article of War 63 [U. S. Comp. St. p. 957]), provides:

"All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are subject to orders, according to the rules and discipline of war."

The petitioner W. A. Pundt is a teamster in the permanent employment of the Quartermaster's Department of the army. It is unnecessary almost to discuss the necessity of teamsters to the military service. A military post could not be properly maintained, if indeed it could be maintained at all, without teamsters. The character of an army teamster's service and his duties are such that it would be impossible for him to perform them properly and be at the call of the road commissioners to work the public roads of Catoosa county outside of the government's property.

Pundt is not an "inhabitant" of the state in the sense in which that term is used in the statutes of Georgia in reference to road duty. He comes from another state, and is in this state and in Catoosa county simply as an employe of the Quartermaster's Department of the army. In the language of the Circuit Court of Appeals for the Sixth Circuit (In re Thomas, 87 Fed. 453, 31 C. C. A. 80):

"Inasmuch as the Legislature \* \* \* had no power to regulate the conduct of this administrative agency of the national government by such a statute as is here in question, it ought to be presumed that the Legislature did not intend it to have such an application, and that the statute should be construed accordingly."

This view of the matter, however, is not controlling with me, because I believe Pundt is exempt from this road duty not only for the reason just mentioned, but because of the fact that he is a necessary instrumentality in that portion of the United States army stationed at Ft. Oglethorpe, and that he is such an important and necessary part

of the military establishment as that the state and the county of Catoosa has no right to call on him to be absent from the fort when such absence would interfere with the proper discharge of his duties as a necessary and important, even if an humble, part of the army of the United States.

The roads within the park, including the Ft. Oglethorpe property, comprise roads of about 100 miles open to the public, and these roads are kept up and maintained by the United States, so that it is not only illegal, and in my judgment in contravention of the laws of the United States, but it is unfair, that any persons actively and regularly connected with the army post should be called upon to perform road duty on the roads of Catoosa county outside of the park.

The necessary conclusion, therefore, is that, on account of the petitioner's position and duties in connection with the Quartermaster's Department of the army at Ft. Oglethorpe, he is not subject to road duty in Catoosa county as claimed by the road commissioners, and that his detention in jail for failure to perform such road duty is in violation of his rights under the Constitution and laws of the United States, such laws including the Articles of War and the Army Regulations, the latter made in pursuance of the statutes of the United States, and therefore, for present purposes, considered as a part of the statutes.

2. As will be seen, from the agreement of facts in this case, a writ of certiorari was applied for from the decision of the road commissioners, and the same was dismissed in the superior court on the ground, as expressed in the order of dismissal, "that no notice has been served on the opposite party in interest, as required by law." Notice of the sanction of a writ of certiorari and the time and place of hearing must be given to the opposite party in interest at least ten days before the sitting of the court to which the same is returnable, and in default of such notice a writ of certiorari will be dismissed. Civ. Code Ga. 1895, § 4644. The notice in this case appears to have been served upon the road commissioners, and, while this fact is not expressed in the order of the superior court, it is evident that this notice was deemed insufficient, and that the road commissioners were not considered "the opposite party in interest." Upon whom this notice should have been served is not apparent from the statutes of the state, so far as my examination goes. Perhaps treating this proceeding as a criminal case or a quasi criminal case in the superior court, after the writ of certiorari was sanctioned, service could have been made on the Solicitor General of the circuit. I do not know whether this would have been held sufficient in a case of this character or not. At all events, there was no hearing upon the merits in the superior court. This being true, it seems it should have no effect here.

In *Hughes v. United States*, 4 Wall. 232-237, 18 L. Ed. 303, in the opinion by Mr. Justice Field, it is said:

"It requires no argument to show that judgments like these are no bar to the present suit. In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and

must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

*Smith v. McNeal*, 109 U. S. 426-430, 3 Sup. Ct. 319, 27 L. Ed. 986; *St. Romes v. Levee, etc., Company*, 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. Ed. 289.

This case must stand, therefore, I think, on the action of the road commissioners in recommitting Pundt to jail for his failure to comply with the order of the road commissioners requiring him to work the public roads. He was in jail under this order of the road commissioners when the writ of habeas corpus was applied for.

3. The foregoing being the situation, should Pundt be discharged from custody by an order made in this proceeding?

Sections of the Revised Statutes of the United States material here are as follows:

"Sec. 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus.

"Sec. 752. The several justices and judges of the said courts within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

"Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States. \* \* \*

U. S. Comp. St. 1901, p. 592.

The statutes then provide the method of applying for the writ, the allowance and direction of the same, the time and character of the return, and the bringing of the body of the party before the judge for a hearing, and for a disposition of the matter.

The Supreme Court has in many cases considered and passed upon the question as to when and in what class of cases the courts shall exercise their discretion in favor of discharging a prisoner while in custody under state authority, when on the hearing of a writ of habeas corpus it is claimed that such detention of the prisoner is in violation of the Constitution or a law of the United States; and when, on the contrary, it should refuse to discharge and allow the case to go through the courts of the state, and from the highest court of the state to the Supreme Court of the United States. The Supreme Court has always held that, unless a case be exceptional, it should be allowed to take the latter course, and the courts of the United States decline to interfere by habeas corpus proceedings. The most important cases on this subject, commencing with *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, are cited in the most recent cases, *In re Lincoln*, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984, and *Urquhart v. Brown*, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760. In *Ex parte Royall*, supra, in the opinion by Mr. Justice Harlan, he stated the rule as to how the discretion of the court should be

exercised in this class of cases. An extract from that opinion is as follows:

"We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption under the commission, or order, or sanction, of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations—in such and like cases of urgency involving the authority and operations of the general government, or the obligations of this country to, or its relation with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority. \* \* \*

"That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

In *Urquhart v. Brown*, *supra*, Mr. Justice Harlan, again speaking for the court on this question, said:

"The exceptional cases in which a federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the state are those of great urgency that require to be promptly disposed of, such, for instance, as cases, involving the authority and operations of the general government, or the obligation of this country to, or its relations with, foreign nations."

The more important cases in which it has been held that a prisoner in state custody should be discharged when his arrest and detention is in violation of the Constitution or a law of the United States are *Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699; and *Boske v. Comingore*, 177 U. S. 459-470, 20 Sup. Ct. 701, 44 L. Ed. 846.

In *Ohio v. Thomas*, *supra*, the case was originally heard by Circuit Judge Taft in *Re Thomas* (C. C.) 82 Fed. 304-311. *Thomas* was

governor of the central branch of the National Home for Disabled Volunteer Soldiers located in Montgomery county, Ohio, the Home being established by authority of an act of Congress. A warrant was issued against Thomas, and he was arrested and brought before a justice of the peace of the state of Ohio, charging him with furnishing and serving to the inmates of the Home as food certain oleo-margarine, in violation of the statutes of the state of Ohio. When brought before the justice of the peace, Thomas declined to plead to the charge, and moved to dismiss the same on the ground that the acts upon which said proceeding was founded were done by him in the discharge of his duty as governor of said Home under the authority of the board of managers in charge of said institution by virtue of the acts of Congress, and by the authority of said acts. Thomas was tried by the justice of the peace, who found him guilty and sentenced him to pay a fine of \$50, or stand committed until the fine was paid. A warrant of commitment was issued against him, and he applied for a writ of habeas corpus. In the opinion, Judge Taft says:

"It is unnecessary, in my view, to consider the question, what is the territorial jurisdiction of the state of Ohio over the land occupied by the National Home at Dayton? Let it be conceded that the case presented upon the petition and the facts shown at the hearing is not different from what it would have been had the Legislature of Ohio never passed any act ceding jurisdiction to the United States over the land acquired for the purpose of a national military home. In such a case, can it be maintained that the Legislature of the state of Ohio may pass an act which shall regulate in any way the manner in which federal governmental functions shall be discharged by the board of managers of the National Home as agents of the national government? It is very clear to me that the question must be answered in the negative. Nor can there be any doubt that the acts of the petitioner complained of, and made the ground for prosecution under the state law, were acts in pursuance of the authority of the national government reposed in it by the Constitution of the United States. By that instrument Congress is given power by taxation to provide for the common defense and general welfare of the United States. It is given power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia, to suppress insurrections and repel invasions, to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, and to make all laws which shall be necessary and proper for carrying into execution these powers."

After quoting an extract from the opinion of Mr. Justice Peckham, in *United States v. Gettysburg Electric Railroad Company*, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576, Judge Taft proceeds:

"The same power that exists to create national parks and to create national cemeteries is exercised in the erection and maintenance of a national home, to care for the defenders of the nation, who, though not killed, were disabled and wounded in the defense. The housing and feeding of such persons are, then, a federal governmental function and duty. When the government of the United States purchases land in a state for the purpose of discharging such a duty, it is not within the power of the State Legislature to interfere with or regulate the mode in which it shall be performed. What it does for this purpose is exactly as much within its complete control as when its quartermaster furnishes food to its soldiers, or when its pension agents distribute money to its pensioners. It is entirely immaterial in what place, within the jurisdiction of the government of the United States, the duty is discharged.



State lines cannot affect or modify the complete control which the federal government and its agents and officers duly authorized have over the manner of discharging it. The jurisdiction of the state government in such a case is excluded, not because of the place where the act is done, but because that which is being done is the business of the United States, and such business is as completely beyond the influence and control of the state government as if it were not done within the territory of the state."

This case, *In re Thomas*, was taken by appeal to the Circuit Court of Appeals of the Sixth Circuit, 87 Fed. 453, 31 C. C. A. 80, which disposed of the case in a per curiam as follows:

"The facts of this case are stated in the opinion of Taft, Circuit Judge, who heard the case in the court below. His opinion is reported in 82 Fed. 304. With respect to the question of law involved, we concur in the reasoning upon which Judge Taft's opinion proceeds (and which we are content to adopt as our own), and in the conclusion which he reached, save that we prefer to rest our approval of the order made by the court below upon the ground that, inasmuch as the Legislature of Ohio had no power to regulate the conduct of this administrative agency of the national government by such a statute as is here in question, it ought to be presumed that the Legislature did not intend it to have such an application, and that the statute should be construed accordingly. The order of the court below is affirmed, with costs."

In the opinion of the Supreme Court by Mr. Justice Peckham (*Ohio v. Thomas*, supra), it is stated:

"Whatever jurisdiction the state may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the Home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the Home, by the board of managers and by Congress. Under such circumstances the police power of the state has no application.

"We mean by this statement to say that federal officers who are discharging their duties in a state, and who are engaged, as this appellee was engaged, in superintending the internal government and management of a federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by federal authority.

"In asserting that this officer under such circumstances is exempt from the state law, the United States are not thereby claiming jurisdiction over this particular piece of land, in opposition to the language of the act of Congress ceding back the jurisdiction the United States received from the state. The government is but claiming that its own officers, when discharging duties under federal authority, pursuant to and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed."

And also this:

"Some of the same authorities also show that this is one of the cases where it is proper to issue a writ of habeas corpus from the federal court, instead of awaiting the slow process of a writ of error from this court to the highest court of the state where a decision could be had. One of the grounds for making such a case as this an exception to the general rule laid down in *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406, and *Baker v. Grice*, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748, consists in the fact that the federal officer proceeded against in the courts of the state may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the federal government might in the meantime be obstructed. This is such a case."

In *Boske v. Comingore*, supra, it appears that Comingore was collector of internal revenue of Kentucky, and in a proceeding in the

state court he declined to produce and file with the court certain books in the office of the collector. Upon his refusal to do this, he was fined and committed for contempt of court. Comingore then applied to the United States District Court for a writ of habeas corpus which was granted, and on the hearing he was discharged. This was affirmed by the Supreme Court of the United States. In the course of the opinion by Mr. Justice Harlan, he said:

"The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the department to which he belonged. The District Court, therefore, did not err in determining the question of the constitutional law raised by the application for a writ of habeas corpus, and rendering final judgment."

In *Minnesota v. Brundage*, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 639, in the opinion by Mr. Justice Harlan, the two cases just discussed are referred to in this way:

"So in *Ohio v. Thomas*, 173 U. S. 276, 284-285, 19 Sup. Ct. 453, 43 L. Ed. 699, which was the case of the arrest of the acting governor of the central branch of the National Home for Disabled Volunteer Soldiers at Dayton, Ohio, upon a charge of violating a law of that state, the action of the Circuit Court of the United States discharging him upon habeas corpus while in custody of the state authorities was upheld upon the ground that the state court had no jurisdiction in the premises, and because the accused, being a federal officer, 'may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the federal government might in the meantime be obstructed.' The exception to the general rule was further illustrated in *Boske v. Comingore*, 177 U. S. 459, 466-467, 20 Sup. Ct. 701, 44 L. Ed. 846, in which the applicant for the writ of habeas corpus was discharged by the Circuit Court of the United States while held by state officers, this court saying: 'The present case was one of urgency, in that the appellee was an officer in the revenue service of the United States whose presence at his post of duty was important to the public interests, and whose detention in prison by the state authorities might have interfered with the regular and orderly course of the business of the department to which he belonged.'"

The case at bar, in my judgment, comes within the rules laid down in these cases. If the prisoner is confined in jail in Catoosa county, it will necessarily interfere materially with the Quartermaster's Department at Ft. Oglethorpe. The importance of this department to the troops is obvious.

In view of the circumstances, I do not think the case should await the slow process and the delay of carrying it through the state courts. It is not at all clear that Pundt has any rights now in the state court. It seems that, if his right to be discharged from custody is ever to be determined, it must be determined and the petitioner have the benefit of it now.

An order will be entered discharging the petitioner, W. A. Pundt, from the custody of James B. Pendleton, jailer of Catoosa county.

There were four other cases before the court, of the same character as that of Pundt: James Price, James L. Kennedy, G. K. Peavey, and D. A. Mowery. Their cases were disposed of by the road commissioners in the same way. In one of them, however, James Price,

it is admitted that no notice was given to appear and work the roads. What is said in this case is applicable in the other cases, and like orders will be made in all, as they were heard together by consent of counsel.

**BALFOUR, GUTHRIE & CO. v. PORTLAND & ASIATIC S. S. CO.**

(District Court, D. Oregon. February 8, 1909.)

No. 4,791.

**1. WAR (§ 19\*)—BLOCKADE—ESTABLISHMENT AND DURATION.**

A proclamation by one of two nations engaged in war declaring a blockade of the enemy's ports does not affect the right of a neutral to enter such ports unless the blockade is made effective in fact.

[Ed. Note.—For other cases, see War, Cent. Dig. § 96; Dec. Dig. § 19.\*]

The neutrality laws, see note to *Hart v. United States*, 28 C. C. A. 622.]

**2. SHIPPING (§ 108\*)—CARRIAGE OF GOODS—CONTRACT OF AFFREIGHTMENT.**

Libelant was a shipper of flour from Portland, Oregon, to Asiatic ports by respondent's line of steamships, the custom being for it to reserve space on a vessel for a certain tonnage, the ports of destination not being designated until the vessel was loaded when bills of lading were issued containing the specific contract including a provision that the carrier should not be liable for loss or damage occasioned "by arrest or restraint of princes, rulers, or people." Following such method of dealing, by a writing made Aug. 1, 1904, space was reserved for libelant for 2,000 tons of flour on a steamship of respondent sailing Aug. 28, on her regular voyage for Japanese and Chinese ports. Russia and Japan had been for some months at war and Russia had issued a proclamation declaring flour contraband of war. Russia had not established any effective blockade of Japanese ports but her war vessels had seized some neutral vessels as prizes, including one owned by respondent, the cargo of which was condemned. Respondent continued to operate its vessels however and both parties knew of such seizure as well as the general war conditions when the reservation of space was made. A day or two later the agreement was canceled by respondent as to shipments to any Japanese ports on the ground of the war conditions. Held that in view of the previous method of dealing between the parties the reservation of space by agreement amounted to a contract by implication to carry flour to any regular port of call of the vessel in Japan which should be designated by libelant at the time of loading, subject to the limitation of liability contained in the usual bills of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 405; Dec. Dig. § 108.\*]

**3. WAR (§ 18\*)—CONTRABAND—FLOUR.**

While flour is not in general contraband of war it may be so if intended for military use by a belligerent or destined for a port of military or naval equipment, and being thus on the border line a proclamation of one of the governments at war declaring it contraband is sufficient to impress it with that character.

[Ed. Note.—For other cases, see War, Cent. Dig. § 91; Dec. Dig. § 18.\*]

**4. WAR (§ 18\*)—RIGHTS OF NEUTRALS—VALIDITY OF CONTRACT TO CARRY CONTRABAND.**

A citizen of a neutral state may lawfully contract to carry contraband of war and his undertaking will be enforced by the courts of the neutral state.

[Ed. Note.—For other cases, see War, Cent. Dig. § 92; Dec. Dig. § 18.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexe.

5. SHIPPING (§ 108\*)—CARRIAGE OF GOODS—CONTRACT OF AFFREIGHTMENT—LIMITATION OF LIABILITY—"ARREST OR RESTRAINT OF PRINCES, RULERS, OR PEOPLE."

A clause exempting a carrier from liability for loss or damage occasioned "by arrest or restraint of princes, rulers, or people" in a contract of affreightment by a neutral to carry contraband of war, made when conditions of war exist and are known to both parties, must be construed as intended to apply only to actual arrest or seizure and confiscation and affords no ground for repudiation of the contract by the carrier because of the danger of seizure.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 405, 408; Dec. Dig. § 108.\*

For other definitions, see Words and Phrases, vol. 1, p. 504.]

In Admiralty.

Williams, Wood & Linthicum, for libelants.

W. W. Cotton and Arthur C. Spencer, for respondent.

WOLVERTON, District Judge. This is a libel for the recovery of damages for the breach of a contract of affreightment, whereby it is alleged the respondent agreed to carry 1,750 tons of flour from Portland, Or., to Japanese ports. The breach consists in the refusal of the respondent to carry the flour as agreed. A dispute arose at the outset whether any contract was ever in fact consummated. This, together with the controversy following, requires a statement of all negotiations had between the parties relative to the subject.

The respondent was, at the time, engaged in navigating a line of steamers for carrying freight from Portland, Or., to Japanese ports, namely, Yokohama, Kobe, and Moji, and to Hong Kong, China. Pursuant to previous communications by telephone between representatives of the libelants and respondent, J. W. Ransom, acting for R. B. Miller, who was the general freight agent of respondent, wrote the libelants, on July 30, 1904, as follows:

"Gentlemen: Referring to conversation with Mr. Jones this date. Kindly confirm reservation of space for your account on the Nicomedia about Aug. 28th for 2,000 tons flour. Will advise you later if reservation can be increased."

To this letter the libelants replied, August 1, 1904:

"Dear Sir: Answering yours of 30th ult., we confirm reservation of 2,000 tons space per s. s. 'Nicomedia' to sail hence 28th inst., and now await to hear what further space you can put at our disposal."

On August 2d the respondent wrote canceling the reservation:

"Gentlemen: Confirming telephone advice. Owing to war conditions in the Orient and Russian Government's declaration of food stuffs as contraband, we have been obliged to cancel all engagements of space for shipments destined Japan ports on the Nicomedia Aug. 28th. Understand that 1,750 tons of your 2,000 ton reservation on this steamer is destined Japan, and cancellation of same will leave your total reservation on the Nicomedia 250 tons for Hong Kong. If you can increase your offerings for this port will be pleased to have you do so."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On August 20, 1904, libelants wrote the respondent, as follows:

"Dear Sir: Referring to engagement made with you for 1,750 tons space on 'Nicomedia' for Japan and your subsequent declination to carry out same, we are advised we have an enforceable contract with you and now call upon you to carry out same, otherwise we will hold you liable for all loss, damage and prejudice that may come to us thereby."

Respondent wrote libelants, August 23d:

"Replying to your letter of August 20th in regard to space on the Nicomedia, I beg to say that on August 2nd, we were compelled to cancel all engagements of space for shipments destined to Japan ports on the Nicomedia, and so informed you on that date."

In libelants' previous negotiations with respondent for space on its vessels, a definite tonnage was reserved, but the ports of destination were not designated until the ship was ready to receive her cargo. Further than this, when the cargo was aboard, a bill of lading, reciting in specific form the contract of affreightment, was issued to respondent. This form of bill of lading contains a stipulation, as follows:

"It being mutually agreed that the carrier shall not be liable for loss or damage occasioned \* \* \* by arrest or restraint of princes, rulers, or people."

There is practically no disagreement in the evidence touching this method of dealing between the parties. As soon as libelants ascertained that they could secure space for shipment, they sold the flour by cable at port of destination, thus obligating themselves to make delivery thereof in due course of the ship's arrival. In pursuance of their usual custom in this respect, they sold the flour in Japan, designed to be shipped by the steamship Nicomedia, immediately upon securing space for such shipment, as per the written memorandum or agreement between the parties above set out.

The respondent was operating its vessels between Portland, Or., and Japan and China, at all times during the negotiations for shipment of the flour, and at all such times, and for some time prior thereto, Russia and Japan were and had been at war. Some time in June or early in July, 1904, Russia issued a proclamation declaring flour contraband of war, which continued in force until after the Nicomedia entered upon her intended voyage. Mr. Schwerin testifies that Russia had at that time also, "practically notified the world of an active blockade of the Japan coast." Further on, however, he says, referring to the seizure of Arabia by Russian gunboats:

"We had previously carried flour while the discussion of these questions was going on, because, according to advices I had from Japan, Russia was not maintaining a blockade according to international law, although she had declared Japan's ports blockaded."

Whatever the historical fact may be touching any proclamation of Russia declaring Japan's ports blockaded, the proofs here adduced do not show that any effective blockade of any port of Japan was ever maintained by that country. The most that can be said under the evidence is that the Russian Vladivostok flying squadron was for a time harassing shipping plying to and from Japanese ports, which squadron

made some seizures of vessels of neutrals as prizes of war. Notably, it is shown that the respondent's steamship *Arabia* was seized by three Russian cruisers on July 22d, 30 miles off Cape Inuboe, and taken to Vladivostok as a prize of war. Her cargo, consisting of flour and car bodies, was alone condemned, however; the ship being released about a month later. The *Calculus*, a steamship of the Blue Funnel Line, out of Seattle, was seized about the same time, presumably by the same squadron. The respondent had definite advices of the *Arabia*'s seizure in Portland about the 25th or 26th of July, and very clearly it had such advices prior to writing the letter of July 30th requesting confirmation of space for account of the *Nicomedia*. It further appears, from Mr. Schwerin's testimony, that the respondent was well advised at the time touching war conditions as they affected shipping to and from Japanese ports. Indeed, he assigns such conditions as a reason why the respondent should not accept further shipments for Japan, and it was through his authority that the alleged contract of affreightment was canceled. The libelants had knowledge of these war conditions also, and knew of the seizure of the *Arabia*. Mr. Burns, the manager of the libelant company, says, relative to entering into the contract, "We were taking the risk of losing our flour." So that both parties entered into whatever contract was the result of their negotiations with full knowledge of the war conditions affecting shipping on the Japanese coast at the time.

It is first insisted by respondent that no contract to carry flour to Japan on the *Nicomedia* was consummated, because the reservation of space by the libelants was general, without specification of any ports of delivery. In view of the previous manner of negotiation between the parties, of reserving space generally, and designating the ports of delivery when the ship was ready to receive cargo, I am of the opinion that there was an undertaking, by implication, to carry so much of the cargo for which space was reserved to the *Nicomedia*'s regular ports of call in Japan as the libelants might specify when she was ready to receive cargo. There was no designation of any port of delivery, but it was very well understood that the ship would sail on her accustomed voyage to the Orient on August 28th; her ports of call being Hong Kong, in China, and Yokohama, Kobe, and Moji, in Japan. And so it was that space was reserved for that voyage. The libelants had been shipping to ports in Japan, as well as to Hong Kong, over this line, so that, by the very reservation of space generally, there remained the right or privilege in the libelants to name in due time the ports of delivery for the cargo. Upon like principle, the conditions contained in the usual bill of lading issued by the respondent before sailing days must be regarded, as the respondent contends, as containing the stipulations of the parties; all negotiations being had in anticipation of the issuance of such a paper and its acceptance by the libelants.

There is contention of counsel that the charter party was dissolved by reason of the alleged Russian blockade of Japanese ports; the contention proceeding upon the well-established rule that it is unlawful for a neutral to enter a blockaded port, for which offense the ship

and cargo is subject to seizure and condemnation as good prize. Indeed, the law is so strict that a neutral vessel cannot approach a blockaded port with intent to enter, or even for the purpose of making inquiries of a blockading vessel, without subjecting itself to seizure. *The Cheshire*, 3 Wall. 231, 18 L. Ed. 175; *The Adula*, 176 U. S. 361, 20 Sup. Ct. 432, 44 L. Ed. 505. This is according to international law, which applies in prize cases. The inhibition cannot help the respondent, however, as it has not been shown that any blockade existed at the time of the negotiations in question or of the sailing of the *Nicomedia*. Under none of the authorities does the blockade have the effect claimed for it, unless it be real and effective in fact. See *The Spartan* (D. C.) 25 Fed. 44. And it has certainly not been proven that any blockade of such character was maintained for any length of time.

The next contention of respondent, strenuously urged, is that the conditions prevailing, namely, the continuance in force of the Russian proclamation declaring flour contraband of war, the presence of the Russian gunboats in the waters off the coast of Japan, and the frequent or occasional seizure of neutral ships and search for contraband, are tantamount to "arrest or restraint of princes," etc., and, therefore, that respondent was warranted under the terms of the contract of affreightment in refusing to carry the flour for which space was reserved. In response to this position, it is urged upon the other side, first, that flour is not contraband of war; and, second, that, the contract having been entered into while the war conditions suggested were prevalent, it became a contract to carry the flour notwithstanding the conditions. This brings up the question whether the contract by a citizen of a neutral to carry contraband of war to citizens of one of the belligerents is void because illegal and contrary to law.

Contraband of war is apparently insusceptible of exact definition as applied to every species of merchandise. For ascertainment of that which may be characterized as contraband, the United States Supreme Court has divided articles of contraband into three classes:

"The first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." *The Peterhoff*, 5 Wall. 28, 58, 18 L. Ed. 564.

The rule is perhaps sufficiently accurate in a general way for practical purposes, but much depends, for the appropriate classification of many articles of commerce, upon the peculiar and attendant circumstances of each particular case. This is true, undoubtedly, of that species of commerce denominated "provisions." Mr. Justice Story says that:

"By the modern law of nations, provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on ac-

count of the particular situation of the war, or on account of their destination." Citing *The Jonge Margaretha*, 1 Rob. Adm. 189.

He then continues:

"If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."

To this rule there is an exception "where the provisions are the growth of the neutral exporting country." *The Commercen*, 1 Wheat. 382, 387, 4 L. Ed. 116.

In the case of *The Jonge Margaretha* (see 2 *Tudor's Leading Cases*, \*847), the exception is supplemented with the further qualification, "and when they are not prepared for immediate use." It is further laid down in that case that:

"Where articles of provisions are going to a commercial port, the presumption is that they are going there for civil use; contra, if they are going to a port of naval military equipment, and especially if there be a hostile armament then preparing there."

Flour may probably be considered as a provision prepared for immediate use; but as to whether it was designed that the product in the present instance should go to a naval or military equipment station, there is no proof except that Japan was in a state of war. Ordinarily, therefore, the presumption would prevail that the flour was going to Japan for civil use, and would not be contraband except that it was declared to be so by one of the belligerents. Perhaps a mere declaration by a belligerent nation that articles of commerce are contraband, when by the rules of international law they are not, would not make them so. But here is a proclamation touching provisions that rest upon the border line, and depend for their real character upon the particular state of the port of their destination, whether engaged in civil pursuits only, or in the equipping of either the army or the navy with war supplies. It would seem that, under such conditions, the proclamation of one of the governments at war would be effective to impress the provisions with the character of contraband. At any rate, I am inclined so to treat the flour concerned here. The pivotal question, therefore, is, Was there an "arrest or restraint of princes" within the meaning and intentment of the charter party?

Had the charter party been entered into prior to the prevalence of any war conditions affecting Japan and her ports of entry, there could be but little question that the respondent could have legitimately declined to carry the flour. The case of *The Styria*, 101 Fed. 728, 41 C. C. A. 639, and again decided on appeal to the Supreme Court, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027, is one which upon the facts, save that the contract was entered into before war conditions arose, bears a strong analogy to the present. The *Styria* was an Austrian steamship, and sailed April 16, 1898, with some cargo, from Trieste via Sicilian ports for New York, reaching Port Empedocle, Sicily, on the 21st. Here she took on board a quantity of sulphur, completing her cargo on the 24th of April. On April 25th Congress declared that war had existed between Spain and this country since April 21st. On the



same date the Queen Regent of Spain announced the existence of war with the United States, and authorized the royal navy to capture and confiscate contraband of war being carried under any flag. The master and managing agents of the ship, knowing that its course would take it within a few miles of the Spanish coast in order to sight light-houses, and having learned from the Italian press that Spanish men-of-war were looking for contraband goods, and that a sulphur ship had been taken, relanded the sulphur, and refused to carry it on the contemplated voyage to New York. The Circuit Court of Appeals, speaking through Lacombe, Circuit Judge, has this to say:

"It seems manifest that, upon the outbreak of war, a voyage with contraband on board to the port of one of the belligerents might fairly be regarded as a risky piece of business. The suggestion made upon the argument that the naval power of Spain was not such as would induce a 'man of ordinary courage, judgment, and experience' to hesitate to proceed is of no weight. We may not attribute to the captain of the *Styria* knowledge gained after the event; and, indeed, this court is not advised of any historical facts which would warrant the conclusion that it was not entirely within the power of Spain during the first few months of the war to arrest and search every vessel westward bound through the Straits of Gibraltar, and picking her way along by the lighthouses on the Spanish coast."

After reciting several clauses of the charter party, among which is "(a) restraints of princes and rulers of people," the court proceeds:

"We find in clause (a) abundant authority for a refusal to carry forward the sulphur while such a condition of affairs existed as that already described as being generally known to exist when the discharge began on April 27th. There is no logical difference between a restraint of princes and rulers exercised by a cruiser with power to visit, search, and seize, lying two leagues off Cape Empedocle, and that exercised by a half-dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances the owner of contraband cargo (loaded, as this was, before war broke out) could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. \* \* \* That a well-founded apprehension of capture by the cruisers of a belligerent is the equivalent of an actual restraint is the doctrine of the later authorities."

The Supreme Court sustains this view of the Court of Appeals, and upholds the action of the master in relanding the sulphur; the court declaring that by so doing he "had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so."

In the course of the opinion in the Court of Appeals, the court takes occasion to remark that:

"The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered."

The case of *Nobel's Explosives Co. v. Jenkins*, L. R. 1896, 2 Q. B. 326, cited by the Supreme Court, is also quite analogous. There the plaintiff's goods, which were contraband of war, had been placed aboard a general ship of the defendant for carriage from London to Yokohama, under a bill of lading containing a clause similar to the one here. The ship also contained noncontraband goods belonging to other shippers. The master landed the goods. The plaintiff forwarded

them later, and instituted suit for the freight paid for forwarding. I quote liberally from the opinion of Matthew, Judge, delivered in the case, as follows:

"The main ground of defense was the exception in the bill of lading of 'restraint of princes, rulers, or people.' A large body of evidence was laid before me to show that, if the vessel sailed with the goods on board, she would, in all probability, be stopped and searched. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board, he would have been acting recklessly. It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith*, L. R. 7 Q. B. 404, and *Rodoconachi v. Elliott*, L. R. 9 C. P. 518. The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese government that contraband of war should be landed. The analogy of a restraint by a blockade or embargo seems to me sufficiently close. The warships of the Chinese government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary, as was contended by the plaintiffs' counsel. There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time. I find that the captain, in refusing to carry the goods farther, acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception. \* \* \*

"But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. Whether he has discharged that duty must depend on the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated."

A citizen of a neutral may, however, lawfully contract to carry contraband of war, and his undertaking will be enforced by the courts of the neutral state. While, by international law, trade by neutrals in contraband of war with belligerents is inhibited, and subjects the unlawful commerce to seizure and condemnation by a belligerent, and while neutral states recognize the right of imposing this restriction upon the action of its subjects, yet it has been judicially determined that this law is not inconsistent with the right of neutrals to trade in contraband with citizens of belligerent states, and to make contracts to that end, and to have the same enforced. The proposition may seem anomalous, but it appears to be sound, nevertheless. I quote the reasoning of Lord Westbury in its support:

"This right, which the laws of war give to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offense against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the

other belligerent in seizing and appropriating the contraband articles is equally lawful. Their conflicting rights are coexistent, and the right of the one party does not render the act of the other party wrongful or illegal. \* \* \* But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents; and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined." Carver on Carriage by Sea, p. 247.

So it has been held by the Supreme Court. In *The Santissima Trinidad* and *The St. Andre*, 7 Wheat. 283, 5 L. Ed. 454, the court says:

"The question, as to the original illegal armament and outfit of the *Independencia*, may be dismissed in a few words. It is apparent that, though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemnable as good prize for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

An insurance of contraband goods by a neutral is held valid, and, as remarked by Brown, District Judge, in *The Spartan*, *supra*, there seems to be no good reason why an express contract to carry such goods should not be as valid as a contract to insure them.

Now, with these principles established, what is the effect of entering into the contract in question, embodying the stipulation that the respondent shall not be liable for loss by "arrest or restraint of princes"? It must be conceded that the contract was made in the light of and with reference to the attending and existing circumstances and conditions. There was a condition of war existing between Russia and Japan. There was impending a proclamation issued by Russia declaring flour contraband of war; and there was on the high seas to the eastward of Japan the Russian flying squadron, seizing vessels of neutrals suspected of having on board articles contraband of war. At the same time the respondent company was entreating this government to intercede with Russia, and, if possible, to induce her to rescind her proclamation. Respondent was also appealing to the Japanese government to send out convoys to protect the respondent's vessels against seizure by Russian gunboats, and to conduct them safely into Japanese ports. Yet, with all these things impending and the conditions prevailing as recounted, respondent contracted with the libelants to carry the flour specified to Japan on the *Nicomedia*, her sailing date being August 28, 1904, or thereabouts.

It can hardly be disputed that the respondent entered into the contract with full knowledge of the existence of war conditions, and with the intention of carrying the flour notwithstanding these conditions. The *Aragonia*, another of respondent's vessels, sailed from Portland with flour for Japan on the 31st day of July, almost at the exact time that the contract was consummated, and the *Aztec*, a ship belonging to the Pacific Mail, but navigated for account of the respondent com-

pany, sailed with flour for Japan on September 25th, she having arrived in port at Portland on August 25th, and taken on her cargo after that date. So that, in the light of these facts, the purpose to carry the flour of the libelants, notwithstanding the war conditions prevalent, becomes perfectly manifest. The contract was one, in purpose and effect, to carry contraband of war. Now, having entered into such a contract with that intent and purpose in view, what is the significance and intendment of the clause referred to? It can hardly be contended that such intendment and signification should be the same as where the contract was made prior to the time that any such war conditions arose, or not in anticipation thereof. If it can bear such a construction, the contract has made it optional with the respondent to carry or not as it might see fit from motives of its own, regardless of the fact that its purpose and intent was to carry, notwithstanding the dangers incident to the traffic or on account of the war. I am impressed that it cannot bear that construction, but that when the clause "arrest or restraint of princes, rulers, or people" was introduced in the contract to carry notwithstanding the war conditions, the idea thereby voiced was that there must be actual and absolute arrest, and by that means a restraint of princes, and that it was not intended that anticipated or threatened interference with shipping should avail to annul the contract, when such conditions were then actually prevalent. If the clause has not this meaning, in the light in which the contract was entered into, it is idle verbiage, or it operates, as before suggested, to extend to the respondent an option to carry or not, as it might feel so disposed. Every clause, as every word of a contract, must be given effect, if possible, and, where the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the object and purposes they had in view. Furthermore, the words of the contract will be given a reasonable construction where that is possible, rather than an unreasonable one. 9 Cyc. 580, 587. It is not to be supposed that contracts are entered into to be avoided at the will and pleasure of either of the parties, unless such a purpose be so expressed by clear enunciation. They are rather to be considered as mutually obligatory, and the construction, where the language is of doubtful import, that will give them that effect, should, from principles of right and equity, be adopted. The libelants were willing to take their chances of the flour being lost through dangers of war. Their manager says as much in his testimony. And the respondent was willing to carry the flour, and also to take its chances of the impending dangers. This is manifest from the fact that, at the time the contract of affreightment was made, it was actually carrying flour on another ship to Japan, and continued to contract and to carry the commodity on a boat subsequently sailing; and all this after the Arabia had been arrested and its cargo of flour confiscated. Libelants were the owners of a part of that cargo. It seems most reasonable, therefore, that the respondent agreed to carry as against all restraint of princes except actual arrest or seizure and confiscation, and the contract, viewed in the light of the attendant conditions, will bear this interpretation without doing violence to the language thereof. The in-

terpretation is manifestly the more just. Hence, I hold that the libelants are entitled to recover what damages they have sustained by reason of the refusal to carry their flour as agreed.

The case of *The Styria*, supra, in both the Court of Appeals and the Supreme Court, and the case of *Nobel's Explosives Co. v. Jenkins*, supra, were each determined in the main upon the legal principle that the master or owner of the ship has a discretion for the safety of the boat and cargo in landing or refusing to carry goods contraband; and this he must exercise in the interests of all concerned in the ship and the cargo, having regard for both that which is contraband and that which is not so. But how can the principle of discretion in the master or owner apply where the contract is one to carry contraband, as the one in suit is? Having such a discretion not to carry contraband, why did not the respondent avoid the complication by refusing to enter into any contract at all? The conditions must, from the very nature of things, be different where the owner, notwithstanding his discretion to refuse to carry contraband where, in the interest of the ship and of the cargo, it would be dangerous to do so under conditions of war subsequently arising, deliberately enters into a contract to carry that class of cargo when the war conditions are actually present. In the case of *The Styria* the fact that the contract was not one to carry contraband was emphasized by the court, and there can be but little doubt, both as it respects that and the English case, that if the contract had been of that nature the judgment of the court would have been different.

By reason of the respondent's refusal to carry libelants' flour as per the agreement, the libelants were compelled to ship by way of Seattle, in order to meet their obligations at ports in Japan, at an increased rate of freight. They shipped on August 31, 1904, on the *Oanfa*, 122 tons to *Jardine, Matheson & Co.*, destination Kobe, at the rate of \$4.50 per ton; 65 tons to the same consignees at Moji at the same rate; and 251 tons to *Samuel Samuel & Co.*, on two consignments to Yokohama, comprising 438 tons in all. On September 5th the libelants shipped, on the steamship *Quito*, out of Seattle, 656 tons of flour to *Jardine, Matheson & Co.*, by two consignments, to Yokohama, at the rate of \$5 per ton, and 175 tons to *Samuel Samuel & Co.*, Yokohama, at the same rate; thus incurring a loss on the shipment by the *Oanfa* of 50 cents per ton, and on the *Quito* of \$1 per ton, the entire loss amounting to \$1,050, which amount the libelants are entitled to recover against the respondent.

A decree will be entered accordingly.

## In re VAN HORN.

(District Court, W. D. Michigan, S. D. March 20, 1908.)

**DAMAGES (§ 80\*)—LIQUIDATED DAMAGES AND PENALTIES—CONSTRUCTION OF STIPULATIONS.**

A contract by which one party agreed to buy and maintain for a term of three years a stock of patterns made by the other party, and also to buy during the term fashion sheets of not less than \$222.25 in value in the aggregate, provided that in case of breach by either party the other might terminate the contract and recover as liquidated damages a sum equal to the amount to be paid for such fashion sheets. During the time the contract ran, before the bankruptcy of the purchaser, the fashion sheets purchased amounted to about \$50 per month. *Held*, that the provision was a reasonable one, and would be construed as one for liquidated damages, as stated by the parties, and not as a penalty, and as such enforced.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170-175; Dec. Dig. § 80.\*]

In Bankruptcy. On review of order of referee disallowing claim of the McCall Company.

Stratton & Evans, for claimant.

Cady & Andrews, for trustee.

KNAPPEN, District Judge. By the contract in question it was agreed that the bankrupt should carry for sale a stock of McCall patterns, a part of which stock had previously been purchased from claimant; further purchases to be paid for at the prices of 5 cents and 7½ cents for each pattern; the stock to be at all times kept up to \$400 cost price; bankrupt to reorder once each week, or oftener, to replace all patterns sold; patterns to be kept and offered for sale on the first floor of bankrupt's place of business, and to be sold at catalogue retail prices only; the bankrupt agreeing not to sell any other patterns than the McCall patterns received from claimant during the term of the contract, which was at least 3 years and 3 months from September, 1906, and not to transfer the stock of patterns from Benton Harbor, Mich., without claimant's written consent; that at the end of the contract, if the stock was found to be less than \$400 cost price, it should be brought up to that amount by the purchase of new patterns, or the difference in cash paid to claimant; that bankrupt should purchase from claimant fashion sheets in amounts specified for each separate month during the term of the contract, beginning with November, 1906, at the price of \$7 per 1,000 sheets, a total of 31,750, aggregating \$222.25. Claimant agreed to take back, in exchange for other patterns, at the full contract price, all patterns purchased which should be semiannually reported by claimant as discarded, and that if, at the end of the contract period, bankrupt had paid more cash for patterns purchased than had been received for them, claimant should pay such loss in cash. The contract contained an express provision that if either party should intentionally break it, or refuse or fail to perform it promptly, after two weeks' notice in writing given by the other, the other might, at his option, be released from all future obligations under it, and recover "as liquidated

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

damages, and not as a penalty, a sum equal to the agreed charge for fashion sheets during the entire term of this contract."

The bankrupt was so adjudicated about April 1, 1907, upon her own petition. Thereupon claimant filed its claim for the unpaid price of the articles furnished under the contract, and for the stipulated damages provided, construed by claimant to amount to \$232.75. The referee allowed the claim on account of articles furnished under the contract, but disallowed the claim for stipulated damages, on the ground that such damages were in reality a penalty; stress being laid by the referee upon the proposition that by the terms of the contract a failure to perform it in a minor particular (as a failure to order a few fashion plates or magazines, or to pay for the same, if ordered), or a failure to perform the contract at nearly the end of the three years and three months term, though faithfully performed until that time, would subject the bankrupt to the payment of the stipulated amount.

Whether the stipulation referred to is one for damages, by way of compensation for breach of contract, or is, on the other hand, in the nature of a penalty, is the only question presented on this review. It seems clear that under this contract the actual damages for a breach are uncertain in their nature, and practically impossible to be estimated with certainty. I am therefore of opinion that the contract presented a proper case for liquidating damages. *Jaquith v. Hudson*, 5 Mich. 123; *Calbeck v. Ford*, 140 Mich. 48, 103 N. W. 516. See, also, 2 *Joyce on Damages*, § 1296 et seq., where the subjects of liquidated damages and penalty are fully considered.

The question remains whether the sum provided as damages is in reality in the nature of a penalty, rather than compensation. This question is to be determined by the reasonableness of the provision, in connection with the subject-matter. While the statement in the contract that the sum provided is for liquidated damages, is not conclusive upon the proposition, yet, as expressed in *Guerin v. Stacy*, 175 Mass. 595, 56 N. E. 892:

"In general, when parties say that a sum is payable as liquidated damages, they will be taken to mean what they say, and will be held to their word."

The amount of the damages stipulated is not so large as to negative the idea of compensation. The contract itself does not show what amount of business the parties expected would be done under it. The contract under consideration was, however, a renewal of an arrangement previously existing, and the parties, therefore, had some practical information upon the subject. The amount of the fashion sheets to be purchased should naturally bear some relation to the amount of business expected to be done under the contract, and the stipulation as to the amount of these sheets may well have been made in view of the previous experience of the parties. It appears, by the claim presented for articles furnished under the contract, that during the months of January, February, and March, 1907, the purchases averaged more than \$50 per month, and the contract contemplates that during these three months a little less than the average purchases of fashion sheets would be made. At the same rate, the purchases dur-

ing the contract period should aggregate about \$2,000, and perhaps more. The damages contemplated are thus but about 10 per cent. of this amount.

I am not impressed with the proposition that these damages may be awarded for an unimportant breach. The breach merely gives the other party the right to terminate the contract, and the damages are given, not for each breach, but only as an entire award for the failure to realize the benefits of the contract during the remainder of the term, and only upon the exercise of such option of termination; and it is given to both parties alike.

Nor am I strongly impressed with the consideration that the damages stipulated are the same, regardless of the time when the breach occurs, and that they might thus be excessive in case of a breach occurring but a short time before the completion of the contract period, and so be regarded a penalty. It is common practice to insert in agreements upon the sale of a business a provision not to engage in the same business within a specified time, and to stipulate for damages in case of a breach at any time within the period limited; and such contracts have generally been enforced, without regard to whether the breach occurred near the beginning or near the end of the period limited. In such cases proof of the actual damages is not permitted, but the damages stipulated are recoverable without regard to the time when the breach occurred.

Among the cases which illustrate this proposition are *Jaquith v. Hudson*, *supra*, and *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475. In *Borley v. McDonald*, 89 Vt. 309, 38 Atl. 60, a stipulation for damages was enforced for the breach of an agreement by an employé not to engage in the same business for a year after quitting his employment. In *Guerin v. Stacy*, *supra*, a stipulation for the payment of damages by the lessor, in case the lease should be terminated before the expiration of a term of about four years, was enforced, where the termination took place but a year before the expiration of the term. All these cases support the reasonableness of the amount of damages here in question.

The conclusion reached is that the stipulation of the parties should be sustained. The referee's order disallowing the claim is overruled, and the claim allowed at the sum of \$222.25.



## BLISS v. ANACONDA COPPER MINING CO. et al.

(Circuit Court, D. Montana. April 26, 1909.)

No. 280.

## COSTS (§ 60\*)—DISCRETION IN EQUITY—APPORTIONMENT.

The awarding of costs in an equity case is within the discretion of the court; and where, in a case in which large interests were involved, the law was not settled, and there was reasonable basis for the suit, although the bill is dismissed, the court may properly, in the exercise of such discretion, require each party to pay his own costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 265; Dec. Dig. § 60.\*

Right to costs in equity, see note to Tug River Coal & Salt Co. v. Brigel, 17 C. C. A. 368.]

See 167 Fed. 342.

R. L. Clinton and C. M. Sawyer, for complainant.

A. J. Shores, C. F. Kelly, Forbis & Evans, and D. Gay Stivers, for defendants.

HUNT, District Judge. Pursuant to the order of the court heretofore made on January 25, 1909, hearing was had on February 15th, in order that the court might listen to the testimony of the superintendent of the Washoe Smelting Company, and such testimony as the parties chose to present upon the subject of possible means of so treating the flue dust at defendants' smelting works as to reduce the quantities of arsenic passing out of its stack, and thereafter making any such specific order as might seem equitable and right. Bliss v. Anaconda Copper Mining Co. et al. (C. C.) 167 Fed. 342.

In obedience to a subpoena issued, Mr. Mathewson, superintendent of the Washoe smelter, appeared and testified at considerable length. Reduced to the briefest statement, the substance of the evidence given by Mr. Mathewson was that there are several principal means known to science for the extraction of arsenic from fumes, and that none of them could be made applicable to the conditions existing at the Anaconda smelter, owing to the size of the works and attendant difficulties to be overcome. He said the process of cooling by water spray could not be used, for the reason, among others, that the product would be a mixture of acid water and mud, the quantity of which would be so enormous at Anaconda that it could not be disposed of in safety to the community, and that the drainage from this mixture would find its way to the streams, and make the waters dangerous to all animal life.

He testified regarding a method of cooling by the admission of air into bag houses, but said that it is an impracticable way, because the gas in the smoke would destroy the bags as fast as they could be supplied. The "bag-house method," as it is called, is successful in lead and zinc smelters; but, owing to the quantities of acid in the fumes from copper smelters, it is impossible to prevent the immediate destruction of the bags.

He also explained a radiation process, saying, however, that as by the methods now employed in the Washoe smelter all the particles are

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

caught, except the very finest, so far as known the radiation process would not be effective to catch the particles that are not now being recovered.

The witness also said that there is a freezing process, but that that could only be used by counting upon a very large product of poison mud, which, as heretofore explained, could not be left exposed without great danger to animal life. Where the quantity of mud produced by this process is small, it can be buried; but at the Washoe smelter, owing to the enormous amount that would be produced, burial would be impossible.

The so-called electrical discharge method was explained by Mr. Mathewson, and it was made quite clear that, owing to the mechanical difficulties encountered thus far, practical application of this process, as attempted in California, has not been a success, and could not be made effective at the Washoe, where the velocity of the gases is approximately, at the slowest, 20 times greater than at Selby, Cal. Prof. Cottrell, the inventor of this process, visited the Washoe smelter, and, after study of conditions there, was not willing to assure defendants of its success, without first making further experimentation, which he said he would conduct in California.

Mr. Mathewson also detailed the friction or wire process, now being constructed at the Boston & Montana copper smelter at Great Falls, Mont. The process consists of suspending thousands of wires from the ceiling of large chambers in a way to cause friction of the gases, and thus bring about a settling of the dust. Mr. Mathewson himself doubts the success of this experiment, but says that, if demonstration of its efficiency is had, it will be used by the Washoe Smelting Company. He expects final tests to be made during this year.

Another system testified to is the filtering of the gases through finely pulverized slag moistened with water. This, the witness said, would also result in the production of immense quantities of poison mud, and, moreover, has not been successful in Utah, where it has been tried.

The feasibility of decreasing the velocity of the gases was explained. This method, the witness said, would require the construction of a flue 20 times as great as the present Washoe flue, to decrease the velocity to 60 feet per minute. By this device the product recovered would be dust; but, comparatively speaking, the excess over that now saved would be so slight as not to make the process worth very serious consideration.

The use of centrifugal gas cleaners was mentioned; but that process would also mean the accumulation of great masses of acid mud, and thus involve the same problem of how to dispose of the poisoned mud and liquids therefrom without the utmost peril to life.

Mr. Mathewson closed his testimony by saying that the result of his own study, and of the extensive investigations and experiments made by engineers and scientists in Europe and America in behalf of the defendants, is that the Washoe Company has a system nearer perfection than any other yet devised for the purpose of treating arsenic fumes. He added, however, that he knew the system was not perfect, and that the defendants were still experimenting, and would continue

to study the question in the hope "that some day some improvement of practical value will be devised which we will promptly adopt."

Mr. Falding, a distinguished chemical engineer, also testified at the request of the court. He said that he was then under employment by defendants to make examination into methods for treating the fumes at the Washoe smelter, particularly with a view to possible manufacture of sulphuric acid, and that, although he had been in Anaconda only three weeks, yet he could say that, from such examination as he had made, the Washoe Company was employing the most modern and successful methods for the treatment of the fumes, but that he could not tell, at the time he testified, whether it would be feasible to manufacture sulphuric acid. He dwelt upon the problem of treating the fumes at Anaconda as of much greater magnitude and difficulty than that presented by the smelting operations at Ducktown, Tenn., or at other places, where he had made examinations. He stated that he was given directions to proceed with his investigations at Anaconda without limitation, to the end that his report might cover every problem presented within the special range of his qualifications.

After hearing these witnesses testify, counsel for the complainant said that they did not care to cross-examine at that time, as it would require knowledge to be gathered after consultation with experts (whom they said they had in mind), in order to enable them to be prepared to inquire into some of the matters testified to by Mr. Mathewson. Accordingly the court readily continued the further hearing until April 19th. On April 19th the matter was called, whereupon counsel for complainant stated that they desired to submit an offer. This offer is as follows:

"This cause having been set down for hearing on the 19th day of April, 1909, at Butte, Mont., the complainant at this time desires to finally submit this cause to the court, subject to the following offer on behalf of complainant and those farmers in Deer Lodge Valley who are similarly situated and similarly injured:

"(1) That the complainant and the farmers who are members of the Deer Lodge Valley Farmers' Association have offered, prior to the commencement of this suit, to submit to any fair arbitration, have at all times been willing to submit to any fair arbitration, and are now willing to submit the appraisal of their land and damages to the statutory form of arbitration, or any other fair arbitration; provided, however, that the complainant will not submit to any form of arbitration, unless those who have so largely and generously contributed to the bringing and maintenance of this suit shall also be allowed and offered the same arbitration as complainant, as the complainant is now, and at all times has been, by all ties of honor and good conscience bound to make no settlement, sale, or arbitration unless the members of the Deer Lodge Valley Farmers' Association, who own lands in the Deer Lodge valley and are similarly situated, and whose lands and property are subject to injury from the fumes emanating from the Washoe smelter, shall be accorded the same treatment by the defendant corporations as shall be offered to, or received by, the complainant.

"(2) That in the event an arbitration shall not be acceptable to the defendants, the members of the Deer Lodge Valley Farmers' Association will submit their damages to arbitration and their lands to condemnation, under the same statutory proceedings as land is now condemned for public use under the laws of the state of Montana; provided, however, that the complainant will not submit to condemnation until the same proceedings have

been taken against the members of the Deer Lodge Valley Farmers' Association.

"(3) That in so far as complainant is able to learn from corresponding with chemical engineers or engineering chemists, they could not secure the services of any such chemists, except under very unsatisfactory assurances, and at a very large compensation to be first paid to them; and the position taken now by complainant is that under the admissions of Mr. E. P. Mathewson, superintendent of the Washoe smelter, and the undisputed proof offered by complainant, that from 10 to 30 tons of arsenic per day, besides a large amount of sulphur in various forms, to wit, about 5,000,000 pounds per day, is being emitted into the atmosphere by the Washoe smelter. The pollution of the air and the magnitude of that pollution is not now open to dispute, and the complainant's position is that it is the duty of the defendants to devise ways and means to prevent such pollution; and the complainant is not in a position, and is not able, to devise ways or means by which the defendants can precipitate the poisonous or injurious substances at a commercial profit, or treat or dispose of the large poisonous by-product which would follow such precipitation; and we respectfully urge that the court should, by a proper order, compel the precipitation of the poisonous substances before the fumes are released into the atmosphere, or enjoin the further operation of the Washoe smelter, unless the defendants should accept complainant's proposed arbitration or condemnation."

Counsel offered in evidence the transcript of the testimony of Mr. Mathewson and Mr. Falding, heretofore referred to, and thereupon submitted the matter without introducing any witnesses. In this way the matter is presented for final decision.

I can only regard those portions of complainant's offer, wherein he expresses a willingness to submit to arbitration, provided all members of the Deer Lodge Valley Farmers' Association, whose lands are subject to injury from defendants' smelter, shall be "accorded the same treatment" as shall be offered to complainant, and those portions of his offer wherein complainant says he will submit to condemnation of his lands according to such rules as govern condemnation proceedings in the state of Montana, provided similar condemnation proceedings are instituted by defendants against the several members of the Deer Lodge Valley Farmers' Association, as entirely irrelevant to the matter specified in the order of the court, and which constituted the ground for the retention of the bill in the case. Mr. Bliss, as already said in the opinion, is the only complainant before the court, and there is no authority in this tribunal to make any order whatsoever which can in any way adjudicate possible rights between the several members of the Deer Lodge Valley Farmers' Association and these defendant companies. Courts of equity are circumscribed in their powers by the rule that the relief which may be granted must be agreeable to the bill. Accordingly, we are brought right back to the only question which was reserved; that is, whether there is any device or method known at the present time whereby defendants can reduce quantities of arsenic escaping from the stack, and at the same time be permitted to continue the operation of their smelting plant.

Defendants have shown that they are doing all they can, considering the state of the art, and that they intend to continue their efforts, hoping for better success than they now can attain. Complainant has not attempted to dispute the truth of the evidence introduced by defendants upon the supplementary hearing, and does not contend that

it is improbable or contrary to scientific truths. The case then resolves itself into a condition where the conclusions and decision, which denied an injunction order stopping the works, control; and the court now, after the further hearing, can find no facts upon which to base a decree imposing conditions as to processes or mechanical devices to be used in operating the defendants' works, and permit the smelting operations to continue, and is without power to fix or to enforce any such conditions relating to arbitration or condemnation as are included in complainant's offer. The case of *McCleery v. Highland Boy* (C. C.) 140 Fed. 951, is not applicable, for there the decree was strictly between record parties to the litigation, and did not attempt to bind others than the parties.

The offer of complainant will be filed; but the first two paragraphs must be disregarded, as containing matter having no bearing upon the case, while the substance of the third paragraph is disposed of by saying that it relates to the principal subjects covered by the opinion filed.

The question of costs is also serious. The usual rule in equity is that the party found entitled should be reimbursed the expense of defending his rights. It is, however, a recognized doctrine that costs in equitable suits are subject to the sound judicial discretion of the court, and, where it appears that complainant had good reason to think the defendant was liable upon equitable principles, the court does not necessarily award costs against him, but may ascertain what sound discretion requires to be done under the facts of the case. It can be said that the questions involved in this litigation were not thoroughly well settled when this complainant brought his suit. There was wide room for difference of opinion. It has been since this suit was instituted that the Supreme Court of the United States rendered its decisions in *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, *Georgia v. Tennessee Copper Company*, 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, and *Dun v. Lumbermen's Credit Association*, 209 U. S. 20, 28 Sup. Ct. 335, 52 L. Ed. 663, and that the Circuit Court of Appeals of the Eighth Circuit decided the case of *American Smelting Co. v. Godfrey*, 158 Fed. 225, and that the Circuit Court of Appeals of the Ninth Circuit has laid down the law in *Mountain Copper Co. v. United States*, 142 Fed. 625, 73 C. C. A. 621, and in *McCarthy v. Bunker Hill & Sullivan Mining Co.*, 164 Fed. 927. Upon careful consideration, I conclude that it is equitable that each party herein shall pay his and their own costs. The *Scotland*, 105 U. S. 24, 26 L. Ed. 1001; *Adams, Equity*, \*392; *Brooks v. Byam*, Fed. Cas. No. 1,949; *Grattan v. Appleton et al.*, Fed. Cas. No. 5,707; *Goodyear v. Sawyer* (C. C.) 17 Fed. 2; *Clark v. Reed*, 11 Pick. (Mass.) 446.

It is therefore ordered that the bill be dismissed, complainant to pay his costs, and defendants to pay their costs. The dismissal is, of course, without prejudice to the institution of any action for damages actually sustained by complainant, or such other suit as may be proper under the rule recognized in *McCarthy v. Bunker Hill & Sullivan Mining Co.*, *supra*.